NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-785

COMMONWEALTH

vs.

ROBERT E. LEBARON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a bench trial, the defendant was convicted of indecent assault and battery on a child under the age of fourteen after having been previously convicted of a certain sexual offense.[1] On appeal, the defendant claims that there was insufficient evidence to support his conviction. We affirm.

"When analyzing whether the record evidence is sufficient to support a conviction, an appellate court is not required to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt'" (citation omitted). Commonwealth v. Rocheteau, 74 Mass. App. Ct. 17, 19 (2009). "Rather, the relevant question is whether, after viewing the evidence in the light most favorable to the

[1] In this case, the defendant was also convicted of violating a harassment prevention order and intimidation of a witness, but he raises no claim relative to these convictions on appeal.

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id., quoting Commonwealth v. Latimore, 378 Mass. 671, 677 (1979).

When evaluating sufficiency, the evidence must be reviewed with specific reference to the substantive elements of the offense. See Jackson v. Virginia, 443 U.S. 307, 324 n.16 (1979); Latimore, supra at 677-678. To convict a defendant of indecent assault and battery on a child under fourteen years of age, the Commonwealth must prove "that (1) the child was not yet fourteen years old at the time of the offense, (2) the defendant intentionally touched the child without legal justification or excuse, and (3) the touching was indecent." Commonwealth v. Cruz, 93 Mass. App. Ct. 136, 138 (2018). The defendant claims that the evidence failed to establish the third element, i.e., that his touching was "indecent." We disagree.

"A touching is indecent when, judged by the normative standard of societal mores, it is violative of social and behavioral expectations in a manner which [is] fundamentally offensive to contemporary moral values . . . [and] which the common sense of society would regard as immodest, immoral and improper"(quotations and citations omitted). Commonwealth v. Vazquez, 65 Mass. App. Ct. 305, 306 (2005). See Commonwealth v.

Bishop, 296 Mass. 459, 462 (1937); Commonwealth v. Mosby, 30 Mass. App. Ct. 181, 184-185 (1991).

Here, in the light most favorable to the Commonwealth, as witnessed by the father of the three year old special needs victim, the thirty-nine year old defendant both "groped" the victim's buttock and stuck his tongue in the victim's ear. When evaluated through the lens of the normative standard of societal mores, the judge was entitled to conclude that the defendant's conduct was violative of social and behavioral expectations in a manner which is fundamentally offensive to contemporary moral values. Put more simply, society would regard the touching of a three year old child in the manner described above as immodest, immoral, and improper, and thus indecent. See Vasquez, supra at 306. See also Commonwealth v. Colon, 93 Mass. App. Ct. 560, 563 (2018) ("While ears may not be on the list of 'sexual parts,' they are intimate enough so that the insertion of a tongue into an ear can reasonably qualify as 'indecent'").

The defendant claims that because the victim's father at one point in his testimony described the touching as a "pat on the butt," the evidence was insufficient. We disagree as this is nothing more than a request for us to the view the evidence in the light most favorable to the defendant, which we cannot do. See Commonwealth v. Johnson, 91 Mass. App. Ct. 296, 309 (2017).

The defendant also claims that it was only after the victim's father learned that the defendant was a registered sex offender that he concluded that the touchings were inappropriate. But our appellate task is to review the record evidence for sufficiency, not to evaluate motives or weigh the credibility of witnesses. See Commonwealth v. Bacigalupo, 455 Mass. 485, 489 (2009).

Finally, the defendant claims that his touchings of the child victim, which occurred in front of others, were not "sexual" acts, and that there was no evidence introduced at trial that the defendant had any sexual interest in children the victim's age. Putting aside the evidence from which a reasonable fact finder could conclude that the defendant had an unnatural obsession with the victim, the Commonwealth was not required to demonstrate that the defendant's actions were driven by sexual urges in order to prove that they were indecent. In similar vein, the Commonwealth was not required to prove -- and would not have been permitted to introduce evidence of -- the

defendant's prurient interest in children of the victim's age.

Judgments affirmed.

By the Court (Meade, Milkey & Massing, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: September 28, 2022.

[2] The panelists are listed in order of seniority.