COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2012 CR 00563**
vs.	:	**Judge McBride**
DEVIN THOMAS STEDMAN AKA DEVAN THOMAS STEDMAN	:	
Defendant	:	**DECISION/ENTRY**
	:	

Scott C. O'Reilly, assistant prosecuting attorney for the state of Ohio, 123 North Third Street, Batavia, Ohio 45103.

Marshall McCachran, assistant public defender for the defendant Devan Thomas Stedman, 10 South Third Street, Batavia, Ohio 45103.

This cause came before the court for trial on November 7, 2012. At the conclusion of the trial, the court took the issues raised at trial under advisement.

The defendant is charged in a one-count indictment with gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree, with a specification that evidence other than the testimony of the victim was admitted in the case corroborating the violation.

Upon consideration of the record of the proceeding, the oral arguments of counsel, the evidence presented for the court's consideration, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT

On June 20, 2012, the defendant Devan Stedman was at his sister Amber Stedman's apartment located at 6 Montgomery Way, Apartment 5, Amelia, Clermont County, Ohio. Present in the apartment at the time were Devan Stedman, Amber Stedman, Amber's newborn twin sons, Amber's 2-year old son, and I.A., who is the daughter of a cousin to Devan and Amber and who was approximately 18 months old at the time.

The defendant was on the couch watching television when he began to think about pornography he had viewed previously and started to become sexually aroused. He told I.A. and Amber's two-year-old son to come and play in the toy room and he shut the door to that room. He began tickling I.A., who was on the floor on her stomach, at which point his penis was erect. The defendant then made a humping motion over I.A. three times, during which his erect penis through his pants touched I.A.'s back and buttocks through her diaper and clothing. The defendant realized what he was doing was wrong, at which point he stopped, continued playing with trucks on the floor for a few minutes, and then went into the bathroom and masturbated.

Meanwhile, Amber, who had been sleeping on the couch, became concerned when the defendant shut the door to the toy room so she went into the room

immediately next to the toy room. In that bedroom, there is a square hole that gives an unobstructed view into the toy room. That hole is covered by a plate which is not screwed into the wall on the bottom, and Amber slid up the plate so she could see into the toy room. From this position, she was able to observe the defendant, whose back was to her, make the three humping motions on I.A..

Amber was shocked by what she observed and called her mother, who then came over to the apartment. The mother was asking the defendant general questions about what happened to which the defendant responded that he didn't know why he did it and didn't know what was wrong with him and that he needed help.

Several days later, Amber took her children and I.A. to Children's Hospital because she was concerned about possible molestation. Children's Protective Services was notified and that agency then reported the incident to law enforcement. Sergeant Chris Stratton of the Clermont County Sherriff's Office Investigative Unit spoke with Amber at her apartment and then spoke to the defendant on July 3, 2012. That interview was tape recorded, and during that interview the defendant admitted to humping I.A and to touching her buttocks and upper back with his erect penis over which he was wearing pants.[1]

STANDARD OF REVIEW

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.[2] R.C. 2901.05(E) states that " 'reasonable doubt' is present when

[1] State's Exhibit 1.
[2] R.C. 2901.05(A).

the [trier of fact], after * * * carefully consider[ing] and compare[ing] all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs."

LEGAL ANALYSIS

Pursuant to R.C. 2907.05(A)(4):

> "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
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> * * * *
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> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

The Ohio Revised Code defines "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."[3]

First, the court notes that the fact that the touching in the case at bar occurred through clothing is of no consequence. Many Ohio courts, including the Twelfth District

[3] R.C. 2907.01(B).

Court of Appeals, have concluded that "sexual contact" as defined by R.C. 2907.01(B) includes touching of erogenous zones covered by clothing.[4]

R.C. 2907.01(B) does not provide an exhaustive list of erogenous zones.

In *State v. Dooley* (Feb. 17, 2005), 8th Dist. No. 84206, 2005-Ohio-628, the defendant got into bed with a minor male and placed his head on the boy's chest "while kissing and sucking [the boy's] nipple."[5] The court concluded that under this factual scenario the male breast constituted an erogenous zone.[6]

In the case of *State v. Lawrence* (March 24, 2008), 12th Dist. No. CA2007-01-017, 2008-Ohio-1354, in response to a jury question regarding what constituted "sexual contact," the trial court clarified that the definition included more body parts than those listed in the definition and called upon the jury to "use the judgment of a reasonable person in determining whether an area of the body may be perceived as sexually stimulating or gratifying."[7] When the jury inquired further as to whether a male breast could be considered an erogenous zone, the court responded that the jury would have to determine that within the context of the case.[8] The appellate court found no plain error in those instructions and did not find the court's recitation of the definitions to be misleading or prejudicial.[9]

The court in *State v. Jenkins* (July 27, 2001), 2nd Dist. No. 2000-CA-59, 2001-Ohio-1525, held that the defendant touching his "nude stepdaughter between her legs

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[4] See, e.g, *State v. Goins* (Dec. 3, 2001), 12th Dist. No. CA2000-09-190, 2001-Ohio-8647, *8; *State v. Crosky* (Jan. 17, 2008), 10th Dist. No. 06AP-655, 2008-Ohio-145, ¶ 50; *State v. Jones* (Oct. 5, 2006), 8th Dist. No. 87411, 2006-Ohio-5249, ¶ 15; and *State v. Young* (Aug. 15, 1997), 4th Dist. No. 96-CA-1780, 1997 WL 522808, *4.
[5] *Dooley* at ¶ 21.
[6] Id. See, also, *State v. Poirier* (Aug. 16, 2002), 6th Dist. Nos. -01-1479, L-01-1480 and L-01-1481, 2002-Ohio-4218, ¶ 27.
[7] *State v. Lawrence* (March 24, 2008), 12th Dist. No. CA2007-01-017, 2008-Ohio-1354, ¶ 41.
[8] Id.
[9] Id.

with a vibrator constituted the touching of an erogenous zone of another, even if the area touched was not her vagina, buttock or thigh."[10]

In *State v. Miesse* (Aug. 18, 2000), 2nd Dist. No. 99-CA-74, 2000 WL 1162027, the court noted that "the term 'erogenous' is an adjective meaning, '[r]esponsive to sexual stimulation.' "[11] In that case, the defendant admitted that he was sexually aroused by and derived sexual gratification from touching, kissing, or blowing on the stomachs of the minor victims.[12] The trial court concluded that the language of R.C. 2907.01(B) indicates that the legislature intended that body parts that are not traditionally viewed as erogenous zones, may, in some instances, be considered erogenous zones.[13] The defendant did not challenge that finding on appeal but the appellate court noted that this ruling was correct and that, "by admitting under cross-examination that he touched children's stomachs to obtain sexual gratification, [the defendant] effectively confessed to seven of the eight [GSI] charges leveled against him, since seven of the eight charges alleged that the sexual contact that Miesse had with his victim included tickling and kissing their bellies."[14]

In *State v. Stair* (Jan. 14, 2002), 12th Dist. No. CA2001-03-017, 2002-Ohio-18, the testimony offered at trial demonstrated that the defendant placed his hands on the minor victim's hips and slid his hands along her abdomen as he removed her shirt."[15] The victim testified that these actions were sexual in nature and that the defendant

[10] *State v. Jenkins* (July 27, 2001), 2nd Dist. No. 2000-CA-59, 2001-Ohio-1525, *4.
[11] *State v. Miesse* (Aug. 18, 2000), 2nd Dist. No. 99-CA-74, 2000 WL 1162027, *4, quoting, Webster's II *New College* Dictionary (1995) 382.
[12] Id.
[13] Id.
[14] Id.
[15] *State v. Stair* (Jan. 14, 2002), 12th Dist. No. CA2001-03-017, 2002-Ohio-1, *4.

threatened that he could rape her if he wanted to.[16] The appellate court held that "[t]he jury which was able to judge [the victim's] credibility and to view her demonstration of appellant's movements, was best able to make the factual determination of whether appellant's actions were sexually motivated and whether the touching constituted sexual contact as defined by R.C. 2907.01(B)[,]" and that the jury's verdict was not against the manifest weight of the evidence.[17] The court offered no explanation as to how the victim's hips and abdomen fit the definition of "erogenous zone."

The court in *State v. Kleyman* (Dec. 18, 2008), 8th Dist. No. 90817, 2008-Ohio-6656, adopted the reasoning of a Lake County Common Pleas decision that the "sexual contact" definition encompasses the touching of "any part of the body of another, which the mind of the offender or victim or a reasonable person would perceive as sexually arousing or gratifying to either the offender or the victim, for the purpose of sexual arousal or gratification of either the offender or the victim."[18] That court then held that there was sufficient evidence of "sexual contact" because the defendant was sexually aroused when he was rubbing the victim's arm, shoulder and stomach.[19]

In *State v. Ackley*, supra, Judge Eugene Lucci offers the following definition for "erogenous zone" and explanation for that definition:

> "In the context of R.C. 2907.01(B), this court defines 'erogenous zone' to mean any part of the human anatomy that, when touched by another, is perceived by the offender, or by the victim, or by a reasonable person, as being sexually arousing or gratifying to either the offender or the victim.

[16] Id.
[17] Id.
[18] *State v. Kleyman* (Dec. 18, 2008), 8th Dist. No. 90817, 2008-Ohio-6656, ¶ 27, citing, *State v. Ackley*, 120 Ohio Misc.2d 60, 778 N.E.2d 676, 2002-Ohio-6002, ¶ 14 (Ohio Com.Pl. Lake County, 2002).
[19] Id. at ¶¶ 28-29.

> * * * [O]ne with a fetish for navels or feet could be in violation of this statute for touching the navel or feet of another, not his or her spouse, for the purpose of sexual arousal or gratification. Although the body parts, namely navel or feet, are not specifically listed in the 'sexual contact' definition, if the state is able to prove beyond a reasonable doubt that, in the mind of the offender, or in the mind of the victim, or in the mind of a reasonable person, those body parts are sensitive to sexual stimulation, or are apt to cause sexual arousal or gratification in either the offender or the victim, and if it was the purpose of the offender in the touching to obtain sexual arousal or gratification for himself or the victim, then the state has carried its burden of proof.
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> * * *
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> [T]he offender is in the best position to know whether he considers the body part he touched to be an erogenous zone of the victim and whether his purpose is sexual arousal or gratification. The offender is put on notice by the statute that if he touches any erogenous zone of the body of another, not his spouse, and certainly of a person under the age of 13 years, to obtain sexual gratification or arousal, he is committing a crime."[20]

The court finds the suggested definitions of "erogenous zone" set forth in *Ackley*, *Kleyman*, and *Miesse* to be somewhat troubling because of their broadness. Regardless, the court is persuaded after reviewing the relevant caselaw that the term "erogenous zone" is not easily definable and that the best definition is "any part of the body which, in the mind of the defendant, or in the mind of the victim, or in the mind of a reasonable person, is sensitive to sexual stimulation or apt to cause sexual arousal or sexual gratification to either the defendant or to the victim." While this definition is admittedly very broad, the state still has the burden of proving beyond a reasonable doubt in a particular case both that the particular body is an "erogenous zone" and that

[20] *Ackley*, supra, at ¶¶ 14-15 and 19.

the purpose of the offender in initiating or maintaining the touching of the body part was to sexually arouse or gratify either the defendant or the victim.

In the case at bar, the defendant touched the upper back of the minor victim with his penis and the state urges this court to find that the upper back is an "erogenous zone" under the expansive definition of that term set forth in the cases discussed above. However, the court need not reach this issue because the defendant also admitted in his interview with Sergeant Stratton that he touched the buttock of I.A. with his erect penis through his pants while making the humping motion. While the defendant later recanted this admission and stated that he only touched her upper back, the court does not find this self-serving adjustment to be credible. The defendant is clear in the interview about the series of events that day and about making the point that he never penetrated the victim. When Sergeant Stratton asks him "and you were pressing your boner against what, her butt?" the defendant answers "yeah." The court does not believe that the defendant who, up to that point, made several important points about his actions very clearly, would mistakenly agree that he had touched I.A.'s buttocks.

The buttock is one of the body parts explicitly included as an "erogenous zone" in R.C. 2907.01(B) and, as such, the state has proven that element beyond a reasonable doubt.

The court must also consider whether the touching of the erogenous zone was for the purpose of sexual arousal or gratification. "The trier of fact may consider 'the type, nature and circumstances of the contact, along with the personality of the defendant.'"[21] In the case at bar there is no question that the contact occurred for the

[21] *Stair*, supra, at *4.

purpose of sexual arousal and gratification as the defendant was touching I.A. with his erect penis after thinking about pornography and becoming sexually aroused.

As a result, the state has proven beyond a reasonable doubt that the defendant had sexual contact with I.A., who is not his spouse and who is less than thirteen years of age. Therefore, the state has proven the defendant's guilt of gross sexual imposition beyond a reasonable doubt.

Additionally, the state has proven the charged specification. That specification requires the state to prove that "evidence other than the testimony of the victim was admitted in the case corroborating the violation." Both the defendant's confession to Sergeant Stratton and Amber Stedman's testimony meet this requirement.

CONCLUSION

Based on the above analysis, the court finds that the state proved the defendant's guilt beyond a reasonable doubt of the charge of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4), with a specification that evidence other than the testimony of the victim was admitted in the case corroborating the violation.

Counsel shall conference and call the Assignment Commissioner (732-7108) to obtain a date for a sentencing hearing. That hearing is to be set within four weeks of the date of this decision.

The Probation Department is directed to prepare a Pre-Sentence Investigation Report.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 4th day of November 2012 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride