

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO,

Appellant/Cross-Appellee,

vs.

DENNIS D. MURRART,

Appellee/Cross Appellant.

Case No. 06-1293
(Discretionary Appeal)

Case No. 06-1488
(Certified Conflict)

On Appeal from the
Hancock County Court
of Appeals, Third
Appellant District

Court of Appeals
Case No. 5-05-08

MERIT BRIEF OF APPELLANT/CROSS-APPELLEE
BRIEF 1

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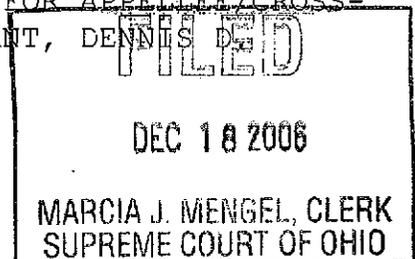
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STATEMENT OF THE FACTS

Appellee, Dennis D. Muttart, and Angela Hinojosa were married and had two children, Mason and Alexis, (Tr. p. 395, 843). Mason was born on April 16, 1997 and Alexis was born on August 11, 1998. (Tr. p. 395) Muttart and Hinojosa separated on October 19, 1999 and went through a divorce in 2000-2001. (Tr. p. 400, 845) To their credit the relationship after the divorce was amicable and friendly, especially regarding visitation with the children. (Tr. p. 847) Muttart got the children virtually every other weekend (Tr. p. 402) and for extensive periods in the summer.

During the week of March 14, 2003 Muttart contacted Hinojosa to arrange a visitation in the middle of the week because he had been laid off from his work. (Tr. p. 851) Muttart picked up the children and stayed with them at his mother's house in Findlay, Ohio so Mason could attend school that week. (Tr. p. 851) Because his mother lived alone and had to work at her own job, Muttart had a lot of time alone with the children. When Mason was in school, Muttart was alone with Alexis. (Tr. p. 852-858)

On Friday March 21, 2003, Muttart took the children home to Hinojosa's house and then returned to his home in Muskegon, Michigan. (Tr. p. 851) That night Mason had a panic attack. Hinojosa testified she called Muttart to see if

anything unusual had occurred while the children were with Muttart. (Tr. p. 409) Through the course of the weekend Hinojosa observed a change in the children. Mason continued to have panic attacks and Alexis was interacting with an imaginary friend named "Kelly". Hinojosa's concern for Mason was so great that on Monday, March 24, 2003 she called her family doctor and scheduled an appointment for the next day. (Tr. p. 410)

Also on Monday, March 24, 2003, Elizabeth McQuistion stopped at Hinojosa's house to visit. (Tr. p. 412) Hinojosa shared with McQuistion her concern over Mason's panic attacks and Alexis interacting with an imaginary friend. (Tr. p. 412) She also advised McQuistion about a prior allegation Alexis had made regarding Muttart. (Tr. p. 413) McQuistion left and returned several hours later with Vicky Higgins. (Tr. p. 414-415)

Vicki Higgins testified that McQuistion came to the office where Higgins worked. (Tr. p. 281) Higgins had never met Hinojosa or her children, but after having dinner with McQuistion, Higgins became sufficiently concerned for the welfare of the children that she went to Hinojosa's house at McQuistion's request. (Tr. p. 282-287) After speaking with Hinojosa for a while, Higgins was allowed to talk to the children. (Tr. p. 290) Higgins spent some time becoming

acquainted with Alexis. (Tr. p. 305) When Higgins inquired of Alexis about things she didn't like, Alexis had a noticeable change in her demeanor. She began crying, was not talking, began tapping her teeth and making a regurgitation sound with her throat. (Tr. p. 306-313) Higgins was concerned with this behavior and attempted to calm Alexis down. (Tr. p. 315) Higgins asked Alexis if her imaginary friend "Kelly" could tell what occurred. At this suggestion Higgins noted a drastic change in Alexis's behavior. (Tr. p. 315) Alexis stopped tapping her teeth, stopped making the regurgitation noises and became relaxed. (Tr. p. 316) Alexis jumped up, ran to her room, and came back seconds later skipping, smiling and bubbly. (Tr. p. 317-318) Higgins asked "Kelly" why Alexis's teeth hurt. (Tr. p. 321) "Kelly" responded that "Daddy Dennis" (i.e. Muttart) put his penis in Alexis's mouth and made her suck it. (Tr. p. 322)

When Higgins spoke to Mason about Alexis's disclosure she indicated that Mason's demeanor changed from that of a "bubbly kid" to being unhappy or distressed. (Tr. p. 332) Higgins testified that Mason was bouncing from one foot to the other, ringing his hands and talking very rapidly. (Tr. p. 332) Mason then reported that Muttart made Alexis suck his penis, (Tr. p. 333) and that this was "s-e-x." (Tr. p. 334)

After speaking with both children Higgins decided it was necessary to notify the police. (Tr. P. 337) When Alexis learned the police were being notified she again became upset because Muttart told her "the police would come take mommy away and put her in jail if she -- if she told about Daddy Dennis." (Tr. p. 324) In addition, "Kelly" told both Higgins and Hinojosa she was supposed to get a Barbie doll after the act, but that he never got it for her. (Tr. p. 325) After again calming Alexis down, Higgins showed Alexis how to dial 911 in an effort to help the child to feel empowered. (Tr. p. 338) Officer Marshall of the Findlay Police Department came to the residence and began the investigation. (Tr. P. 505-518)

The next day, Tuesday, March 25, 2003, Hinojosa took Alexis to see Dr. Johnson. (Tr. p. 111, 428) Hinojosa testified she converted Mason's previously arranged appointment to an appointment for Alexis. (Tr. p. 428) Dr. Johnson testified he checked Alexis and tested her for various venereal diseases. (Tr. p. 116) Dr. Johnson also testified he made a medical referral for Alexis to Dr. Randal Schlievert, a child sex abuse expert. (Tr. p. 117)

Dr. Schlievert, at the Mercy's Children Hospital in Toledo, subsequently examined Alexis. (Tr. p. 154, 227) Prior to the examination Alexis met with Julie Jones a social worker employed by Dr. Schlievert. (Tr. p. 154) In preparation of

the medical exam, Mrs. Jones collected a social and medical history from Alexis. During this time Alexis disclosed that Muttart put his penis in her mouth. (Tr. p. 161) Alexis also indicated that it happened more than one time at her Grandmother Judy's house. (Tr. p. 163) She also indicated Muttart "put his pee pee in her pee pee" and it was "hurty hurt". (Tr. p. 164) Dr. Schlievert testified he examined the child and opined she was the victim of sexual abuse. (Tr. p. 233)

On March 28, 2003, Alexis was interviewed jointly by Detective Matthew Tuttle of the Findlay Police Department and Brianna Westrick of the Hancock County Children's Services. (Tr. p. 62)

In October of 2003, Muttart was indicted by the Hancock County Grand Jury for three counts of rape in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree. In addition each count contained language from R.C. 2907.02(B) indicating that the victim of the offense was less than ten (10) years of age.

A jury trial was initially scheduled for February 17, 2004. However, the week before trial Muttart filed a motion in limine seeking to exclude statements the victim and her brother made to third parties during the investigation. The trial date was vacated and instead the court heard

evidence regarding Muttart's motion. At the conclusion of the hearing the trial court granted Muttart leave to supplement the motion and the State an opportunity to respond.

In a detailed judgment entry filed on June 7, 2004, the trial court analyzed the testimony of the various witnesses and ruled which statements would be permitted at trial. The matter proceeded to jury trial commencing on Monday, August 23, 2004. After hearing several days of testimony and arguments of counsel, the jury returned its verdicts on Saturday, August 28, 2004, finding Muttart guilty of all three counts. The trial court continued the matter for sentencing.

On January 4, 2005 the trial court imposed the statutorily mandated terms of life imprisonment for each of the three counts of rape. The court further considered Ohio's sentencing statutes and ordered the sentences be served consecutively, one after the other. Because the sentences were ordered to be served consecutively Muttart is not eligible for parole until after serving a minimum of thirty years incarceration.

The Third District Court of Appeals found the trial court erred in allowing into evidence Alexis's statements made to various medical and mental health professionals. The appellate court did not find any error in the admission of

Alexis's excited utterances made to her mother and Vicki Higgins. The court found the admission of statements made to medical and mental health professionals relating to the two counts of oral sex was harmless in light of the excited utterances. Accordingly, the court affirmed the two convictions for oral rape. However, Alexis's statement to medical personnel about vaginal sex was found to be prejudicial and the court reversed the conviction for the count of vaginal rape.

From this judgment the State of Ohio appealed. Muttart filed a cross appeal. In addition, the court of appeals certified its decision to be in conflict with the decisions of various other appellate courts. Pursuant to an order of the Supreme Court, the matters were consolidated for briefing.

ARGUMENT

PROPOSITION OF LAW

A CHILD VICTIM'S OUT-OF-COURT STATEMENTS TO MEDICAL PERSONNEL ARE ADMISSIBLE UNDER EVIDENCE RULE 803(4) REGARDLESS OF THE COMPETENCY OF THE CHILD.

CERTIFIED CONFLICT QUESTION

MUST A CHILD VICTIM'S STATEMENTS, MADE FOR PURPOSES OF MEDICAL DIAGNOSES [sic] AND TREATMENT (EVID. R. 804(4)), [sic] BE EXCLUDED FROM ADMISSION AT TRIAL, PURSUANT TO STATE V. SAID (1994), 71 OHIO ST.3D 473, WHERE THERE HAS BEEN NO PRIOR DETERMINATION BY THE TRIAL COURT THAT THE CHILD WAS COMPETENT AT THE TIME THE STATEMENT WAS MADE?

I. Introduction

The State of Ohio contends the court of appeals erred in its conclusion that Alexis's statements to various medical personnel were not admissible without a determination by the trial court that the child would have been competent to testify at the time the statements were made. The State submits a child victim's out of court statements to medical personnel are admissible under Evid.R. 803(4), regardless of the child's competency. It is respectfully requested that this Court reverse the decision of the court of appeals and reinstate the judgment and sentence of the trial court.

II. The Witness Statements at Trial.

Before his trial, Muttart filed a motion in limine seeking to exclude statements the victim and her brother made to various third parties during the investigation. In a pre-trial hearing, the court heard testimony from the various witnesses regarding Muttart's motion. In a detailed judgment entry the trial court analyzed the testimony of the various witnesses and ruled which statements would be permitted at trial. The court considered the statements in relation to Evid.R. 803(2) and (4) and Crawford v. Washington (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

At trial, Angela Hinojosa and Vicki Higgins were permitted to testify regarding Alexis's statements made through an imaginary friend while Alexis was in a state of agitation. The trial court and court of appeals found these statements were properly admitted as they were not testimonial and were excited utterances under Evid.R. 803(2). In these statements Alexis disclosed Muttart forced her to perform oral sex on him.

Statements made to Julie Jones as part of Alexis' medical history taken prior to the sexual assault examination were admitted at trial. Mrs. Jones testified Alexis disclosed that Muttart put his penis in her mouth. Alexis also

indicated that it happened more than one time at her Grandmother Judy's house. She also indicated Muttart "put his pee pee in her pee pee" and it was "hurty hurt". The trial court found the statements were not testimonial and were necessary for medical diagnosis and treatment of any injuries the child may have sustained as a result of the rapes. The statements were admitted into evidence pursuant to Evid.R. 803(4). However, the court of appeals found error in the admission of these statements because there was no prior determination by the trial court that the child was competent to make the statements. The court of appeals found the statements regarding oral sex were harmless, because of the properly admitted statements of Hinojosa and Higgins. The statement regarding vaginal sex though, was prejudicial. The court of appeals reversed the conviction as to this count of rape.

Statements made to Betty Humphries and Connie Crego-Stahl, licensed clinical counselors at the Findlay Family Resource Center, were also admitted into evidence. Humphries testified she was the person who made the initial assessment of Alexis and was therefore required to talk with Alexis to obtain information to make a diagnosis. Humphries stated Alexis told her that she was afraid of monsters and that she did not want to see Muttart anymore. Humphries recommended

therapy treatment for Alexis to deal with the issue of sexual abuse. Crego-Stahl was the therapist for Alexis. She testified that Alexis had stated she had a secret, which was an indicator of child abuse. Crego-Stahl went on to testify that Alexis stated Muttart made me suck his pee pee. Additionally, Alexis told Crego-Stahl that she was afraid to go to Muttart's house and that Muttart told her if she didn't keep her secret then her mother, Hinojosa, would go to jail. The trial court found these statements were made for purposes of psychological diagnosis and treatment and were admissible pursuant to Evid.R. 803(4). The court also found the statements were not testimonial. The court of appeals disagreed, but found their admission to be harmless.

Detective Matthew Tuttle of the Findlay Police Department and Brianna Westrick of the Hancock County Children's Services also testified at trial. However, they did not testify regarding any specific statements made by Alexis. The trial court had previously ruled statements by Alexis to these individuals were testimonial and therefore not admissible at trial.

III. The Holding in State v. Said should be Limited to Applications of Evid.R. 807.

The State of Ohio contends the trial court was

correct in ruling the statements of Julie Jones, Betty Humphries, and Connie Crego-Stahl were admissible under Evid.R. 803(4), because they were made for the purposes of medical/psychological diagnosis and treatment.

Evid.R. 803 provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition

* * *

(4) Statements for the purposes of medical diagnosis or treatment. Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonable pertinent to diagnosis or treatment.

In the opinion rendered in the instant case by the court of appeals, the court, relying on State v. Said (1994), 71 Ohio St.3d 473, held that the various statements made by Alexis to medical/psychological professionals were not admissible because the trial court failed to ascertain the competency of the child at the time the statements were made. State v. Muttart, 3rd Dist. No.5-05-08, 2006-Ohio-2506, ¶¶ 49-51.

In State v. Said (1994), 71 Ohio St.3d 473, this Court held, "a trial court must find that a declarant under the age of ten was competent at the time she made the statement in order to admit that statement under Evid.R. 807." Said at 477. Because Said was decided on hearsay admitted pursuant Evid.R. 807, several appellate districts have refused to extend its holding beyond an application to Evid.R. 807. Those courts have not required a competency determination prior to admitting a child's out-of-court statements to medical professionals. In contrast, the Third District Court of Appeals determined that the competency requirement is mandated prior to the use of any hearsay by a child declarant. Muttart at ¶50.

IV. Cases in Conflict with Said.

In State v. Ashford (Feb. 16, 2001), Trumbull App. No 99-T-0015, unreported, the Eleventh District Court of Appeals held that statements of a child victim, who was not competent to testify, were admissible under Evid.R. 803(4). In its consideration of Said, the appellate court found the requirement for a competency hearing was limited to cases involving admission of a child victim's statement pursuant to Evid.R. 807. The appellate court said the cornerstone of admissibility under Evid.R. 803(4) is whether the statements

are reasonably pertinent to diagnosis or treatment. Id. at p. 8, citing State v. Miller (1988), 43 Ohio App.3d 44, paragraph two of the syllabus.

In State v. Brewer, 6th Dist. No. E-01-053, 2003-Ohio-3423, the Sixth District Court of Appeals held that statements of a mentally impaired victim did not require a competency determination when they were admitted for the purpose of medical diagnosis. In Brewer, the defendant was charged with the rape of a woman who was mentally and physically disabled. Id. at ¶ 1-2. A nurse witnessed the rape, and in the course of treating the victim, confirmed with the victim that vaginal penetration had occurred. Id. at ¶ 20-25. Several months after the incident the victim died of unrelated causes and was not available for trial. The court was also unable to hold a hearing to determine the competency of the victim.¹ The trial court admitted the out of court statements. In finding the victim's statements were admissible under Evid.R. 803(4), the court noted:

[T]he hearsay exception for statements pertinent to medical treatment "* * * is based upon the belief that the declarant's subjective motive generally guarantees the statement's trustworthiness. Since the effectiveness of the treatment depends upon the accuracy of information given to the physician, the declarant is motivated to tell the truth."

¹ It is noteworthy that this is the exact situation about which Justice Resnick expressed concern in her dissent in State v. Said (1994), 71 Ohio St.3d 473, 480.

Id. at ¶ 28, quoting State v. Eastham (1988), 39 Ohio St.3d 307, 312.

Further, the Brewer court followed a number of other decisions in holding that Evid.R. 803(4) has no prerequisite of determining whether the declarant is competent to testify. See Id. at ¶ 29-30, citing State v. Ullis (1993), 91 Ohio App.3d 656, 665; State v. Miller (1988), 43 Ohio App.3d 44, 46; State v. Ashford (Feb. 16, 2001), Trumbull App. No 99-T-0015, unreported; State v. Wilson (Feb. 18, 2000), Adams App. No. 99CA672, unreported; State v. McWhite (Dec. 29, 1995), Lucas App. No. L-95-007, unreported; State v. Valdez (Nov. 29, 1991), Ottawa App. No. 90-OT-014.

Similarly, in State v. Rice, 8th Dist. No. 82547, 2005-Ohio-3393, the Eighth District Court of Appeals indicated Evid.R. 807 requires a competency determination, but Evid.R. 803(2) and 803(4) do not. The victim in this case was four or five years old at the time of the incident, suffered from cerebral palsy and was substantially physically incapacitated. The jury convicted defendant primarily on hearsay evidence admitted through the victim's mother and a social worker. In its consideration of Said the appellate court noted the excited utterance exception to the competency requirement contained in Said and extended this exception to include

statements made for medical diagnosis or treatment under Evid.R. 803(4). Id. at ¶ 12-14.

The same conclusion was reached by the Tenth District Court of Appeals in State v. Edinger, 10th Dist. No. 05AP-31, 2006-Ohio-1527. In Edinger, the court found that Said was limited to Evid.R. 807 and that no competency determination is required when child hearsay is admitted pursuant to Evid.R. 803(4). Edinger at ¶ 68. The Edinger court said, "Because the Said court did not address the admissibility of statements under Evid.R. 803(4), this court specifically finds that that court's holding on that issue does not apply to the present case." Id.

V. A Competency Determination of a Child Witness Under Ten Years of Age is not needed for Admission of Statements Under Evid.R. 803(4).

Said was decided based upon hearsay that was admitted pursuant to Evid.R. 807. Said, at 477. The Court entered into a detailed analysis of Professor Wigmore's requirements for the admissibility of evidence, as well as the lack of reliability of hearsay admitted pursuant to Evid.R. 807. However, in its analysis, the Said Court did not fully examine Evid.R. 803, a rule that admits hearsay under quite different reasoning and circumstances than Evid.R. 807. The Court did note that Evid.R. 803(2), permitting excited

utterances into evidence, possessed certain indicators of reliability. Said, at 477. A number of appellate decisions noted Said's exception that excited utterances do not require a competency determination as a prerequisite for admission into evidence. Those appellate courts have extended the exception to include statements made for purposes of medical diagnosis or treatment pursuant to Evid.R. 803(4), regardless of the competency of the declarant. See In re: D.L., 8th Dist No. 84643, 2005-Ohio-2320; State v. Brewer, 6th Dist. No. E-01-053, 2003-Ohio-3423; State v. Rusnak, 8th Dist. No. 8011, 2002-Ohio-2143; State v. Ashford, (Feb. 16, 2001), Trumbull App. No. 99-T-0015, unreported; State v. Wilson (Feb. 18, 2000), Adams App. No. 99CA672, unreported; State v. Shepard (July 1, 1993), Cuyahoga App. No. 62894, unreported; State v. Ullis (1993), 91 Ohio App.3d 656; State v. Miller, supra; State v. McWhite (Dec. 29, 1995), Lucas App. No. L-95-007, unreported.

Additionally, as detailed below, the Court in Said noted that a competency determination is not required prior to admission of excited utterances because such statements possess inherent indicators establishing reliability. Said at 477 fn1. Similarly, the competency hearing requirement should not apply to statements made for medical diagnosis or treatment because they have similar indicia of reliability.

This Court has previously confirmed the reliability of hearsay statements to medical personnel admitted under Evid.R. 803(4) from children in abuse cases in State v. Dever (1992), 64 Ohio St.3d 401. The Court found that a child's statement to a doctor is "sufficiently trustworthy" and admissible under Evid.R. 803(4). Id. at 410. The Court said:

Once the child is at the doctor's office, the probability of understanding the significance of the visit is heightened and the motivation for diagnosis and treatment will normally be present. That is to say, the initial desire to seek treatment may be absent, but the motivation certainly can arise once the child has been taken to the doctor. Absent extraordinary circumstances, the child has no more motivation to lie than an adult would in similar circumstances. Everyday experience tells us most children know that if they do not tell the truth to the person treating them, they may get worse and not better. An overly strict motivational requirement for the statements of young children will almost always keep those statements out of evidence. That is not an acceptable balance of competing interests. We are unwilling to approve a rule which allows a person accused of abusing a young child (when there is no physical evidence of that abuse) to keep the child's statements to a doctor out of evidence simply because of a lack of initial motivation to seek treatment. In many situations, the statements of young children are sufficiently trustworthy and can appropriately be admitted pursuant to Evid.R. 803(4).

Id. citing generally State v. Larson (Minn.1991), 472 N.W.2d 120; People v. Meeboer (1992), 439 Mich. 310, 484 N.W.2d 621.

There are safeguards which promote the admission of statements made to medical professionals. For instance, a trial court may conduct a hearing to consider the circumstances surrounding the making of the hearsay statement to ensure it was not inappropriately influenced by another. Dever at 410.² In addition, the witness whose testimony brings in the child's hearsay statement can be cross-examined about the circumstances surrounding the making of the statement. Whether the child's statement was in response to suggestive or leading questions are matters the trial court can consider. Id. If no such factors exist, then the evidence should be admitted. The credibility of the statements would then be for the jury to evaluate in its role as factfinder. Id.

In addition, the Dever Court went on to state:

[A] court should not presume * * * that the statements are unreliable merely because there is no indisputable evidence of the child's motivation. Rather, in such a case as this, when an examination of the surrounding circumstances casts little doubt on the motivation of the child, it is permissible to assume that the factors underlying Evid.R. 803(4) are present.

Id. at 412.

Therefore, a child victim's out-of-court statements to medical personnel bear a strong indicia of reliability and

² In the instant case the trial court conducted such an evidentiary hearing prior to trial and heard testimony from the various medical and psychological professionals. The court found their statements to be admissible at trial.

are admissible under Evid.R. 803(4) regardless of the competency of the child. The holding in Said should be limited to situations involving Evid.R. 807.

VI. The Reasoning of Said Should Be Limited to the Admission of Hearsay Statements Pursuant to Evid.R. 807.

Evid.R. 807 is the only rule the Said Court examined in detail. The Court held that a competency hearing was required before statements could be admitted under this rule. The Court then spoke of a hearing requirement being necessary in a broad sense before admission of any hearsay by a child declarant. However, the Court noted an exception for hearsay that it deemed to be uniquely reliable, i.e. excited utterances. Said at 477 fn. 1. In finding this exception, the Court relied on its prior decision concerning the reliability of excited utterances in State v. Wallace (1988), 37 Ohio St.3d 87. In Wallace, the Court found:

On the theory that there is a countervailing assurance of reliability-the requirement of excitement-the other aspects of competency are not applied. Thus an excited utterance is admissible despite the fact that the declarant was a child and would have been incompetent as a witness for that reason, or the declarant was incompetent by virtue of mental illness or the declarant was a spouse of the defendant in the criminal case in which the statement was offered.

Id. at 94-95, fn 10, citing McCormick, Evidence (3 Ed. Cleary Ed.1984) 858, Section 297. Accordingly, in Said,

the Court exempted Evid.R. 803(2), excited utterance, from the competency hearing requirement because of its one of a kind guarantees of reliability. Said, at 477, fn1 citing State v. Boston (1989), 46 Ohio St.3d 108. Therefore, if the hearsay is reliable, no competency hearing is required.

In finding that a competency hearing is required before admitting a child's out of court statements, the Said Court relied upon Professor Wigmore's evidence treatise. Id. at 475-476. The Court stated:

As Professor Wigmore explains, hearsay statements must meet the same basic requirements for admissibility as live witness testimony: "The admission of hearsay statements, by way of exception to the rule, therefore presupposes that the asserter possessed the qualifications of a witness * * * in regard to knowledge and the like."

Id. quoting 5 Wigmore on Evidence (Chadbourn Rev.1974) 255, Section 1424.

In finding that competency was a basic requirement for a witness, the Court noted that Evid.R. 601 presumes that all witnesses over age ten are competent. Id. at 476. Then, based upon Professor Wigmore's assertions, this Court concluded that before a statement of a declarant under age ten is admissible, a court must find that the declarant was competent at the time the statement was made. Id.

The Court's reliance on Professor Wigmore's

statements does not provide a solid foundation for this line of reasoning. Professor Wigmore's analysis, relied on by the Said Court, did not pertain to hearsay exceptions contained in Evid.R. 803. On the contrary, the analysis dealt with the unique exceptions outlined in Evid.R. 804 when the declarant is unavailable to testify.

In his discussion of statements made to medical providers, Professor Wigmore does not address the competency of the patient. Rather Wigmore notes the reliability of statements to medical professionals is derived from the patient's desire to be treated and the doctor's need for medical history in order to provide that treatment.

When a physician examines a patient to ascertain his ailment and to prescribe for it, a portion of his reasons for action must be the patient's own statements. To exclude testimony not wholly independent of this foundation for opinion is, in strictness, to exclude almost always medical testimony based on a personal examination.

See 3 Wigmore on Evidence (Chadbourn Rev.1974) 4, Section 688.

The reliability standard for statements made for medical diagnosis or treatment is built into Evid.R. 803(4). The rule requires that the statements be reasonably related to medical diagnosis or treatment. A fact reliable enough to serve as the basis for a diagnosis and treatment by a medical professional is also reliable enough to escape hearsay proscription. State v. Miller (1988), 43 Ohio App.3d 44, 47,

citing U.S. v. Iron Shell (C.A.8, 1980), 633 F.2d 77, 83-84, citing 4 Weinstein & Berger, Weinstein's Evidence (1979), Section 803(4), at 803-129. Because the medical provider relies on the victim's statements to decide what course of treatment should be provided or medications prescribed, such a statement has inherent reliability, even if made by a child. In addition, the medical professional can consider the statements in conjunction with his or her observations made during the physical exam. This lends additional credibility to the statements. The type of treatment provided is directly related to the medical history and physical exam. A competent medical professional will not render treatment, proscribe medications, or perform other medical procedures if the medical professional does not find the statements correspond to the physical exam or if the statements are too ambiguous to be relied upon for medical diagnosis or treatment. The medical provider's reliance on the statement makes it uniquely reliable and eliminates the need for a competency termination.

Moreover, the medical provider through whom the statement is introduced can be cross-examined as to the circumstances surrounding the making of the statement. Such an inquiry will ensure the patient was not improperly influenced by suggestive or leading questions. If no such factors exist, then the evidence should be admitted for the

jury's consideration. Dever, supra at 410.

This was the position advocated by Justice Resnick in her dissent in Said. "Under the various hearsay exceptions, selected out-of-court statements are deemed to possess certain indicia of reliability which warrant their admissibility into evidence regardless of whether the declarant will testify during trial." Said, at 479. The dissent noted that hearsay admitted pursuant to long accepted standards is deemed to be reliable and that the majority opinion undertook no analysis of such rules to show that they do not possess sufficient indicia of reliability. In fact, the Said majority ignores this Court's decision in Dever, supra, which finds that child statements to medical personnel bear adequate indicia of reliability for admission under Evid.R. 803(4).

Additionally, if Said is interpreted to require a competency hearing before medical hearsay of a child less than ten years of age is admitted, the hearsay exception of Evid.R. 803(4) may become unavailable for such children. There would always have to be a competency hearing where the child would be required to testify. This would effectively eliminate the hearsay exceptions under Evid.R. 830(4) for declarants under age ten. Such a disparity in the law between persons under ten years of age and those over ten years of age is inappropriate and unfair.

The Court's holding in Said lacks clarity and does not give sufficient direction to lower courts to impose and enforce the hearing requirement. Therefore, it should be limited to applications of Evid.R.807 or overruled.

VII. ISSUES RELATING TO CRAWFORD V. WASHINGTON.

If Said is interpreted to require a competency hearing before medical hearsay of a child under ten years of age is admitted, the hearsay exception may become unavailable for child victims under ten. A decision to mandate a competency hearing may result in medical personnel considering potential litigation while interviewing a child victim of sexual abuse in order to be able to testify that the child was competent to make the out of court statements. Gathering information as to the child's competence for future litigation could lead to a court finding the statements to be testimonial under Crawford v. Washington (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

In Crawford, the United States Supreme Court found that a declarant's extra judicial statement is inadmissible if the statement is testimonial. Unfortunately, the Supreme Court intentionally declined to provide a comprehensive definition of "testimonial." Id. However, the analysis of whether a statement is testimonial generally focuses on (1)

whether the government was involved in creating the testimony as in a police interrogation or prior court testimony and (2) whether the declarant could reasonably expect the statement to be used in court. Id. The proper inquiry in deciding whether a statement is testimonial for evidentiary purposes is whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime. State v. Stahl, 111 Ohio St.3d 186, 2006-Ohio-5482, (adopting the "objective witness" standard and holding that courts should focus on the expectation of the declarant at the time of making the statement in order to ascertain if the statement was testimonial).

Allowing a child victim's statements into evidence pursuant to the medical diagnosis or treatment exception is consistent with this Court's decision in Stahl. In Stahl this Court held that an adult rape victim's admissions to a sexual assault nurse about her rape and the identity of the person who attacked her were non-testimonial statements.³ After Stahl, it is clear that a nurse gathering information about a sexual assault for purposes of treating the victim is not testimonial. However, if the nurse were to ask a child under

³ The Court in Stahl did not address whether such statements would be subject to a competency determination if the victim were a child under ten years of age.

age ten questions about his/her competency in anticipation of future criminal prosecution, it is doubtful that such actions would survive scrutiny under Crawford. More importantly, the medical provider should diagnose and provide treatment without being concerned about potential court hearings.

In cases where medical personnel routinely deal with child sexual abuse cases, the practitioner will become aware of the competency requirement, and will surely have the requirement in mind when questioning the child. If the medical practitioner does not look for evidence establishing the competency of the child, the court may not be able to determine if the child victim was competent "at the time she made the statement." Said, at 477. In such a case, application of Crawford protection of confrontation will either render the child's hearsay inadmissible as testimonial hearsay or inadmissible for insufficient evidence that the child was competent at the time of the declaration. If evidence of the child's competency during the medical examination is unavailable, the child's statements are inadmissible. However, if the doctor were to interview the child to determine his or her level of competency during the exam, the medical exam begins to look more like trial preparation, and the statements are inadmissible under Crawford.

In State v. Dever (1992), 64 Ohio St.3d 401, this Court held that exclusion of child hearsay statements for purposes of medical diagnosis was an unacceptable consequence of the rigid application of common law motivational requirements imposed by the Court in State v. Boston (1989), 46 Ohio St.3d 108. The Court found that the necessity of the admissibility of child hearsay statements, under the medical diagnosis exception of Evid.R. 803(4), in abuse cases weighed more heavily than the common law requirement that the child be motivated to seek treatment before the statement was admissible. The Court said:

An overly strict motivational requirement for the statements of young children will almost *always* keep those statements out of evidence. That is not an acceptable balance of competing interests. We are unwilling to approve a rule which allows a person accused of abusing a young child (when there is no physical evidence of that abuse) to keep the child's statements to a doctor out of evidence simply because of a lack of initial motivation to seek treatment. In many situations, *the statements of young children are sufficiently trustworthy and can appropriately be admitted pursuant to Evid.R. 803(4).* Dever, 64 Ohio St. 3d at 410, emphasis added.

Similarly, if a competency hearing is required to admit a child declarant's statements under Evid.R. 803(4), the application of Crawford will keep statements out of evidence. This is an unacceptable result.

CONCLUSION

This Court's decision in Said was limited to applications of Evid.R. 807. Because statements made to medical and psychological professionals for the purpose of diagnosis or treatment have inherent reliability, a child victim's out-of-court statements made to medical personnel are admissible under evidence Rule 803(4) even when there has been no determination as to the child's competency. As to this issue, the decision of the Third District Court of Appeals should be reversed.

Respectfully submitted,

Mark C. Miller

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Counsel for Appellant/
Cross-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2006 a true and exact copy of the foregoing Merit Brief of Appellant/Cross Appellee, Brief 1 was served upon

Maria Santo, Counsel for Appellee/Cross-Appellant, at 124
South Metcalf Street, Lima, Ohio 45801 by regular U.S. Mail.

Mark C. Miller
MARK C. MILLER
Assistant Prosecuting Attorney
Hancock County, Ohio

Counsel for Appellant/
Cross-Appellee

APPENDIX

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO,

APPELLANT,

vs.

DENNIS D. MUTTART,

APPELLEE.

06-1293

ON APPEAL FROM THE
HANCOCK COUNTY COURT
OF APPEALS, THIRD
APPELLATE DISTRICT

Court of Appeals
Case No. 5-05-08

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

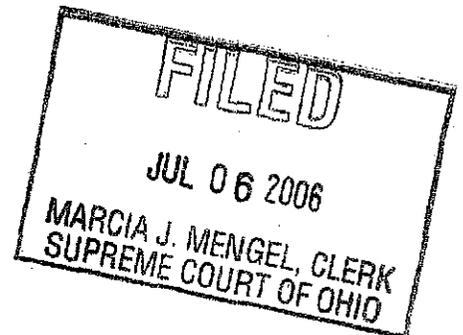
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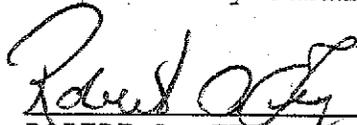


NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hancock County Court of Appeals, Third Appellate District, entered May 22, 2006, in the Court of Appeals Case No. 5-05-08, State v. Muttart.

This case involves a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



ROBERT A. FRY
Hancock County Prosecuting Attorney



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COUNSEL FOR APPELLANT, STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served upon Maria Santo, Attorney for Appellee, Dennis D. Muttart, 124 South Metcalf Street, Lima, Ohio 45801, by ordinary U.S. Mail on this 6th day of July, 2006.



MARK C. MILLER (55702)
Assistant Prosecuting Attorney
Hancock County, Ohio

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

vs.

DENNIS D. MUTTART

Appellant.

* Supreme Court Case No.

* **06-1293**

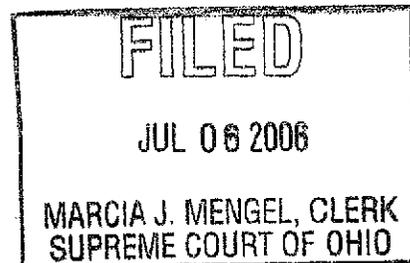
* On Appeal from the
* Hancock County Court of Appeals,
* Third Appellate District

* Court of Appeals
* Case No. 5-05-08

*

NOTICE OF APPEAL OF APPELLANT DENNIS D. MUTTART

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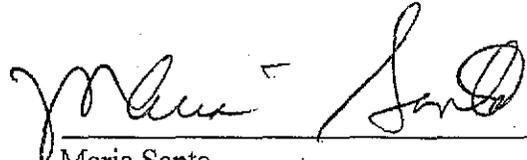
COUNSEL FOR APPELLEE, STATE OF OHIO

Notice of Appeal of Appellant Dennis D. Muttart

Appellant Dennis D. Muttart hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hancock County Court of Appeals, Third Appellate District, entered in Court of Appeals Case No. 5-05-08 on May 22, 2006.

This case involves a felony and is one of public or great general interest.

Respectfully submitted,

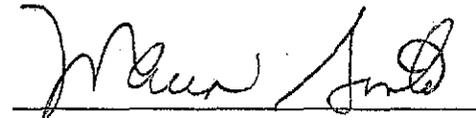


Maria Santo

COUNSEL FOR APPELLANT,
DENNIS D. MUTTART

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by regular U.S. Mail to Counsel for Appellee, Mark C. Miller, Hancock County Assistant Prosecuting Attorney, at 222 Broadway, Rm. 104, Findlay, Ohio 45840 on July 6th, 2006.



Maria Santo

COUNSEL FOR APPELLANT,
DENNIS D. MUTTART

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
HANCOCK COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE

v.

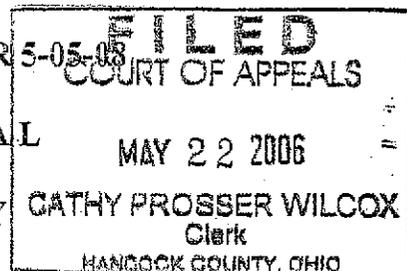
DENNIS D. MUTTART

DEFENDANT-APPELLANT

CASE NUMBER 5-05-03

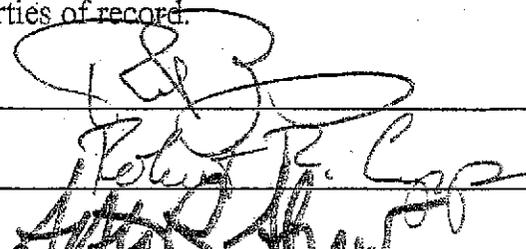
JOURNAL

ENTRY



For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is affirmed in part and reversed in part with costs to be divided equally between the parties for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.



(Shaw, J., concurs in judgment only)
JUDGES

DATED: May 22, 2006

FILED
COURT OF APPEALS
JUL 12 2006
CATHY PROSSER WILCOX
CLERK
HANCOCK COUNTY, OHIO

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

HANCOCK COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 5-05-08

v.

DENNIS D. MUTTART

JOURNAL
ENTRY

DEFENDANT-APPELLANT

This cause comes on for determination of appellee's motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution.

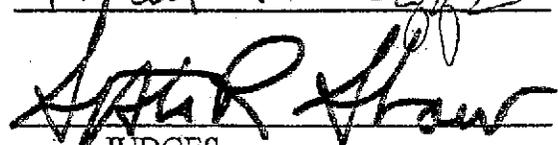
Upon consideration the court finds that the judgment in the instant case is in conflict with judgments rendered by the Sixth District Court of Appeals in *State v. Brewer*, 6th Dist. No. E-01-053, 2003-Ohio-3423; the Eighth District Court of Appeals in *State v. Rice*, 8th Dist. No. 82547, 2005-Ohio-3393; the Tenth District Court of Appeals in *State v. Edinger*, 10th Dist. No. 05AP-31, 2006-Ohio-1527; and, the Eleventh District Court of Appeals in *State v. Ashford* (Feb. 16, 2001), 11th Dist. No. 99-T-0015, unreported. Accordingly, the motion is well taken and the following issue should be certified pursuant to App.R. 25:

Must a child victim's statements, made for purposes of medical diagnoses and treatment (Evid. R 804(4)), be excluded from admission at trial, pursuant to *State v. Said* (1994), 71 Ohio St. 3d 473, where there has been no prior determination by the trial court that the child was competent at the time the statement was made?

It is therefore **ORDERED** that appellee's motion to certify a conflict be, and hereby is, granted on the certified issue set forth hereinabove.



Robert R. Capps



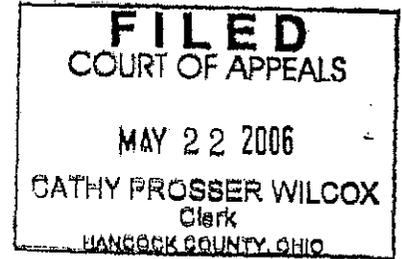
JUDGES

DATED: July 12, 2006
/jlr

I, the undersigned, clerk of the Common Pleas Court within and for said County, do hereby certify that the foregoing is a true and correct copy of the original Journal Entry

Cathy P. Wasson Wilcox
Clerk of the Common Pleas Court

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**



STATE OF OHIO

CASE NUMBER 5-05-08

PLAINTIFF-APPELLEE

v.

OPINION

DENNIS D. MUTTART

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed in part, reversed in part and cause remanded.

DATE OF JUDGMENT ENTRY: May 22, 2006

ATTORNEYS:

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Findlay, OH 45840

Case No. 5-05-08

For Appellee.

Rogers, J.

{¶1} Defendant-Appellant, Dennis D. Muttart, appeals a judgment of the Hancock County Court of Common Pleas, sentencing him upon his convictions for three counts of rape. On appeal, Muttart contends that the trial court erred by admitting hearsay statements in violation of the Confrontation Clause, that the trial court erred by imposing consecutive sentences and that the trial court erred in ordering restitution. Based on the following, the judgment of the trial court is affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

{¶2} In July of 1996, Muttart and Angela Hinojosa married. During their marriage, two children were born; M.M. was born April 16, 1997, and A.M. was born August 11, 1998. Muttart and Hinojosa separated in 1999 and ultimately divorced in 2001. Following their divorce, Muttart and Hinojosa had shared custody of their children and maintained an amicable visitation relationship. During this period, Muttart had moved to Michigan for work. As a result, he would generally travel back to Findlay, Ohio, every other weekend and take the children to his mother's house for their visits. In addition, Muttart would have extended visits with the children. During these extended visits, Muttart would take the children back to Michigan.

{¶3} During the week of March 16, 2003, Muttart contacted Hinojosa to arrange a visitation in the middle of the week, because he had been laid off from his work. M.M. was in kindergarten at the time; therefore, Muttart came down to Findlay, Ohio, and spent the week with the children at his mother's house.

{¶4} On Friday, March 21, 2003, Muttart took the children back to Hinojosa's house and returned to Michigan. That night M.M. had a panic attack and Hinojosa called Muttart to determine whether anything unusual had happened with the children that week. Muttart told Hinojosa that nothing unusual had occurred. Throughout the course of the weekend, Hinojosa continued to observe a change in the behavior of the children. M.M. continued to have panic attacks, and A.M. began interacting through an imaginary friend named "Kelly."

{¶5} On Monday, March 24, 2003, Hinojosa contacted her family doctor about M.M.'s panic attacks and made an appointment for him the next day. Additionally, Hinojosa's friend, Elizabeth McQuiston, stopped by to visit. During McQuiston's visit, Hinojosa shared her concern over M.M.'s panic attacks and A.M.'s interaction with an imaginary friend. After leaving Hinojosa's house, McQuiston contacted Vicky Higgins about the children's behavior.

{¶6} After meeting for dinner, McQuiston and Higgins returned to Hinojosa's house so that Higgins could speak with the children. Initially, Higgins spoke with Hinojosa about the children's behavior. Subsequently, she was

allowed to speak with the children. Higgins spent some time becoming acquainted with both children, and, then, McQuiston took M.M. outside to play so that Higgins could speak with A.M.

{¶7} At that point, Higgins asked A.M. about things she didn't like and observed a noticeable change in A.M.'s demeanor. According to Higgins, A.M. began to cry, would not talk, began tapping her teeth and making a regurgitation sound with her throat. After unsuccessfully attempting to calm A.M. down, Higgins asked A.M. if her imaginary friend, "Kelly," could tell her what A.M. did not like. At that point, A.M.'s behavior again dramatically changed and A.M. stated that she would go and get Kelly. A.M. then got up, ran to her bedroom and came skipping back a few seconds later. Next, Higgins asked Kelly why A.M.'s teeth hurt, and Kelly responded, "Because Daddy Dennis put his penis in [A.M.'s] mouth and made her suck it." (Tr. p. 322.) Additionally, Kelly told Higgins that "the police would come take mommy away and put her in jail if the -if she told about Daddy Dennis." (Tr. p. 324.) Finally, Kelly told both Higgins and Hinojosa that she was supposed to get a Barbie doll but that he never got it for her. (Tr. p. 325.)

{¶8} Following Higgins' talk with A.M., she went outside to bring M.M. back into the house so that she could talk with him. After A.M. gave M.M.

permission to talk, M.M. told Higgins that "Dennis made [A.M.] suck his penis" and that "that is S-E-X." (Tr. pp. 333-34.)

{¶9} After her conversations with the children, Higgins contacted the police. That night Officer Douglas Marshall of the Findlay Police Department came to Hinojosa's house and began an investigation into the allegations of sexual abuse. Officer Marshall did not interview either of the children, because he was not trained to properly conduct such interviews.

{¶10} The next day, Tuesday, March 25, 2003, Hinojosa took A.M. to see Dr. Johnson. A.M.'s appointment with Dr. Johnson was the appointment that Hinojosa had originally made for M.M. Following an exam and various testing, Dr. Johnson referred A.M. to Dr. Randal Schlievert, a child sexual abuse specialist in Toledo, Ohio.

{¶11} On March 28, 2003, A.M. was interviewed jointly by Detective Matthew Tuttle of the Findlay Police Department and Brenda Westrick of Hancock County Children's Services.

{¶12} In April of 2003, A.M. was examined by Dr. Schlievert at Mercy Children's Hospital in Toledo, Ohio. Prior to her exam, A.M. met with Julie Jones, the Assistant Director of Child Abuse Program at Mercy Children's Hospital. Jones' job involved meeting with the child before his or her exam with the doctor, to obtain a medical and social history of the child as well as prepare the

child for his or her exam. During Jones meeting with A.M., A.M. stated that she had talked to another girl at school about Dennis, that Dennis used to be her dad but now he is not and that she tried to get out of the bathroom but he locked the door. Additionally, Jones stated that A.M. told her that “[h]e put this in my mouth,” while she was pointing between her legs. (Tr. p. 161.) A.M. also told Jones that “pee came out of it,” “he did it more than once,” and that “Dennis put his pee pee in my pee pee.” (Tr. pp. 163-64.) Finally, when Jones asked A.M. what it felt like when Dennis put his pee pee in her pee pee, A.M. stated that “it hurtie hurt.” (Tr. p. 164.)

{¶13} Following her meeting with A.M., Jones met with Dr. Schlievert and told him about everything that A.M. had told her for the purposes of A.M.’s exam. Dr. Schlievert then examined A.M. While Dr. Schlievert found there were no physical findings of abuse, he opined that A.M. had been sexually abused.

{¶14} In October of 2003, Muttart was indicted by the Hancock County Grand Jury for three counts of rape in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree. Additionally, each count alleged that the victim was less than ten years of age, pursuant to R.C. 2907.03(B).

{¶15} In February of 2004, Muttart filed a motion in limine, asking the trial court to preclude the State from attempting to introduce any hearsay testimony concerning any statements made to third parties by A.M. or M.M. In his motion,

Muttart included the specific testimony he wished to exclude. Additionally, Muttart argued that all hearsay statements should be excluded because such statements did not fall within any of the hearsay exceptions and because the totality of circumstances showed that such statements were unreliable. Finally, Muttart asserted that the trial court must find A.M. competent under Evid. R. 601(A).

{¶16} In the State's motion in opposition of Muttart's motion in limine, the State asserted that the hearsay statements of A.M. and M.M. could properly be included as excited utterances, statements made for medical diagnosis and expert opinion testimony.

{¶17} Subsequently, the trial court held a hearing on Muttart's motion in limine. At the hearing, Hinojosa, Higgins, Jones, Humphries, Crego-Stahl and Dr. Schlievert all testified. Following the hearing, the trial court filed its judgment entry, denying Muttart's motion in limine. In its judgment entry, the trial court noted that at the time of the hearing, Muttart had agreed to defer a hearing on the issue of competency. Additionally, the trial court found that A.M.'s statements to Hinojosa and Higgins were admissible under Evid.R. 803(2), the excited utterance hearsay exception; that A.M.'s statements made to Jones were admissible under Evid.R. 803(4), because such statements were made for the purposes of a medical diagnosis; and, that statements made to Humphries and Crego-Stahl were

admissible under Evid.R. 803(4), because those statements were made for the purposes of psychological diagnosis and treatment. The trial court went on to exclude all hearsay statements made by A.M. to all law enforcement officers. Finally, the trial court found that Muttart's rights to confrontation were not violated under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354. Specifically, the trial court noted that in *Crawford* the Court had stated that non-testimonial statements do not violate the Confrontation Clause of the United States Constitution if those statements fall within a firmly rooted hearsay exception. Finding that the statements of Hinojosa, Higgins, Jones, Humphries and Crego-Stahl were non-testimonial and that each fell within a firmly rooted hearsay exception, the trial court found Muttart's rights would not be violated by the admission of those statements.

{¶18} In August of 2004, a jury trial was held. At the trial, the State presented the testimony of Brenda Westrick, a child abuse and neglect investigator at the Hancock County Children's Office; Dr. Donald Johnson, A.M.'s Family Doctor; Jones; Dr. Schlievert; Higgins; Hinojosa; Officer Douglas Marshall, a Findlay Police officer; Detective Matthew Tuttle, a Findlay Police detective; and, Betty Humphries and Crego-Stahl, both licensed clinical counselors at the Findlay Family Resource Center. Muttart presented the testimony of Jeff Seaver, Rodney

Burns, Sheri Horn and Judy Wilson. Each testified as a character witness. Finally, Muttart testified on his own behalf.

{¶19} During the State's case-in-chief, Hinojosa and Higgins testified to the above incidents, including the statements made by A.M. and M.M. Additionally, Dr. Johnson testified that he had seen A.M. and that he recommended that Hinojosa make an appointment with Dr. Schlievert.

{¶20} Jones testified that she had met with A.M. prior to A.M.'s appointment with Dr. Schlievert and that she had obtained A.M.'s medical and social history. Additionally, she testified to the above statements made by A.M. during her meeting with A.M. Dr. Schlievert also testified that he had examined A.M. Specifically, he testified that while he did not talk with A.M. himself, he did receive the medical and social history obtained by Jones for the purposes of his examination. He went on to state that there were no physical findings of sexual abuse; however, he opined that A.M. had been sexually abused.

{¶21} Westrick, an investigator with the Hancock County Children's Services Office, testified that she and Detective Tuttle had jointly interviewed A.M. following the report of sexual abuse being made. Westrick did not testify to any specific statements made by A.M. during the interview. Westrick also testified that Muttart voluntarily signed a no-contact order for the children.

Finally, she stated that the conclusion of her investigation was that substantial sexual abuse had taken place.

{¶22} Additionally, Detective Tuttle testified that he had interviewed A.M. with Westrick and that he had informed Muttart of the allegations following his interview with A.M.

{¶23} Next, Betty Humphries, a clinical counselor at the Findlay Family Resource Center, testified that she first met with A.M. in June of 2003. Humphries went on to testify that she was the person who had made an initial assessment of A.M.; therefore, she was required to talk with A.M. to obtain information to make a diagnosis. Humphries also stated that A.M. told her that she was afraid of monsters and that she did not want to see her dad anymore; however, Humphries stated that A.M. did not make any specific allegations of abuse to her. Following her meeting with A.M., Humphries recommended that A.M. obtain play therapy to deal with the issue of sexual abuse.

{¶24} Finally, Connie Crego-Stahl, a clinical counselor at the Findlay Family Resource Center, testified that she had been working with A.M. as a play therapy counselor since late June of 2003. According to Crego-Stahl, in the early course of their therapy, A.M. had stated that she had a secret, which was an indicator of child abuse. Crego-Stahl went on to testify that it was not until November of 2003 that A.M. began to disclose what her secret was. Specifically,

Crego-Stahl testified that “[A.M.] stated Dennis made me suck his pee pee and I tried to get out of the bathroom, but he locked the door and I don’t know how.” (Tr. pp. 635-636.) Additionally, A.M. told Crego-Stahl that she was afraid to go to Dennis’ house and that Dennis told her that if she didn’t keep her secret then her mother, Hinojosa, would go to jail. Based upon A.M.’s disclosures as well as the other information obtained during her therapy sessions with A.M., Crego-Stahl opined that A.M. was suffering from post-traumatic stress disorder and that A.M.’s behaviors were consistent with a child that had been a victim of sexual abuse.

{¶25} Upon the conclusion of the State’s case-in-chief, Muttart presented the testimony of several character witnesses, including Jeff Seaver, Rodney Burns, Sheri Horn and Judy Wilson. Finally, Muttart took the stand on his own behalf. According to Muttart, he had picked the children up during the week of March 16, 2003, and that he spent the week with the children at his mother’s house in Findlay, Ohio. Additionally, he testified that each day he would take M.M. to school in the morning, pick him up at noon, take the children to his brother’s house in the afternoon, he and the children would return home between 7:30 and 8:30 at night and that he would then bathe the children and get them ready for bed. He stated that while he did spend several hours with A.M. alone each day, nothing

inappropriate took place. Finally, he stated that he believed Hinojosa had planted the story of sexual abuse in the childrens' heads.

{¶26} Upon the conclusion of all the evidence, the jury found Muttart guilty on all three counts of the indictment. In January of 2005, the trial court sentenced Muttart to three consecutive life terms upon his convictions. Additionally, the trial court classified Muttart as a sexual oriented offender. It is from this judgment Muttart appeals, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT COMMITTED AN ERROR OF LAW BY ADMITTING HEARSAY STATEMENTS IN VIOLATION OF THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE.

Assignment of Error No. II

THE TRIAL COURT COMMITTED AN ERROR OF LAW BY IMPOSING A CONSECUTIVE SENTENCE.

Assignment of Error No. III

THE TRIAL COURT COMMITTED AN ERROR OF LAW BY ORDERING RESTITUTION.

Assignment of Error No. I

{¶27} In the first assignment of error, Muttart contends that the trial court erred by allowing hearsay statements in violation of his Sixth Amendment right to confront those witnesses against him. Specifically, Muttart argues that the hearsay

testimony of Westrick, Jones, Dr. Schlievert, Higgins, Hinojosa, Tuttle, Humphries and Crego-Stahl is contrary to the holding of the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354.

{¶28} In *Crawford*, the Supreme Court addressed an issue involving the Confrontation Clause of the Sixth Amendment, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." *Crawford*, 541 U.S. at 38. The question of whether a criminal defendant's rights under the Confrontation Clause have been violated is reviewed under a de novo standard. *United States v. Robinson* (6th Cir. 2004), 389 F.3d 582, 592.

{¶29} In *Crawford*, the defendant's wife, exercising her marital privilege, did not testify at his trial. 541 U.S. at 40. Before trial, however, in a tape-recorded statement to police, defendant's wife described the stabbing with which her husband was charged. *Id.* at 39. The statement conflicted with defendant's claim that the stabbing was in self-defense. *Id.* Defendant argued that his wife's statement was not only inadmissible hearsay, but violated his Sixth Amendment right of confrontation. *Id.* at 40. The trial court determined that the statement, though hearsay, was reliable and trustworthy, and the jury was allowed to hear it. *Id.* Defendant was subsequently convicted. *Id.* at 41.

{¶30} On appeal, the United States Supreme Court scrutinized the reliability of the wife's testimonial hearsay statement under the Confrontation Clause. *Id.* at 42-50. The Court concluded that “[w]here *testimonial* statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Id.* at 69 (emphasis added). Accordingly, the Court held that where testimonial evidence is at issue the Constitution requires unavailability and a prior opportunity for cross examination. *Id.* at 68.

{¶31} While the Court determined that unavailability and prior cross-examination was required for testimonial evidence, the Court also found that “[w]here *nontestimonial* hearsay is at issue, it is wholly consistent with the Framers’ design to afford the State flexibility in their development of hearsay law - as does *Roberts*, and as would an approach that exempted such statements from Confrontation scrutiny altogether.” *Id.* (emphasis added.) Accordingly, the Court held that with nontestimonial hearsay the *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, reliability test still applies.

{¶32} Finally, while the Court in *Crawford* did not “spell out a comprehensive definition of ‘testimonial,’” it did give the following examples of what may be included as testimonial statements:

‘[E]x parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior

testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'

Id. at 51-52. (citations omitted.)

{¶33} Thus, under *Crawford*, the first issue is whether the testimony is testimonial or nontestimonial. While the Court did not specifically define testimonial, the above examples show that statements made during a police investigation or court proceedings will qualify as testimonial. *U.S. v. Cromer* (6th Cir. 2004), 389 F.3d 662, 672-73. Additionally, it seems that statements made under circumstances that would lead a reasonable person to conclude that such statements would later be available for use at trial also qualify as testimonial under *Crawford*. *Crawford*, 541 U.S. at 52; see, also, *Cromer*, 389 F.3d at 673.

{¶34} Turning to the testimony in the case sub judice, only the testimony of Westrick and Tuttle would qualify as testimonial under *Crawford*. The interview performed by Westrick and Tuttle was for the sole purpose of the police investigation. While hearsay statements made by A.M. through Westrick and Tuttle, if introduced at trial, would have violated Muttart's Sixth Amendment rights, the trial court specifically excluded the hearsay testimony of all law enforcement in its judgment entry on the motion in limine. Additionally, upon

review of the record, we cannot find that either Westrick or Tuttle gave any specific hearsay testimony. While they did state what the allegations were surrounding the case, neither Westrick nor Tuttle repeated any out of court statements made by A.M.

{¶35} Turning to the remaining witnesses, Jones, Dr. Schlievert, Higgins, Hinojosa, Humphries and Crego-Stahl, we do not find that any of these statements fall into the testimonial category. Initially, we also note that like Westrick and Tuttle, Dr. Schlievert did not testify to any specific hearsay statements made by A.M. While he did testify that Jones had given him the information from her meeting with A.M., he did not repeat any of those statements at trial. Thus, we will not address his testimony any further.

{¶36} Turning specifically to the involvement of Jones, Humphries and Crego-Stahl, we are satisfied that these statements were made solely for the medical or psychological purposes. With each of these witnesses, we are particularly swayed by the fact that their involvement with A.M. was made solely independent of the police investigation. In other words, in the case sub judice, Jones, Humphries and Crego-Stahl were all involved with A.M.'s case without the urging of the police. Specifically, Hinojosa had contacted her family doctor prior to the police investigation about M.M. and merely changed that appointment so that A.M. could be seen. Additionally, it was Dr. Johnson who recommended that

Hinojosa take A.M. to Dr. Schlievert because he was a child abuse specialist. There is no indication in the record that the police or children's services had any part in Hinojosa's taking A.M. to be examined. Furthermore, there is no indication in the record that the police or children's services advised Hinojosa to take the children to the Findlay Family Resource Center where A.M. received counseling from Humphries and Crego-Stahl. As with Jones, there is no evidence that A.M.'s counseling had anything to do with the police investigation taking place. Additionally, there is no indication that a reasonable person would expect any of the statements made to Jones, Humphries or Crego-Stahl to be used at a trial.

{¶37} As to the statements made to Higgins and Hinojosa, we are also unable to find that A.M. and M.M.'s statements to Higgins and Hinojosa were testimonial. Again, neither Higgins nor Hinojosa are law enforcement personnel, and, at the time the statements were made to them, there was no indication that a police investigation would be pursued. Rather, Higgins and Hinojosa were merely trying to determine why the children were acting in such a strange manner. It was not until after the statements were made that there was any indication that an investigation would be pursued. We are satisfied that under the circumstances, at the time the statements were made, a reasonable person would not be under the assumption that those statements would be available for use at a trial.

{¶38} Having found that hearsay statements testified to by Jones, Higgins, Hinojosa, Humphries and Crego-Stahl were not testimonial, we must next determine whether those statements were properly admitted under the standards set forth in *Ohio v. Roberts*, 448 U.S. 56. Under the *Roberts* standard the Sixth Amendment right to confrontation does not bar the admission of a witness' statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.'" *Id.* at 66. The *Roberts* test is met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Id.*

{¶39} While the question of whether a criminal defendant's rights under the Confrontation Clause have been violated is generally reviewed de novo, a trial court's decision on the admissibility of specific evidence is not subject to reversal in the absence of an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, para. two of the syllabus. An abuse of discretion has been described as a judgment that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Thus, we review the trial court's determination of whether this testimony was admissible hearsay under an abuse of discretion standard.

{¶40} Following the hearing on Muttart's motion in limine, the trial court determined that A.M.'s statements to Hinojosa and Higgins were admissible under Evid.R. 803(2), the excited utterance hearsay exception; that A.M.'s statements

made to Jones were admissible under Evid.R. 803(4), because such statements were made for the purposes of a medical diagnosis; and, that statements made to Humphries and Crego-Stahl were admissible under Evid.R. 803(4), because those statements were made for the purposes of psychological diagnosis and treatment.

{¶41} Evid.R. 803 provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

*** * ***

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition

*** * ***

(4) Statements for the purposes of medical diagnosis or treatment. Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonable pertinent to diagnosis or treatment.

{¶42} In the case sub judice, the victim, A.M., did not testify, and she was not found to be unavailable. However, as Evid.R. 803 notes, availability of the witness is immaterial. While A.M.'s availability is not at issue for the purposes of the admission of the hearsay statements, A.M.'s competency is at issue.

{¶43} In *State v. Said* (1994), 71 Ohio St.3d 473, the Ohio Supreme Court determined that before a statement can be admitted as a hearsay exception, it "must meet the same basic requirements for admissibility as live witness testimony." *Id.* at 475. Under Evid.R. 601, live witness testimony may be

admitted only if the witness is competent. Furthermore, while Evid.R. 601 provides that “[e]very person is competent to be a witness,” subpart (A) excepts “children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.” Thus, the Court in *Said* held that a child must be found competent at the time a statement is made before the statement can qualify under any hearsay exception. 71 Ohio St.3d. at 477.

{¶44} In this case, Muttart raised the issue of A.M.’s competency in his initial motion in limine. Additionally, the issue was addressed at the hearing on that motion. However, as the trial court notes in its judgment entry on Muttart’s motion in limine, “the defendant agreed to defer any hearing on the issues surrounding a competency determination as to the testimony of [A.M.], the alleged victim and [M.M.], the alleged victim’s brother.” Upon review of the entire record, we cannot find that this issue was resolved. Accordingly, in light of *Said*, we must determine whether the trial court’s failure to make a determination as to whether A.M. was competent at the time she made the statements is error.

{¶45} In considering this issue, we must first note that while *Said* held that a child must be found competent at the time a statement is made before a statement can qualify under any hearsay exception, the Court specifically excepted excited utterances from the general rule. 71 Ohio St.3d at 477; see, also, *State v.*

Wallace (1988), 37 Ohio St.3d 87; *State v. Street* (1997), 122 Ohio App.3d 79.

Thus, so long as the trial court did not abuse its discretion in admitting those statements admitted under the excited utterance exception, the trial court did not err in failing to make a competency determination for those statements brought in through Higgins and Hinojosa.

{¶46} As noted above, an excited utterance is defined as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Evid.R. 803(2). The Supreme Court of Ohio has set forth a four-part test for determining what constitutes an “excited utterance”:

The excited-utterance exception is essentially a codification of Ohio common law governing spontaneous exclamations. At common law, this court applied a four-part test in determining what constituted a spontaneous exclamation:

- (a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective,**
- (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination *continued* to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs,**
- (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and**

(d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.

Wallace, 37 Ohio St.3d at 89, citing to *Potter v. Baker* (1955), 162 Ohio St. 488, para. two of the syllabus. Additionally, this Court has previously held that “[t]his test has been liberally applied to out-of-court statements made by child declarants who are alleged victims of sexual abuse.” *State v. Shoop* (1993), 87 Ohio App.3d 467, 472, citing to *State v. Wagner* (1986), 30 Ohio App.3d 261.

{¶47} In its judgment entry on Muttart’s motion in limine, the trial court found that the statements made to Higgins and Hinojosa were admissible as excited utterances. Specifically, the trial court found that:

The evidence before the Court indicates that [A.M.] disclosed the alleged abuse to her mother and Vicky Higgins through her imaginary friend, Kelly. At the time immediately before disclosure, [A.M.] was curled up on the couch, crying, having difficulty swallowing, and tapping her teeth. Further, the crying continued through the whole time she was telling her story. When Vicky Higgins asked [A.M.] why her throat hurt, [A.M.] replied that Kelly could tell her, she went to her room, then came skipping back into the room as “Kelly,” who made the disclosure to Vicky Higgins. The three day lapse between the alleged abuse, which occurred between March 18-21, 2003, and the day of disclosure, March 24, 2003, did not result in [A.M.] making a reflective expression, but [was] the result of continued nervous excitement.

{¶48} Because the trial court specifically looked at the lapse of time between the alleged abuse and the time of A.M.’s disclosure and found that A.M. was still under the influence of the event, we cannot find that the trial court abused

its discretion. The trial court clearly considered the above factors and upon review of the record, the trial court's determination is supported by the evidence presented at the hearing on Muttart's motion in limine. Accordingly, we cannot find that the admission of A.M. and M.M.'s statements through Higgins and Hinojosa were error.

{¶49} Turning to the admission of A.M.'s statements through Jones, Dr. Schlievert, Humphries and Crego-Stahl, the trial court admitted each of these statements under the medical diagnosis exception to the hearsay rule. As noted above, the Supreme Court in *Said* held that a child must be found competent at the time a statement is made before the statement can qualify under any hearsay exception. 71 Ohio St.3d at 71. While the Supreme Court did recognize an exception to this general rule for excited utterances, no such exception was carved out for other types of hearsay allowed under Evid.R. 803. Nevertheless, several Ohio Appellate Courts addressing this issue have held that a child's statements for the purposes of medical diagnosis or treatment are admissible regardless of the competency of a child. See *State v. Rice*, 8th Dist. No. 82547, 2005-Ohio-3393, ¶17; *State v. Brewer*, 6th Dist. No. E-01-053, 2003-Ohio-3423; *State v. Ashford* (Feb. 16, 2001), 11th Dist. No. 99-0015; *State v. Wilson* (Feb. 18, 2000), 4th Dist. No. 99CA672.

{¶50} While several districts have determined that the competency requirement is no longer mandated for the use of hearsay under Evid.R. 803(4), we cannot find that Supreme Court dispensed with that requirement. Under *Said*, the only exception specified by the Supreme Court was excited utterances. Accordingly, we find that based upon *Said*, the trial court was required to determine that A.M. was competent at the time she made her statements to Jones, Humphries and Crego-Stahl, prior to those statements being admitted into evidence. Thus, we find that the trial court erred in admitting those statements without first holding a competency hearing and making specific findings that A.M. was, in fact, competent at the time she spoke with those persons.

{¶51} Having found that the trial court did err in allowing the hearsay testimony of Jones, Humphries and Crego-Stahl without first determining A.M.'s competency at the time the statements were made, we must next determine whether the admission of such testimony was nevertheless harmless. Harmless error is defined as: "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." See Crim.R. 52(A). The Ohio Supreme Court has stated that harmless error is any error that does not affect the outcome of the case and, thus, does not warrant a judgment overturned or set aside. *State v. Brown* (2003), 100 Ohio St.3d 51.

{¶52} As noted above, Jones, Humphries and Crego-Stahl each testified to statements made by A.M. Jones specifically testified that A.M. told her that “[h]e put this in my mouth,” while she was pointing between her legs; that “pee came out of it,” that “he did it more than once;” and that “Dennis put his pee pee in my pee pee.” (Tr. pp. 161, 163-64.) Finally, when Jones asked A.M. what it felt like when Dennis put his pee pee in her pee pee, Jones testified that A.M. stated that “it hurtie hurt.” (Tr. p. 164.)

{¶53} Humphries testified that A.M. told her that she was afraid of monsters and that she did not want to see her dad anymore. However, Humphries stated that A.M. did not make any specific allegations of abuse. Crego-Stahl specifically testified that “[A.M.] stated Dennis made me suck his pee pee and I tried to get out of the bathroom, but he locked the door and I don’t know how.” (Tr. pp. 635-636.) Additionally, Crego-Stahl testified that A.M. told her that she was afraid to go to Dennis’ house and that Dennis told her that if she didn’t keep her secret then her mother would go to jail.

{¶54} Upon review of the specific statements admitted at trial, we find that the statements made by Humphries and Crego-Stahl are harmless. Essentially, both Humphries and Crego-Stahl reiterated the allegations of the oral rape, which were properly before the jury with Higgins and Hinojosa’s statements. While this testimony did corroborate A.M.’s earlier statements through Higgins and

Hinojosa, we cannot find that such testimony warrants reversal on counts one and two, which involve the oral rape charges.

{¶55} In addition, we find Jones' testimony regarding A.M.'s statements of oral rape to be harmless. However, we find that Jones' testimony regarding A.M.'s statements of vaginal rape do rise to the level of reversible error. Essentially, upon review of the entire record, there is no other evidence anywhere regarding the vaginal rape charge. Accordingly, because there was no other evidence of the vaginal rape, Muttart's conviction for count three must be reversed.

{¶56} Having found that there is reversible error as to count three, Muttart's first assignment of error is sustained in part and overruled in part.

Assignment of Error No. II

{¶57} In the second assignment of error, Muttart contends that the trial court erred by imposing consecutive sentences. Specifically, he asserts that the trial court failed to make the required statutory findings necessary to impose consecutive sentences and that the trial court's findings are not supported by the record.

{¶58} The Supreme Court of Ohio recently addressed constitutional issues concerning felony sentencing in *State v. Foster*, 109 St.3d 1, 2006-Ohio-856. In *Foster*, the Supreme Court of Ohio held that portions of Ohio's felony sentencing

framework are unconstitutional and void, including R.C. 2929.14(E)(4), which require judicial findings to impose consecutive terms. 2006-Ohio-856, at ¶¶65-67. Pursuant to the ruling of the Ohio Supreme Court in *Foster*, we find that Muttart's sentence is void as being based upon unconstitutional statutes. Thus, the second assignment of error is sustained.

Assignment of Error No. III

{¶59} In the third assignment of error, Muttart contends that the trial court erred in ordering restitution, because the court failed to consider Muttart's ability to pay such restitution. It is well-established that a trial court speaks only through its journal entries. See, e.g., *State ex rel. Geauga Cty. Bd. Of Commrs. V. Mulligan*, 100 Ohio St.3d 366, at ¶20, citation omitted. Although the trial court stated its intention to impose restitution at the time of the sentencing hearing, no restitution was specified in the final judgment entry. Accordingly, no restitution was actually imposed. Thus, Muttart's third assignment of error is moot.

{¶60} Having found error prejudicial to Appellant herein, in the particulars assigned and argued, we reverse the judgment of the trial court as to Muttart's conviction for count three and affirm his convictions as to counts one and two. Additionally, we vacate the judgment of the trial court as to Muttart's sentence and

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remand for further proceedings consistent with this opinion.

*Judgment affirmed in part,
reversed in part and cause remanded.*

CUPP J., concurs.

SHAW, J., concurs in judgment only.

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Not Reported in N.E.2d

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(Cite as: Not Reported in N.E.2d)

State v. Ashford Ohio App. 11 Dist., 2001. Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Trumbull County.
STATE of Ohio, Plaintiff-Appellee,

v.

Sean P. ASHFORD, Defendant-Appellant.

No. 99-T-0015.

Feb. 16, 2001.

Criminal Appeal from the Court of Common Pleas, Case No. 98 CR 154, Judgment Affirmed.

Dennis Watkins, Trumbull County Prosecutor, Luwayne Annos, Assistant Prosecutor, Warren,
OH, for plaintiff-appellee.

Atty. Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P .A., Cleveland, OH, for
defendant-appellant.

FORD, P.J., CHRISTLEY and NADER, JJ.

OPINION

CHRISTLEY.

*1 Appellant, Sean P. Ashford, brings this appeal from a judgment of the Trumbull County
Court of Common Pleas finding him guilty of two counts of rape and one count of attempted
rape following a jury trial.

In March 1998, appellant took up temporary residence with Nancy Zahniser ("Zahniser") and
her three children including D.G. who was four years old at the time. Prior to moving in with
Zahniser's family, appellant also resided with Greta Kovach ("Kovach"), who is the mother of
then eight year old J.G. Appellant had the opportunity to baby-sit both D.G. and J.G.

The Trumbull County Grand Jury indicted appellant on one count of gross sexual imposition, in
violation of R.C. 2907.05(A)(4); one count of attempted rape with a violent sexual predator

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specification, in violation of R.C. 2923.02, 2907.02(A)(1)(b)(2) and 2941.148; and three counts of rape with a violent sexual predator specification, in violation of R.C. 2907.02(A)(1)(b)(2) and 2941.148. Appellant entered a plea of not guilty.

On May 21, 1998, the trial court held a hearing in response to appellant's motion to suppress all the statements made by him to the police. In a judgment entry issued on June 4, 1998, the court denied this motion. Appellant also filed a motion to determine his competency to stand trial. A competency hearing was held on August 26, 1998, and the court determined appellant was, in fact, competent to stand trial.

As the state was preparing to go to trial, the court conducted an *in camera* examination of D.G. and J.G. to determine whether they were competent to testify, as both children were below the age of ten. The court found J.G. was competent to testify while D.G. was found incompetent to testify.^{FN1}

FN1. At the time of the trial, J.G. was nine years old and D.G. was five years old.

During the trial, the court, at the request of the state, dismissed the charge for gross sexual imposition and one count of rape, but proceeded with the three remaining charges. On December 11, 1998, the jury returned a guilty verdict for the two counts of rape and one count of attempted rape. Appellant was sentenced to two consecutive life sentences for each count of rape to run consecutively with each other, and eight years for the attempted rape to be served concurrent with the rape counts.

Appellant now appeals this judgment, asserting four assignments of error for our review:

“[1.] The trial court erred by failing to suppress the appellant's confession.

“[2.] The trial court erred by admitting hearsay testimony of a witness who was found incompetent to testify, and thereby violated the appellant's Sixth and Fourteenth Amendment rights to confront the witnesses against him as guaranteed by the United States Constitution, as well as Article I Section 10 of the Constitution of the State of Ohio and the rules of evidence.

“[3.] The trial court erred by allowing the state to impeach its own witness over the objections of the appellant.

“[4.] The appellant's convictions for rape and attempted rape are against the manifest weight of the evidence.”

*2 Under the first assignment of error, appellant seems to be challenging the trial court's decision to deny his motion to suppress the written and videotaped confessions. The crux of the

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argument is that his confession was given in response to unconditional promises of "help" made by the interrogating officer. According to appellant, during the interview and questioning, there were never any conditions placed on the promises of help made to him other than his confessing to the charges.

In a hearing on a motion to suppress, the trial court assumes the role of the trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. Thus, the credibility of witnesses during a motion to suppress hearing is a matter for the trial court, and a reviewing court should not disturb the trial court's findings on the issue of credibility. *Fanning* at 20. Accordingly, in our review, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the appropriate legal standard. *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

It is well known that a suspect's waiver of his rights and his subsequent confession must be made voluntarily, knowingly and intelligently. *Miranda v. Arizona* (1966), 384 U.S. 436. "A suspect's decision to waive his Fifth Amendment privilege is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct. * * * Thus, coercive police activity is a necessary predicate to finding that a confession is not voluntary within the Fifth Amendment, on which *Miranda* was based." (Citations omitted.) *State v. Dailey* (1990), 53 Ohio St.3d 88, 91-92.

To determine voluntariness, the court should consider the *totality of the circumstances*, including the age, mentality, prior criminal experience of the defendant, the length, intensity, and frequency of the interrogation, and the existence of physical deprivation or mistreatment, or the existence of any threat or inducement. *State v. Brewer* (1990), 48 Ohio St.3d 50.

"[A] confession 'must not be extracted by any sort of threats or violence, *nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.*' " (Emphasis *sic.*) *State v. Arrington* (1984), 14 Ohio App.3d 111, 114, quoting *United States v. Tingle* (C.A.9, 1981), 658 F.2d 1332, 1335-1336. If " '*the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible.* The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear.' " (Emphasis in the original.) *Arrington* at 115, quoting *People v. Flores* (1983), 144 Cal.App.3d 459, 469.

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*3 Admonitions to tell the truth made by police officers are considered neither threats nor promises, and are permissible. *State v. Loza* (1994), 71 Ohio St.3d 61, 67; *State v. Cooney* (1989), 46 Ohio St.3d 20, 28. Promises that a defendant's cooperation will be considered or that a confession will be helpful do not invalidate an otherwise legal confession. *Loza* at 67. Further, the Supreme Court of Ohio has determined that a confession was voluntary even though the police offered "help" to the defendant if he confessed. *State v. Chase* (1978), 55 Ohio St.2d 237. See, also, *State v. Wilson* (1996), 117 Ohio App.3d 290, 294.

In the case at bar, before the interrogation began, appellant waived his *Miranda* rights three separate times and signed three separate waiver of rights forms. A review of the videotaped interviews, which included the waivers of *Miranda* rights and two confessions, exhibit no signs of police coercion, threats, mistreatment or physical deprivation. Upon completion of each interrogation, when the officer asked appellant if he felt threatened or if any promises were made to him, he replied "no."

While appellant alludes to the fact that he has a learning disability and an I.Q. of eighty-one, a low mental aptitude of the interrogee is not enough to show evidence of overreaching. *State v. Hill* (1992), 64 Ohio St.3d 313, 318. Furthermore, a review of the videotapes show that appellant did not appear to have difficulty reading or understanding the waiver of rights form as he indicated numerous times he understood he had a right to an attorney, a right not to talk to the police officer, and by signing the form, he was waiving these rights.

More importantly, the interrogating officer never stepped over the line in that he never made an improper promise of help to appellant in exchange for a confession. During the interrogation, the officer mentioned that they would try to get appellant help. The officer, however, explained to appellant that if he was found guilty, he would *still* go to prison, and that while in prison, there were different programs that could provide help to him. Thus, the clear implication was that treatment was the "help" which would be available to appellant in prison.

It is our determination that the prohibited "help" which was enumerated in *Chase Arrington*, and *Wilson*, referred to a police promise of an exchange of treatment in lieu of imprisonment. Here, the offer of "help" was clearly not in reference to an elimination or reduction of a prison sentence; rather, the reference was to the availability of treatment programs during incarceration.

Under these facts, we determine that the interrogation tactics used by the police officer, even in light of appellant's mental capacity, did not render appellant's statements involuntary. Any reference made by the police officer to help in the form of treatment available in prison was not improper. Considering the totality of the circumstances, we conclude that there was never any promise of impermissible help which would render the confession involuntary. Thus,

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appellant's written and videotaped confessions were properly admitted by the trial court, and the first assignment of error lacks merit.

*4 Under the second assignment of error, appellant alleges that he was denied constitutional protections when the trial court permitted the admission of hearsay testimony which related to the utterances made by D.G. who was found incompetent to testify.

A trial court has broad discretion to rule on evidentiary matters and will not be reversed on appeal unless the trial court so abused its discretion to the prejudice of the defendant. *State v. Theuring* (1988), 46 Ohio App.3d 152, 155.

Appellant first challenges the testimony of Sharon Gurney ("Gurney"), a friend of D.G.'s family, on the basis that it did not satisfy Evid.R. 807(A)(1) or 803(2).^{FN2} Although appellant has not directed our attention to the precise statement made by Gurney that he takes issue with, he seems to be challenging the following testimony:

FN2. Although appellant objected to Gurney's testimony only after a number of other witnesses had testified, this was sufficient enough to preserve the issue for appellate review. Thus, we will consider this challenge under a simple error analysis.

"Q. [by the prosecuting attorney] Was there a time when [D.G.] told you that part of her hurt?

"A. [by Gurney] Yeah. The first time [March 20, 1998] I was taking a bath and she came in and said Sean hurt her butt, but I just thought he smacked her butt or something, and then I was washing my hair or something and she just went out.

"Q. Okay.

"A. And then the second time, either that night [March 20, 1998] or the night after [March 21, 1998], she came in and said Sean hurt her butt and I was like, 'What do you mean he hurt it,' because it was the second time she told me. She was like, 'He stuck something up it.' I was like, 'What do you mean he stuck something up it?' She was like, 'His thing,' and I was like, 'What? What thing?' And she pointed down to her genital area and I was like, I was like, 'No, he didn't, [D.G.], you know, trying to deny it. I didn't want to think that really happened to her. And then she started crying, 'Yes, he did. Yes, he did,' and then I called Nancy in."

Evid.R. 807 recognizes a hearsay exception for the statements of children under the age of twelve relating to sexual abuse or physical violence and establishes four requirements for admission: (1) the statement must be trustworthy; (2) the child's testimony must be unavailable; (3) independent proof of the act must exist; and (4) the proponent must notify all other parties

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ten days before trial that such a statement will be offered in evidence. The Supreme Court of Ohio has determined "a trial court must find that a declarant under the age of ten was competent at the time she made the statement in order to admit that statement under Evid.R. 807." *State v. Said* (1994), 71 Ohio St.3d 473, 477. Thus, a finding of incompetence mandates the exclusion of the out-of-court statements offered under Evid.R. 807. *Akron v. Deem* (1999), 135 Ohio App.3d 523, 526; *State v. Street* (1997), 122 Ohio App.3d 79, 85;

A case on point is *Street*, wherein the Ninth Appellate District determined that the hearsay testimony with respect to statements made by a four year old victim was properly excluded notwithstanding Evid.R. 807 because the trial court had previously determined that the child was incompetent to testify. Although it was not specified whether the finding of incompetency pertained to the child's condition at the time of the hearing or when the statements were originally made, the court noted that it was "unreasonable to presume that [the child] might have been *more* competent at an earlier age, such as when the statements in question were made." (Emphasis in the original.) *Street* at 85.

*5 Similarly, in this case, the trial court did not specify whether the finding of incompetency referred to D.G.'s mental state at the time of the *in camera* examination or when the statements were actually made. Thus, absent an exception, Gurney's testimony would be inadmissible as a determination of incompetency would require the exclusion of the hearsay statement offered under Evid.R. 807(A). However, in *Said*, the Supreme Court of Ohio excepted excited utterances from this general rule of exclusion. *Said* at 477, fn. 1. See, also, *State v. Boston* (1989), 46 Ohio St.3d 108, 114, fn. 1.

Evid.R. 803(2) defines an "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." In determining whether a statement qualifies as an excited utterance, the court should consider "(1) the lapse of time between the event and the statement, (2) the mental and physical condition of the declarant, (3) the nature of the statement, and (4) the influence of intervening circumstances." *State v. Humphries* (1992), 79 Ohio App.3d 589, 598. Merely being upset does not meet the standard for admissibility under excited utterance. *State v. Taylor* (1993), 66 Ohio St.3d 295, 303.

Neither is time the controlling factor in determining whether a statement fits within the excited utterance exception. *Humphries* at 598. "The controlling factor is whether the declaration was made under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection." *Id.* at 598.

We acknowledge that other Ohio courts have determined that children are likely to remain in a

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state of nervous excitement longer than would adults, and they are less capable of engaging in the reflective thought that the excited utterance exceptions seeks to avoid. *Street* at 86; *Humphries* at 598; *State v. Wagner* (1986), 30 Ohio App.3d 261, 263-264; *State v. Weigand* (Nov. 17, 1995), Lake App. No. 94-L-166, unreported, at 2, 1995 WL 803620.

The Eight Appellate District had this to say with respect to excited utterances:

“Related to the notion of a wide discretion in appellate review is a clear judicial trend to liberalize the requirements for an excited utterance when applied to young children victimized by sexual assaults. [Citations omitted.] The significance and trustworthiness of an excited utterance lies in the fact the words are uttered while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. [Citation omitted.] *The limited reflective powers of a three-year-old, coupled with his inability to understand the enormity of ramifications of the attack upon him, sustain the trustworthiness of his communications. As a three-year-old, truly in the age of innocence, he lacked the motive or reflective capacities to prevaricate the circumstances of the attack.*” (Emphasis added.) *Wagner* at 263-264.

*6 However, we would respectfully observe that young children can also be significantly more subject to suggestion than adults, and, as a result, can be much more likely to say what they think they are expected to say in order to avoid punishment.

This court takes the unpopular position that hearsay allegations of child molestation must be regarded very cautiously. The reason is simple. They are almost impossible to defend against. The common scenario is one in which there is no witness beyond the accused and the victim. The victim is incompetent and not subject to direct or cross-examination. There is no definitive physical evidence of the sexual act or conduct itself; and, there is a substantial lapse of time between the act and its discovery. Hence, the trial court must be extraordinarily cautious in determining “whether the declarant remain[ed] under the stress of nervous excitement at the time the disclosure is made.” *Street* at 86. Put another way, was there any opportunity or motive by the surrounding adults or circumstances to contaminate or influence the child's recollection?

In the instant matter, the admissibility of then four year old D.G.'s statements to Gurney was dependent on the court finding that the child was still under the stress of the startling occurrence. Being mindful of this, we will consider when and how the statements were allegedly made to Gurney.

The offenses against D.G. took place on March 19, 1998. The first disclosure by the child to Gurney occurred on March 20, 1998, when the child walked into the bathroom where Gurney was and spontaneously announced appellant hurt her butt. Gurney indicated she failed to

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recognize the sexual implication of the child's statement. The second disclosure took place either that same night or on March 21, 1998. At that time, the child told Gurney that appellant hurt her butt and stuck something up it. Moreover, during the second disclosure, the child was crying and visibly upset.

There was no suggestion that the child had been coached or subject to other influence in any way. Further, there was no suggestion that Gurney had any motive or reason to lie about the incident. Considering the nature of the assault and the age of the declarant, it was reasonable to find that, even several days later, the four year old child was still in a state of spontaneous excitement at the time of her statements to Gurney. Hence, D.G.'s statements were admissible as an excited utterance under Evid.R. 803(2). See *State v. Chappell* (1994), 97 Ohio App.3d 515, 521-528 (holding that nine year old alleged rape victim's statement thirty-two hours after the rape was properly admitted as an excited utterance); *State v. Fox* (1990), 66 Ohio App.3d 481, 488-490 (holding that seven year old child's statements one day after alleged rape were properly admitted as an excited utterance); *Weigand* at 2-3 (holding that six year old victim's statements made less than twenty-four and forty-eight hours after a sexual assault were properly admitted as an excited utterance).

*7 Accordingly, the trial court did not abuse its discretion in determining under the facts and circumstances in the instant action, that the statements made by the four year old victim to Gurney twenty-four and possibly forty-eight hours after the sexual assaults, were excited utterances.

Next, we consider appellant's contention that Nan Pretot ("Pretot") and Dr. Gary Joseph's ("Dr. Joseph") statements did not fall within any hearsay exception and were inadmissible because the declarant, D.G., was deemed to be incompetent to testify at trial.

The record reflects that appellant failed to object at trial to the admissibility of this testimony. Thus, any error was waived, save plain error. Crim.R. 52(B). Plain error does not exist unless it can be said that, but for the error, the outcome of the trial would clearly have been otherwise. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. "Notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long* at paragraph three of the syllabus.

Medical records admitted into evidence at trial indicated that D.G. was brought to St. Joseph's Medical Center just after midnight on March 22, 1998. Pretot, a nurse, and Dr. Joseph, D.G.'s emergency room attending physician, both took a medical history of the child.^{FN3} While Pretot was present, Dr. Joseph performed a physical exam on the child and prepared a written

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diagnosis.

FN3. It was Pretot's duty as a triage nurse to take a history of an incoming emergency room patient in connection with the emergency room physician's examination.

Appellant takes issue with the following excerpt from the testimony of Pretot:

"Q. [by the prosecutor] As part of the [medical] history that you take do you ask her [victim] what had happened to her?

"A. Yes, I do.

"Q. What did she indicate to you?

"A. Specifically?

"Q. Yes.

"A. When I asked her she said that 'he' and gave me a first name Sean, put lotion down there.

"Q. What do you mean when you say down there?

"A. In the private area, she pointed down to the private area. And then he put his thing down there."

Appellant also maintains that the trial court improperly allowed Dr. Joseph to testify as to statements made to him by the child:

"Q. [by prosecutor] Okay. Did [D.G.] indicate to you how this trauma had occurred?

"A. Yes, she did.

"Q. What did she tell you?

"A. She stated that Sean, that's the name she used, she didn't give me a last name, had placed his-well, what she said was, 'He put his thingy in my butt.' She stated that he had rubbed her with some lotion in her vaginal and anal area, in her private areas, that's what she stated, and then placed his penis in her butt." FN4

FN4. In their testimony, both Pretot and Dr. Joseph state that D.J. identified the perpetrator as being "Sean." However, a review of the transcript reveals that the state failed to lay a proper foundation with respect to this testimony in that the state failed to ask whether hospital protocol required the attending nurse or physician to ask the child "who did this?" Nevertheless, this testimony would have been admissible if a proper foundation would have been laid, and thus does not rise to the level of plain error. Even if we considered this under a simple error analysis, admission of this testimony would, at worst, amount to harmless error.

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Evid.R. 803(4), the medical exception to the hearsay rule, reads as follows:

“Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”

FNS

FN5. Evid.R. 803(4) does not require that the declaration be made to a physician. A statement may fit within the medical treatment exception to the hearsay rule even if it is directed to other physical and mental health professionals including nurses, psychologists, and therapists. *Chappell* at 530; *In re Dustin* (Sept. 30, 1999), Lake App. No. 98-L-034, unreported, at 5, 1999 WL 956880; *State v. Jett* (Mar. 31, 1998), Portage App. No. 97-P-0023, unreported, at 13, 1998 WL 258166. We also note that a nurse is not qualified to make a medical diagnosis. *Berdyck v. Shinde* (1993), 66 Ohio St.3d 573, paragraph one of the syllabus; *Marr v. Mercy Hosp.* (May 22, 1998), Lucas App. No. L-97-1160, unreported, at 3, 1998 WL 336923.

*8 “The cornerstone of admissibility under Evid.R. 803(4) is whether the statements are reasonably pertinent to diagnosis or treatment.” *State v. Miller* (1988), 43 Ohio App.3d 44, paragraph two of the syllabus. A child’s statements relating to medical diagnosis or treatment are not automatically untrustworthy simply because the child was not personally motivated to seek care, but rather was directed to treatment by an adult. *State v. Dever* (1992), 64 Ohio St.3d 401, 409-410. See, also, *Jett* at 12-13.

Further, several Ohio courts have held that hearsay statements of a child made for the purposes of medical diagnosis or treatment are admissible under Evid.R. 803(4) regardless of the competency of the child. *State v. Ullis* (1993), 91 Ohio App.3d 656, 665; *Miller* at paragraph one of the syllabus; *State v. Wilson* (Feb. 18, 2000), Adams App. No. 99CA672, unreported, at 7, 2000 WL 228242; *State v. McWhite* (Dec. 29, 1995), Lucas App. No. L-95-007, unreported, at 4, 1995 WL 763898.

In the case at bar, both the nurse and doctor’s testimony regarding the majority of the child’s out-of-court statements meet the criteria for trustworthiness. The record is devoid of any evidence which would indicate that the child had any ulterior motivation at the time she spoke with Pretot and Dr. Joseph.

This court has held that a statement as to the identity of the perpetrator of a criminal act, which is not reasonably related or necessary to medical diagnosis, is not admissible under Evid.R.

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803(4). *State v. Henderson* (Aug. 20, 1999), Trumbull App. Nos. 98-T-0039, 98-T-0040, and 98-T-0041, unreported, at 2-3, 1999 WL 689736; *State v. Zembower*, (Mar. 27, 1998), Lake App. No. 96-L-184, unreported, at 4, 1998 WL 156858; *State v. Conway* (June 20, 1997), Lake App. No. 95-L-040, unreported, at 6, 1997 WL 361694.

Similarly, the Supreme Court of Ohio had this to say about the admissibility of the abuser's identity under Evid.R. 803(4):

"[S]tatements made by a child during a medical examination identifying the perpetrator of sexual abuse, *if made for purpose of diagnosis and treatment*, are admissible pursuant to Evid.R. 803(4), when such statements are made for the purposes enumerated in that rule. This means that a child's statement identifying his or her abuser should be treated the same as any other statement which is made for the purposes set forth in Evid.R. 803(4)." (Emphasis added.) *Dever* at 414.

The identity of the abuser in this case could have been considered necessary for psychological diagnosis and treatment as the treatment may involve the removal of the child from the situation. *Miller* at 47. See, also, *Wilson*, 2000 WL 228242, at 8.^{FN6} "[S]tatements by a *child abuse victim* that the abuser is a member of the *victim's household* are reasonably pertinent to diagnosis and treatment." (Emphasis added.) *Wilson*, 2000 WL 228242, at 8. This rationale would have been applicable to the case at bar as appellant was a member of the child's household. In fact, the patient discharge report, admitted without objection into evidence as State's Exhibit 2, recommended as a follow-up plan that the child be removed from the dangerous, harmful environment. Nevertheless, a foundation needs to be laid to qualify the admission of this very prejudicial information into the record.

FN6. State's Exhibit 2, which consisted of medical and child abuse reports, was admitted into evidence without objection even though it included the name of appellant as the suspected abuser. Again, we recognize that the state failed to lay a proper foundation with respect to this exhibit in that the state did not ask whether it was hospital procedure for the attending nurse or physician to determine "who did this?" Nevertheless, this exhibit would have been admissible if a proper foundation would have been laid, and thus does not rise to the level of plain error.

*9 Because the child's statements could have been made for purposes of medical diagnosis or treatment, the trial court did not commit plain error in finding the testimony of Pretot and Dr. Joseph admissible pursuant to Evid.R. 803(4). Appellant's second assignment of error is not well-taken.

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In appellant's third assignment of error, he maintains the trial court committed reversible error by permitting the state to impeach its own witness, J.G., through the use of a prior inconsistent statement over the objections of appellant's counsel.

At trial on direct examination, the nine year old J.G., testified concerning the charge of rape and attempted rape wherein she told the jury how appellant tried to touch, what she referred to as, her butt with his fingers. On direct, the child was unable to remember everything that happened to her, and as a result, the state sought to refresh her memory with the statement she provided to the Trumbull County Children's Services. After being permitted to review her written statement, the child testified that appellant tried to sniff, touch, and put his tongue in her genital.
FN7

FN7. J.G. referred to her genital as her "front area" or "private area."

During cross-examination, however, the child recanted her statement by stating that appellant never touched her genital. On redirect examination, the state attempted to rehabilitate, *not impeach*, the child witness. When the prosecutor asked the child about her claim that appellant put his tongue in her genital, the child recanted this statement as well.

Under these circumstances, we determine that the state was not, in fact, attempting to impeach its own witness. Rather, the state was seeking to clarify the child's testimony. Ultimately, this failure to provide evidence as to an element of the charge of rape resulted in its subsequent dismissal. Accordingly, appellant's third assignment of error is without merit.

In his final assignment of error, appellant asserts that his convictions on rape and attempted rape are against the manifest weight of the evidence. He argues that the only evidence indicating he perpetrated the alleged crimes was a confession made under the auspices of counseling, hearsay testimony, or testimony by a victim who later recanted her own testimony.

When reviewing a claim that the judgment was against the manifest weight of the evidence, we must review the entire record, weigh both the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that a new trial must be ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387; *State v. Duong* (Dec. 11, 1998), Trumbull App. No. 98-T-0026, unreported, at 4, 1998 Ohio App.LEXIS 5999; *State v. Schlee* (Dec. 23, 1994), Lake App. No. 93-L-082, unreported, at 16, 1994 Ohio App.LEXIS 5862.

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“[T]he discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Martin* at 175. The role of the appellate court is to engage in a limited weighing of the evidence introduced at trial in order to determine whether the state appropriately carried its burden of persuasion. *Thompkins* at 390 (Cook, J. concurring). The reviewing court must defer to the factual findings of the trier of fact as to the weight to be given the evidence and the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph two of the syllabus.

*10 The evidence supporting appellant's conviction on the two counts of rape is significant. Both Dr. Joseph and Pretot, the child's emergency-room attending physician and nurse, provided unbiased testimony that D.G. told them appellant caused her injuries. This account was repeated in the testimony of Gurney, a family friend. Further, physical evidence was described by Dr. Joseph concerning the child's swollen and chaffed vaginal and perianal areas. Pretot also provided supporting testimony that the rectal area was reddened, swollen and excoriated. Dr. Joseph also determined that the child's injuries occurred recently, were caused by blunt trauma to her anus and rectum, and could have been caused by an erect adult penis. The forensic scientist from the Bureau of Criminal Identification and Investigation testified that small amounts of semen were found on the child's underwear. However, there was an insufficient amount of sperm to conduct a DNA test. Moreover, appellant admitted in a written and videotaped corroborating statement to raping the child twice in one day.

Our review of the record leads us to conclude that the jury reached the correct result and clearly did not lose its way in finding appellant guilty. Accordingly, appellant's convictions concerning the two charges of rape of D.G. are not against the manifest weight of the evidence.

With respect to the attempted rape charge of J.G., appellant confessed that while on the couch with J.G. on his lap, he rubbed his penis between her butt cheeks. He admitted trying to slide his penis into the child's butt, but was interrupted when her brother entered the room. At trial, J.G. failed to corroborate that account and could not remember everything that happened. However, the child did testify that when she was in the bathroom, appellant attempted to pull her pants down and put his fingers up her butt. The child also described an incident occurring either in the bathroom, living room, or bedroom wherein appellant pulled his pants down and laid her on her bed. No other evidence was presented to support the attempted rape charge.^{FN8}

FN8. Attempted rape is defined as conduct that, if successful, would result in the commission of rape. R.C. 2923.02(A).

Questions regarding the credibility of witnesses are matters left to the trier of fact. *DeHass* at

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paragraph two of the syllabus. Although J.G. did not testify to exactly the same events as appellant confessed to, she confirmed that appellant had babysat her and identified him as the perpetrator of an incident of attempted sexual conduct. Even though there is confusion as to when and where the attempted rape occurred, J.G.'s testimony corroborated that some type of sexual conduct was attempted by appellant against her. Further, J.G. only recanted her statement with respect to the rape charge and not the attempted rape charge.

Under these circumstances, we cannot conclude that the jury lost its way or created such a manifest miscarriage of justice that appellant's conviction must be reversed and a new trial ordered. Appellant's conviction of attempted rape against J.G. is not against the manifest weight of the evidence, and the final assignment of error has no merit.

*11 Based on the foregoing analysis, appellant's assignments of error are not well-taken, and the judgment of trial court is hereby affirmed.

FORD, P.J. and NADER, J., concur.

Ohio App. 11 Dist., 2001.

State v. Ashford

Not Reported in N.E.2d, 2001 WL 137595 (Ohio App. 11 Dist.)

END OF DOCUMENT

Not Reported in N.E.2d, 1995 WL 763898 (Ohio App. 6 Dist.)
(Cite as: Not Reported in N.E.2d)

State v. McWhite Ohio App. 6 Dist., 1995. Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Lucas County.

STATE of Ohio Appellee

v.

James McWHITE Appellant

No. L-95-007.

Dec. 29, 1995.

Anthony G. Pizza, prosecuting attorney, and Dean P. Mandross, for appellee.
Julia K. Casey, for appellant.

DECISION AND JUDGMENT ENTRY

*1 This case is an appeal from a judgment of the Lucas County Court of Common Pleas. Appellant, James C. McWhite, Sr., is appealing his conviction and sentence for a single count of complicity to commit murder in violation of R.C. 2903.02. For the reasons discussed below, we affirm the decision of the trial court.

The facts of this case, as established at trial, are as follows. In August 1988, McWhite and Stephanie Smith were living with their three-year old son, James McWhite, Jr., ("Jake")^{FN1} and Smith's six-year old daughter, Nateasha, in an apartment located at 105 East Woodruff Street, Toledo, Ohio.

FN1. Jake's name was subsequently changed to James Smith.

Marilyn Harrington, a deputy clerk with the Domestic Relations Division of the Lucas County Court of Common Pleas in 1988, testified that Stephanie Smith came to her office on August 3, 1988, and swore out a domestic violence complaint against McWhite. On that same date, the trial court issued a temporary restraining order evicting McWhite from the apartment at 105

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East Woodruff and awarding custody of Jake to Smith.

Rita M. Holloway, Stephanie Smith's friend, testified she was concerned about not being able to contact Smith and went over to Smith's apartment at approximately noon on August 7, 1988. Holloway and another neighbor entered through an open window after receiving no response at the door. Upon entering one of the bedrooms, Holloway observed Jake lying on the bed with a tank top wrapped around his neck. Holloway also observed the bodies of Smith and her daughter Nateasha lying on the bedroom floor. Holloway picked up Jake and went to telephone the police. Jake was taken to a local hospital where he was treated for burns and abrasions around his neck.

Meanwhile, Toledo police officers were dispatched to the East Woodruff address concerning the report of a possible murder. Upon entering the apartment, the officers discovered the bodies of Smith and Nateasha in the bedroom of the apartment. The officers also observed large blood stains on the bedroom floor. Upon further investigation, the officers observed more blood stains in the bathroom and a vacuum cleaner standing in water in the bathtub.

A subsequent autopsy report indicated that both Smith and her daughter had been strangled to death. In addition, Stephanie Smith had been stabbed several times.

Stephanie Smith's mother, Delores Smith, testified that McWhite called her on the day the bodies were discovered. Delores Smith testified that McWhite told her he did not kill either Smith or Nateasha. Delores Smith also testified that McWhite told her that Jake could tell her who committed the murders. McWhite also told Delores Smith that the person who committed the murders had scratches on him.

Toledo Police Detective Johnson testified that in interviewing McWhite's friend, Wesley Ulis, the day after the bodies were discovered he observed fresh scratches and abrasions on Ulis's chest and knees.

The trial court determined that Jake, who was nine-years old at the time of the trial in the present case, was competent to testify. At trial, Jake testified that his father hurt his mother, that his mother got hurt with a knife and that his father had stabbed his mother.

*2 Terrence Scully, Ph.D., the psychologist who began treatment of Jake shortly after the bodies were discovered, testified that Jake made the following statements to him during the course of treatment. On the night of the murders, McWhite let Wesley Ulis into Stephanie Smith's apartment. McWhite confronted Smith as she was in the bathroom and instructed Ulis to get a knife from the kitchen. McWhite then told Jake and Nateasha to get out of the

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bathroom. The children went to their bedroom and later returned to the bathroom. Upon the children's return to the bathroom, Ulis put a sweeper in the bathtub which was filled with water and told Jake and Nateasha to get into the bathtub. McWhite and Ulis then locked Smith, Nateasha and Jake in a bedroom. Jake observed Ulis stab and kill his mother and stated that his sister was already dead. Jake indicated that his father, McWhite, had killed his sister Nateasha. After the stabbings, Ulis tied a shirt around Jake's neck and attempted to strangle him.

On August 17, 1988, McWhite was indicted on two counts of aggravated murder and one count of felonious assault. On September 14, 1989, a jury found McWhite guilty of two counts of complicity to commit the murders of Stephanie Smith and her daughter Nateasha and one count of felonious assault against Jake. This court reversed McWhite's convictions and remanded the case for a new trial in *State v. McWhite* (June 14, 1991), Lucas App.No. L-89-303, unreported ("McWhite I"). This court reversed the convictions in McWhite I because Jake's treating psychologist, Dr. Scully, improperly testified as to the truthfulness of the statements Jake made to him.

McWhite was retried and a jury found him guilty of one count of complicity to commit the murder of Stephanie Smith and not guilty of the second count of murder and the single count of felonious assault. This court reversed the conviction in *State v. McWhite* (Nov. 5, 1993), Lucas App.No. L-92-320, unreported ("McWhite II"). In McWhite II, this court reversed because Jake did not testify at trial, and the prosecution failed to determine that Jake was an unavailable witness prior to having Dr. Scully testify as to the statements Jake made to him.

McWhite was retried a third time in the case presently before this court. At the conclusion of the trial, in the case *sub judice*, the jury found McWhite guilty of complicity to commit the murder of Stephanie Smith. The trial court sentenced McWhite to a term of imprisonment of fifteen years to life.

It is from such judgment that McWhite raises the following three assignments of error:

"I. THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED CONTINUANCE FOR COUNSEL TO SUBPOENA A WITNESS TO TRIAL.

"THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT-APPELLANT'S OBJECTIONS TO THE TESTIMONY OF DR. TERENCE SCULLY AS THE TESTIMONY WOULD BE HEARSAY BASED ON THE WORDS OF AN INCOMPETENT DECLARANT AND NOT ADMISSIBLE PURSUANT TO ANY EXCEPTION TO THE HEARSAY RULE AND WOULD VIOLATE THE RULES OF EVIDENCE, THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND

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ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION.”

*3 As his first assignment of error, McWhite argues that the verdict was against the manifest weight of the evidence.

In the seminal case of *State v. Eley* (1978), 56 Ohio St.2d 169, the syllabus, the Ohio Supreme Court stated as follows:

“A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt.”

R.C. 2903.02(A) defines the elements of the crime of murder as “[n]o person shall purposely cause the death of another.” Further, R.C. 2923.03 defines complicity as follows:“(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

“ * * *

“(2) Aid or abet another in committing the offense * * *.”

In the present case, McWhite argues that Jake's testimony to Dr. Scully was different from the testimony he gave at trial. McWhite notes that Jake always indicated to Dr. Scully that it was Ulis who murdered his mother. It was not until trial that Jake identified McWhite as the murderer of his mother.

We do not find that this one inconsistency between Jake's statements to Dr. Scully versus his testimony at trial is fatal to the present case. Any inconsistency in Jake's testimony, as to whether it was McWhite or Ulis who delivered the final fatal blow which killed Smith, does not taint the rest of Jake's testimony concerning McWhite's participation in crime. Jake testified at trial that McWhite hurt his mom with a knife by stabbing her in the bedroom next to her bed. Toledo police reports concerning the amount of blood in the bedroom where Smith's body was found is consistent with such testimony. Further, Jake testified that while Ulis hurt Nateasha and choked him, Jake observed McWhite stab his mother. Therefore, we find that Jake's testimony as to McWhite's actions are substantial evidence upon which a jury could reasonably conclude that McWhite aided or abetted Ulis in committing the murder of Stephanie Smith. Accordingly, the first assignment of error is found not well-taken.

As his second assignment of error, McWhite argues the trial court erred in denying his request for a continuance. On the morning of trial, McWhite requested a continuance because he was

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uncertain when Gerald Briskin (a psychologist testifying on McWhite's behalf) would be available to testify. Further, McWhite requested a continuance to allow Dr. Briskin time to review the approximately twenty-five to fifty pages of Dr. Scully's notes prior to testifying.

This court need not decide whether the trial court abused its discretion in denying the continuance because we find any alleged error was rendered harmless. Crim.R. 52(A), the harmless error rule, provides that error by the trial court "which does not affect substantial rights shall be disregarded." Assuming *arguendo* that the trial court erred in refusing the continuance, it is beyond a reasonable doubt that such error did not affect the substantial rights of McWhite. Dr. Briskin did testify at trial. Further, Dr. Briskin was given Dr. Scully's notes to review one week prior to the date of his testimony at trial. McWhite does not argue, and this court does not find, that he suffered any prejudice as a result of the trial court's denial of his request for a continuance. Therefore, error by the trial court in refusing the continuance, if any, was harmless and will be disregarded. Accordingly, the second assignment of error is found not well-taken.

*4 As his third assignment of error, McWhite argues that Dr. Scully's testimony, of the statements Jake made to him, was inadmissible because Jake was incompetent *at the time he made the statements to Dr. Scully*. McWhite does not challenge the trial court's finding that Jake, himself, was competent to testify during the present trial.

Dr. Scully's testimony concerning Jake's statements was admitted as a hearsay exception under Evid.R. 803(4). Evid.R. 803(4) provides as follows:

"Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

In *State v. Ullis* (1993), 91 Ohio App.3d 656, the case involving the prosecution of Wesley Ullis for the murder of Stephanie Smith, we addressed the identical issue of the admissibility of Dr. Scully's testimony under Evid.R. 803(4). In *Ullis* at 665, we held that hearsay statements of a child, made for the purposes of medical diagnosis or treatment, are admissible under Evid.R. 803(4) regardless of the competency of the child. This court stated as follows concerning Evid.R. 803(4) and the competency of a child declarant: "[B]ecause the evidence [of Jake's statements to Dr. Scully] is admissible pursuant to Evid.R. 803(4), competency of a child witness is irrelevant. Ohio courts have previously ruled that Evid.R. 803(4) has no prerequisite of determining whether the declarant is competent to testify. *State v. Miller* (1988), 43 Ohio App.3d 44, 46, 539 N.E.2d 693, 695; *State v. Valdez* (Nov. 29, 1991), Ottawa App. No. 90-OT-014, unreported. Accordingly, the statements of the child could be admitted pursuant to Evid.R. 803(4) in this case, regardless of any ruling on the child's competency."

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Thus, in *Ulis*, we determined that Dr. Scully's testimony concerning the statements Jake made to him was admissible regardless of Jake's competency. Similarly in the present case, we find the trial court did not abuse its discretion in admitting Dr. Scully's testimony without determining the competency of Jake at the time Jake made the statements to Dr. Scully.

We further reject McWhite's argument that *State v. Said* (1994), 71 Ohio St.3d 473 is controlling in the present case. The *Said* court held that a child's competency must be shown before admitting hearsay statements under Evid.R. 807. Evid.R. 807, which provides for a child abuse hearsay exception, was never the basis for the admission of Dr. Scully's testimony. In fact, Evid.R. 807 could not be used to admit into evidence Jake's statements to Dr. Scully concerning the acts of physical violence directed against his mother and sister. Evid.R. 807 only applies to a child's statements "describing any sexual act performed by, with, or on the child or describing any act of physical violence *directed against the child* * * *." (Emphasis added.) In the present case, the crucial portion of Jake's testimony concerned the violence *done to his mother*. Therefore, the *Said* court's holding concerning Evid.R. 807 is not relevant to the present case where Jake's statements to Dr. Scully were admitted under Evid.R. 803(4). Accordingly, the third assignment of error is found not well-taken.

*5 On consideration whereof, the court finds that the defendant was not prejudiced or prevented from having a fair trial, and the judgment of the Lucas County Court of Common Pleas is affirmed. This case is remanded to said court for execution of sentence. Costs are assessed against appellant as provided for under App.R. 24.

GLASSER, RESNICK and GREY, ^{FN*} JJ., concur.

FN*. Judge Lawrence GREY, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

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Not Reported in N.E.2d, 1993 WL 243071 (Ohio App. 8 Dist.)
(Cite as: **Not Reported in N.E.2d**)

State v. Shepherd Ohio App. 8 Dist., 1993. Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.

STATE of Ohio, Plaintiff-appellee,

v.

Howard SHEPHERD, Defendant-appellant.

No. 62894.

July 1, 1993.

Criminal appeal from Court of Common Pleas, No. CR-262290, Affirmed.

Stephanie Tubbs Jones, Cuyahoga County Prosecutor by Thomas E. Conway, Asst. County
Prosecutor, Cleveland, for plaintiff-appellee.
Paul Mancino, Jr., Cleveland, for defendant-appellant.

JOURNAL ENTRY AND OPINION

DYKE, Chief Judge.

*1 Defendant-Appellant, Howard Shepherd, appeals his conviction for one count of child endangering; two counts of felonious sexual penetration and for one count of rape of his four year old daughter, Heather Shepherd. In eleven assignments of error the Appellant claims that he was denied his constitutional right to confrontation and his right to a fair trial. Upon review, we find Appellant's assignments of error to be without merit. For the reasons set forth below, the judgment of the trial court is affirmed.

Heather Shepherd was declared incompetent to testify at the Appellant's jury trial, however, the following seven witnesses testified on behalf of the State:

1. *Ms. Marilyn Arko:*

Ms. Arko, a therapist in training with the Child Guidance Center, was the first professional to

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work with Heather after she was referred to the Center by the County Welfare Department.^{FN1} Ms. Arko testified that she had nine, fifty minute, face to face contacts with Heather during the course of her treatment at the Center from January, 1991 to May of 1991.

FN1. Heather's mother contacted the Welfare Department through its child abuse hotline. The Welfare Department referred Heather to the Child Guidance Center as a sexual abuse case.

Ms. Arko explained that the approach a clinical therapist takes in working with abused children is somewhat passive. No attempt is made to prompt or "pry" anything from a child. Rather, the approach is to work indirectly with the child, utilizing dolls, puzzles, stories, etc. to enable the child to relate what happened in his or her own words. Ms. Arko stated that Heather, "voluntarily" and "out of the blue" told her that she could show her where her father had hurt her in her "peepee and poopoo." Utilizing an anatomically correct doll, Heather pointed to the specific areas where her father had hurt her. This disclosure was made on January 4, 1991. Ms. Arko stated that on March 11, 1991 Heather mentioned briefly that her "father hurt her butt and is crazy" but that it wasn't until May 17, 1991, when Ms. Arko and Heather were playing with two dolls, that Heather told her that her father had hurt her privates with a "nail." Ms. Arko indicated that Heather was excited and or saddened when she made these disclosures. She further testified that Heather had nightmares and an unusual knowledge of sexual matters.

2. Dawn Simonelli:

Ms. Simonelli, a graduate student at the Mandel School of Applied Social Sciences at Case Western Reserve University, was also a clinical therapist in training at the Child Guidance Center. Ms. Simonelli took over counseling sessions with Heather after Ms. Arko completed her training at the Center. She testified that she worked with Heather on three occasions and that Heather told her that her daddy put screws up her "peepee and butt."

3. Dr. Amy Richardson:

Dr. Richardson, a pediatrician, at Rainbow Babies and Childrens Hospital and an expert in the field of juvenile sexual abuse, testified that she was called to perform a pelvic examination on Heather after Heather resisted an examination by a male pediatrician.

Dr. Richardson's examination of Heather revealed the following abnormalities:

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- *2 A. Moderate neo-vascularization of the vaginal wall.
- B. Two large notches extending completely through the hymenal tissue.
- C. An irregular and ratty appearance of the hymenal rim.
- D. An unusual attenuation of the hymen.
- E. Hymenal irregularity such that the original contour of the hymen could not be determined.
- F. A history of vaginal discharge.

Dr. Richardson testified that the above cited conditions were highly abnormal for a four year old child; that the conditions were consistent with vaginal trauma and sexual abuse and that Heather's inappropriate knowledge of sexual matters, excessive masturbation and hyperactivity were also consistent with sexual abuse.

4. *Ms. Barbara Mumine:*

Ms. Mumine, a social worker with the Department of Human Services testified that the purpose of her visit with Heather was to determine whether she was a victim of sexual abuse. Ms. Mumine testified that Heather utilized an anatomically correct doll and told her that her daddy put a screw in her "peepee."

5. *Veronica Nara:*

Veronica Nara, Heather's grandmother, testified that Heather stayed with her frequently. She further testified that in October, 1990, Heather began to demonstrate some extremely bizarre behavior. Mrs. Nara explained that as she put Heather to bed one evening, Heather climbed on top of her; held her tightly and began kissing her passionately on the lips, saying "Oh, baby; oh baby." Ms. Nara explained that she had to practically "pry" Heather's arms away to be released from the child's embrace. She further explained that Heather became very agitated and frightened by the dark and began telling her that her daddy "did" something to her; that he hurt her; that he put something up her "dupey and shooty"; that these areas were "all red" and that "we" (she and the Appellant) had to put Vaseline on the area to "fix it". Ms. Nara indicated that Heather had become terrified of the dark and that after these disclosures, it took a fair amount of time to calm Heather down and get her to sleep. Ms. Nara also testified that on another occasion, she found Heather in the bathroom, pulling at her genital area, claiming that she had "milk" in there and that she was looking for the "milk".

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6. *Lisa Nara:*

Lisa Nara, Heather's mother, testified that Heather was born on December 1, 1986; that the Appellant was Heather's father; that she lived with the Appellant on and off for two years after Heather's birth; that in 1988 they separated but that from May of 1990 until September of 1990, she permitted the Appellant to see Heather again. She further testified that the Appellant was living with Celia DiCapo on West 63rd Street in Cleveland during the summer of 1990; that the Appellant had possession of Heather on weekends at the DiCapo house from late July, 1990 thru September, 1990; that the Appellant also took Heather to West Virginia, returning to Cleveland on October 6, 1990 and that she no longer permitted the Appellant to see Heather after this date because Heather began telling her things that the Appellant had "done to her."

*3 Lisa Nara also testified to the following:

She (Heather) told me that daddy kissed her in her mouth with her mouth open and in her privates with her peepee.

She said that he told her that he was just making it wet.

She told me that he had screws that he used on her peepee and butt.

(Tr. 160)

Q. Regarding what occurred, you testified that she also indicated that he had done what with his tongue in her privates?

A. Kissed her on her mouth and in her vagina.

(Tr. 161)Q. Was, to your knowledge, Heather ever threatened by Howard Shepherd regarding what would happen to her if she told anybody what he had been doing to her?

A. Yes.

A. She told me that if she told me what her daddy had done, that me, her and her daddy would never be together, and that daddy would take her away from me and she would never see me again.

7. *Derlene Fragomeni:*

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Ms. Fragomeni, a detective with the Cleveland Police Sex Crimes Unit, testified that Heather, utilizing an anatomically correct doll, stated that her father had touched her vagina and rectum; that he put a screw in her butt; that he used a screw from his workbox and that the screw was black. Detective Fragomeni further testified that Heather told her that these things happened to her at "Gina's house" and in West Virginia; that Heather was hyperactive; became upset and began "turning around in circles" while making these disclosures.

Defense counsel cross-examined all of the State's witnesses attempting to undermine the testimony of Ms. Arko and Ms. Simonelli because of their status as "student interns" and because one of the goals of Ms. Arko's therapy was to put Heather at ease with her anticipated court appearance. Defense counsel also attacked Dr. Richardson's testimony suggesting other causes for Heather's hymenal injuries.

The Appellant called two witnesses to the stand before taking the stand himself.

1. *Barbara Martin:*

Ms. Martin testified that she babysat for Heather and that Heather called more than one person "daddy".

2. *Kenneth Cummings:*

Mr. Cummings, Ms. Martin's live-in boyfriend testified that there was a bar on one of the windows of the Nara house to keep Heather's uncle away from her.

3. *Howard Shepherd*

The Appellant admitted that he was convicted of voluntary manslaughter and of carrying a concealed weapon on May 28, 1981.^{FN2} He testified that he was Heather's father; that he saw Heather on and off on weekends during the summer of 1990; that he had a sexual relationship with Celia DiCapo and that he was evicted from the DiCapo house because of his motorcycle. On cross-examination he admitted that he owned a tool box; that Heather was with him "at times" at the DiCapo house prior to September, 1990; that he saw Heather quite a few times during the summer of 1990; that Heather and eight year old, Gina DiCapo were good friends; that he spent "very little time" alone with Heather and denied raping or molesting Heather.

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FN2. The record indicates that while the Appellant was convicted of both crimes on the same date, the crimes themselves were committed on two separate dates.

*4 The jury found the Appellant guilty as charged and the court sentenced him to three consecutive terms of life imprisonment for one count of rape and two counts of felonious sexual penetration. The court also sentenced him to a term of three (3) to five (5) years for child endangering.

I

THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONTATION AND CROSS-EXAMINATION WHEN THE COURT ALLOWED VARIOUS WITNESSES TO TESTIFY AS TO STATEMENTS OF HEATHER SHEPHERD.

Appellant advances a six-part argument in support of his first assignment of error.

First, Appellant argues that statements Heather made to Ms. Simonelli and Ms. Arko were inadmissible because both were student interns at the time they counseled Heather.

Evid.R. 803(4) Statements made for Purposes of Medical Diagnosis or Treatment, provides in relevant part that:

Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms; pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The record demonstrates that the County Welfare Department referred Heather to the Child Guidance Center as a "sexual abuse case." While Ms. Arko and Ms. Simonelli were in training at the time of their interactions with Heather, they were nevertheless clinical therapists, charged with the medically related task of treating Heather for the psychological and emotional trauma associated with sexual abuse. Under Evid.R. 803(4), the statements Heather made during these counseling sessions were clearly admissible. In addition, these witnesses did not render any opinion as to whether the rape occurred or whether Heather would have been a credible witness. Also, the prosecutor did not attempt to qualify them as experts and the court did not declare them to be experts. See, *State v. Smith* (1990), Cuyahoga App. No. 57687, unreported. Thus, Appellant's first argument fails.

Next, the Appellant asserts that statements Heather made to Ms. Mumine were inadmissible

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because the State failed to establish her credentials as a social worker. Ms. Mumine stated on direct examination that she was a social worker, licensed to practice in Ohio and that she regularly treated children who were victims of sexual abuse. (Transcript, Pgs. 117, 120) This court has consistently held that a young rape victim's statements to social workers, clinical therapists and other medical personnel are admissible under Evid.R. 803(4). See, *State v. Duke* (Aug. 25, 1988), Cuyahoga App. No. 52604, unreported citing *State v. Cottrell* (Feb. 19, 1987), Cuyahoga App. No. 51576, unreported and *State v. Negolfka* (Nov. 19, 1987), Cuyahoga App. No. 52905. Thus, Appellant's second argument fails.

In his third argument, Appellant claims that the statements Heather made to Dr. Richardson were inadmissible because she examined the victim after the indictment had been returned.

*5 The record demonstrates that the Appellant failed to object to any aspect of Dr. Richardson's testimony, thus he has waived his right to appellate review of this claim. See, *State v. Williams* (1977), 51 Ohio St.2d 112. In addition, the record demonstrates that Heather had never undergone a pelvic examination.^{FN3} Thus, the examination operated to complete her medical history, confirm her diagnosis, rule out infection and other disease and provide a basis for future treatment. Thus, even if the Appellant had made a timely objection, Dr. Richardson's testimony would have been admissible as it was conducted for the purpose of diagnosis and treatment pursuant to Evid.R. 803(4). Thus, Appellant's third argument fails.

FN3. Heather resisted attempts by male pediatricians to conduct a pelvic examination on two occasions.

In his fourth argument, Appellant claims that the statements Heather made to Lisa and Veronica Nara were inadmissible because the statements failed to fit within an exception to the Ohio Rules of Evidence. Appellant's fourth argument also fails as Heather's statements were admissible under the "excited utterance" exception. See, Evid.R. 803(2).

Evid.R. 803(2) Excited Utterance, provides in relevant part that:

A statement relating to a startling event or condition made while still under the stress of excitement caused by the event or condition.

The Ohio Supreme Court has set forth the rationale behind allowing the admission of excited utterances as follows:

The circumstances surrounding an excited utterance—a startling event, a statement relating to that event, a declarant under the stress of the event—do not allow the declarant a meaningful

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opportunity to reflect on statements regarding the event. Without opportunity to reflect, the chance that a statement is fabricated, or distorted due to a poor memory, is greatly reduced. This is the rationale for allowing an excited utterance into evidence.

State v. Wallace (1988), 37 Ohio St.3d 87, 88.

This court has followed the "clear judicial trend, recognized in Ohio, to liberalize the requirements for an excited utterance when applied to young children victimized by sexual assaults." *State v. Wagner* (1986), 30 Ohio App.3d 261, at paragraph one of the syllabus.

The primary focus of the reviewing court in determining whether a child's statements, verbal or nonverbal, constitute admissible hearsay under this exception, is upon whether or not "the declarant is still under the stress of nervous excitement from the event." *State v. Boston* (1989), 48 Ohio St.3d 108, 118. See, *State v. Duncan* (1978), 53 Ohio St.2d 215.

In the instant case there is evidence that sexual contact with Heather occurred between May, 1990 and September, 1990 and that disclosure of same, occurred on approximately October 6, 1990 and October 30, 1990. As emphasized previously, timeliness of the declaration following the event is not strictly applied in child sex abuse cases. "Because of the limited reflective abilities of an infant declarant, other indicia of reliability may be considered as the child's age, the type of assault and the circumstances of the declaration." See, *State v. Negolfka, supra*, at 7.

*6 Heather was approximately three and one half years old at the time she was abused. She was not just a victim of sexual contact. She was a victim of sexual torture as evidenced by medical findings which confirmed two hymenal perforations. In addition, Heather declared these instances of abuse in an anxious and bizarre manner to the two individuals in her life who represented safety, nurturance and trust, her mother and grandmother. In light of these factors and the lack of motive of the child to falsely accuse her father,^{FN4} we find that Heather made these statements while she was "still under the stress of nervous excitement from the event." See, *Boston* and *Duncan, supra*. Thus, Heather's statements were sufficiently spontaneous to qualify as admissible hearsay under Evid.R. 803(2). Appellant also objects to Detective Fragomeni's testimony because it fails to fall within a firmly rooted hearsay exception. Detective Fragomeni's testimony, however, carried "particularized guarantees of trustworthiness" ^{FN5} in that Heather's declarations were identical to the declarations made to her mother, grandmother, therapists and doctor. These declarations were made in an anxious, hyperactive state and there is no evidence that Heather had a motive to fabricate. Thus, Detective Fragomeni's testimony did not offend the Appellant's constitutional right of confrontation. Moreover, in light of the overwhelming evidence of Appellant's guilt, her testimony was merely

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cumulative and not prejudicial. In his fifth argument, the Appellant, citing *State v. Boston* (1989), 46 Ohio St.3d 108, claims that the statements Heather made to her therapists and to Dr. Richardson, were inadmissible because the record fails to demonstrate that the statements were motivated by Heather's desire to obtain medical treatment or diagnosis. The Ohio Supreme Court recognizing that the "practical result of reading *Boston's* rigid motivation requirement into Evid.R. 803(4) is that a young child's statements to a doctor in the course of a medical examination will virtually never be admissible * * *" modified such restrictions.

FN4. There is no evidence that Heather was hostile towards her father or that she perceived that her parents were hostile towards each other.

FN5. In *Idaho v. Wright* (1990), 110 S.Ct. 3139, the Supreme Court dealt with the issue of preservation of confrontation rights in the context of an unavailable child declarant and a residual hearsay exception. The Court set forth certain factors delineating what constituted "particular guarantees of trustworthiness." These include (1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) the use of terminology unexpected of a child of similar age and (4) lack of a motive to fabricate.

In *State v. Dever* (1992), 64 Ohio St.3d 401, the Court stated:

Boston gives the impression that if the slightest possibility exists that the child's statements were not motivated by her own desire to obtain medical diagnosis or treatment, the statements may not come in as an Evid.R. 803(4) exception. We believe that it is not necessary to apply that approach to every instance in which a child of tender years makes a statement in the course of diagnosis and treatment. While we recognize that a young child would probably not personally seek treatment, but would generally be directed to treatment by an adult, we do not find that the child's statements relating to medical diagnosis or treatment are always untrustworthy for that reason alone. Once the child is at the doctor's office, the probability of understanding the significance of the visit is heightened and the motivation for diagnosis and treatment will normally be present. That is to say, the initial desire to seek treatment may be absent, but the motivation certainly can arise once the child has been taken to the doctor. Absent extraordinary circumstances, the child has no more motivation to lie than an adult would in similar circumstances.

*7 Under *Dever, supra.*, the statements Heather made to those who treated her were admissible pursuant to Evid.R. 803(4). Thus, Appellant's fifth argument fails.

In his sixth argument, Appellant claims that under the holding of *Idaho v. Wright* (1990), 110

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S.Ct. 3139, his confrontation rights have been denied and that he is entitled to a new trial. Appellant's sixth argument also fails.

Idaho is factually dissimilar to the instant case. *Idaho* deals with hearsay admitted, not under a firmly-rooted hearsay exception, but under the state's "residual" hearsay exception. Thus, while the rule of law contained in *Idaho*, -the *Roberts* test-See, *Ohio v. Roberts* (1980), 448 U.S. 56, is controlling on the case at bar, the holding of *Idaho*, is not.

The rule of law set forth in *Roberts*, and re-iterated in *Idaho*, provides that:

(a) When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability."

Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. *Cf. Mancusi v. Stubbs*, 408 U.S. 204. Pp. 62-66.

Ohio v. Roberts, supra., paragraph (a) of the syllabus.

In *Idaho*, the prosecution had the burden of showing that the hearsay was surrounded by "particularized guarantees of trustworthiness." In the instant case, as demonstrated *supra*, all of the hearsay admitted at trial fell within the confines of firmly rooted hearsay exceptions. Thus, Appellant's sixth and last argument fails.

The Appellant was not denied his right to confrontation and cross-examination when the court allowed these witnesses to testify as to statements made by Heather Shepherd. Appellant's first assignment of error is therefore, overruled.

II

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS WHEN HOSPITAL RECORDS WERE ADMITTED.

Appellant claims reversible error arguing that the Fairview General Hospital record admitted (State's Exhibit 6) contained multiple claims of sexual abuse. The document states that "father apparently fondled her in 9/90" and further states that Heather became "scared" and "did not respond well" when the subject of "Daddy" was brought up.

Statements made by a child during a medical examination identifying the perpetrator of sexual

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abuse, if made for purpose of diagnosis and treatment are admissible pursuant to Evid.R. 803(4) when such statements are made for the purposes enumerated in that rule.

State v. Dever, supra., paragraph two of the syllabus.

In *Dever*, the Supreme Court of Ohio found the distinction made between statements of fault generally (which are not admissible pursuant to Evid.R. 804(4)) and specific statements of identity by children in sexual abuse cases to be relevant and persuasive. See, *United States v. Renville* (C.A.1985), 779 F.2d 430. The *Dever* court adopted the holding of the *Renville* court which identified several reasons why the statement of identity is pertinent to treatment or diagnosis: "The statement assists the doctor in treating any actual injuries the child may have, in preventing future abuse of the child and in assessing the emotional and psychological impact of the abuse on the child." *Dever* at 413.

*8 The record demonstrates that Lisa Nara took Heather to Fairview General Hospital after the very first disclosures of abuse. Clearly, the purpose of the appointment was to seek proper medical treatment. This court has consistently ruled that a child sex abuse victims' statements, in which the child explained what occurred or identified the perpetrator, fall within the parameters of Evid.R. 803(4). See, *State v. Duke, supra.* and *State v. Wilson* (April 23, 1987), Cuyahoga App. No. 52031, unreported.

Thus, the Appellant was not denied his constitutional rights by the admission of this hospital record. Appellant's second assignment of error is therefore, overruled.

III

THE DEFENDANT WAS DENIED HIS DUE PROCESS OF LAW AND A FAIR TRIAL WHEN THE PROSECUTOR ATTEMPTED TO BRING BEFORE THE JURY EVIDENCE CONCERNING THE DISMISSED INDICTMENTS INVOLVING GINA DICAPO.

IV

THE DEFENDANT WAS DENIED HIS RIGHT AGAINST SELF-INCRIMINATION WHEN HE WAS IMPROPERLY QUESTIONED CONCERNING GINA DICAPO.

Appellant's third and fourth assignments or errors are baseless. The record fails to demonstrate that the State brought in evidence concerning dismissed indictments involving Gina DiCapo

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FN6 nor was the Appellant improperly questioned on the subject of Gina DiCapo.

FN6. Appellant was initially indicted for twelve counts pertaining to intimidation of witnesses, rapes and gross sexual imposition alleged to have been committed upon eight year old, Gina DiCapo. These indictments were dismissed when Gina and her mother left the jurisdiction. Upon their return, the Appellant was reindicted and pursuant to plea negotiations, pled guilty to one count of rape of Gina DiCapo with an aggravated felony specification for his prior manslaughter conviction.

Lisa Nara testified that the Appellant had possession of Heather on weekends and that the Appellant took Heather to see Gina and Celia at the DiCapo house in Cleveland on a number of occasions. Thus, the issue of Gina DiCapo was put into play before the Appellant took the stand. Moreover, the Appellant himself admitted to being with Heather at the DiCapo house and that Gina and Heather were "good friends." Consequently, it was not improper for the State to question the Appellant about his relationship with Celia or Gina DiCapo or their whereabouts. In addition, a review of the record demonstrates that the court maintained strict control over this area of questioning. While the Prosecutor questioned the Appellant as to the whereabouts of Gina and Celia DiCapo, he never raised the topic of dismissed indictments. Appellant's third and fourth assignments of error are therefore, overruled.

V

DEFENDANT WAS DENIED A FAIR TRIAL WHEN HE WAS CROSS-EXAMINED BY THE PROSECUTOR IN A DERISIVE AND HUMILIATING MANNER CONCERNING DETAILS OF PRIOR CONVICTIONS.

The conduct of a prosecuting attorney during trial cannot be made a ground for error unless that conduct deprives the defendant of a fair trial. It must be clear beyond a reasonable doubt that absent the conduct of the prosecution, the jury would still have found the defendant guilty.

State v. Verona (47 Ohio App.3d 145, paragraph five of the syllabus.)

The record demonstrates that on direct and cross-examination, the Appellant, knowing that he had committed the offenses of voluntary manslaughter and carrying a concealed weapon on two separate dates. *viz.*, October 1, 1980 and January 9, 1981 attempted to give the impression that both crimes were committed during a single incident.

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Appellant's Direct Examination:

*9 Q. All right.

Have you been convicted of any state or federal offenses?

A. Yes, sir.

Q. All right. What was that offense?

A. Manslaughter and carrying a concealed weapon.

Q. And when-was that one case or is that two separate incidents?

A. *That was the same case.*

(Tr. at pages 253, 254)

Appellant's Cross Examination:

Q. They didn't stem from the same incident, did they, Mr. Shepherd?

A. Yes.

Q. Well, the manslaughter regarded a-when you killed Edward Jacobs, shot him to death on October 9, 1980?

MR. SHAUGHNESSY: I object to that.

THE COURT: Sustained.

Q. So these didn't stem from the same incident, did they, they were two separate incidents, were they not?

A. I served time on them.

THE COURT: Do you remember if they were from the same incident or separate incidents?

A. I can't remember which. You know, there was like-I was under some pretty large strain at the time.

Q. Strain from what?

MR. SHAUGHNESSY: Let him answer.

THE COURT: Was it from the same incident or separate, or what?

Where a defendant on direct examination opens the door to impeachment, he or she may be examined in those areas on cross-examination. *State v. Washington*. (Dec. 24, 1987), Cuyahoga

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App. No. 53270 unreported.

In light of the overwhelming evidence of the Appellant's guilt, it is clear beyond a reasonable doubt that the outcome of his trial would have been the same absent intense questioning on the topic of the Appellant's credibility and his prior convictions.

Thus, the State's cross-examination did not deprive the Appellant to a fair trial. Appellant's fifth assignment of error is therefore, overruled.

VI

THE DEFENDANT WAS DENIED A FAIR TRIAL BY REASON OF AN IMPROPER ARGUMENT BY THE PROSECUTING ATTORNEY WHICH REFERRED TO IMPROPER EVIDENCE.

Appellant claims that the Prosecutor's closing argument which referred to the testimony given by the State's seven witnesses is grounds for reversible error.

As was determined in addressing the Appellant's first assignment of error, the testimony of the State's witnesses was found to be admissible. Hence, reference to this testimony in closing arguments, would also be admissible. Appellant's sixth assignment of error is therefore, overruled.

VII

THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN HEATHER SHEPHERD WAS DISQUALIFIED AS A WITNESS THUS, ALLOWING ALL SORTS OF HEARSAY EVIDENCE TO BE OFFERED AND INTRODUCED AT THE TRIAL OF THIS CASE.

The determination of the competency of an infant witness is within the sole discretion of the trial court and will not be disturbed absent a showing of abuse of discretion.

State v. Pershing (1988), 62 Ohio App.3d 405 The test for determining competency which the trial court must apply is twofold. The court in its hearing, must determine: first that the witness has the intellectual capacity to recount the events accurately, and; second, that the witness understands the necessity of telling the truth.

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*10 Evid.R. 601(A).

The *voir dire* examination of Heather failed to meet either part of the test as evidenced by the following exchange:

BY MR. CONWAY:

Q. Did anything happen to you?

A. Yes.

Q. What happened to you? Do you want to tell me? You did promise you would tell me.

A. I forgot.

Q. You promised you would tell me, didn't you?

A. I forgot it.

BY MR. CONWAY:

Q. Did something bad happen to you?

A. (The witness nodded affirmatively.)

THE COURT: She is nodding her head for the record.

Q. Did you tell her what happened?

A. Yes.

Q. What happened? What happened? Did you tell Dawn what happened?

A. I forgot.

BY MR. CONWAY:

Q. What did he do to Gina?

A. Same thing.

Q. What did he do to Gina?

A. Same thing like me.

Q. What did he do to you?

A. Same thing.

Q. That he did to Gina?

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A. (The witness nodded affirmatively.)

BY MR. CONWAY:Q. Did you see a doctor?

A. (The Witness nodded affirmatively.)

Q. A lady doctor?

A. (The witness nodded affirmatively.)

Q. Did she look at you?

A. (The witness nodded affirmatively.)

Q. Did she look at part of your body?

A. (The witness nodded affirmatively.)

Q. Did anybody mess with that part of your body?

A. (The witness nodded affirmatively.)

Q. Do you know what he put in it?

A. I am not telling you.

(Tr. 49, 50, 52, 55, 56)

Heather was able to state that daddy had done something "bad" to her but, she could not bring herself to make particular disclosures. In light of the physical and emotional trauma Heather had experienced; her age and her anxiety in the courtroom, it was not an abuse of discretion for the court to declare Heather incompetent. The Appellant vigorously cross-examined all of the State's witnesses. Thus, the Appellant was not denied due process of law when the court disqualified Heather Shepherd as a witness. Appellant's seventh assignment of error is therefore, overruled.

VIII

THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED A MOTION FOR JUDGMENT OF ACQUITTAL AS THERE IS NO EVIDENCE THAT ANY OF THESE ALLEGED ACTS OCCURRED IN OHIO.

Appellant's assignment of error is baseless. Lisa Nara testified that the Appellant had repeated possession of Heather from May, 1990 until September, 1990 and that the Appellant frequently took Heather to Celia DiCapo's home located on West 63rd Street in Cleveland. (Tr. p. 155, 157)

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Detective Fragomeni testified on cross-examination that Heather stated that these incidents occurred in Cleveland and in West Virginia. (Tr. 189) Appellant's eighth assignment of error is therefore, overruled.

IX

THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant argues that counsel was ineffective because counsel failed to present at trial, the fact that Heather, when asked whether the Appellant had done anything bad, nodded negatively, once, during her *voir dire* hearing.

*11 Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *State v. Lytle* (1976), 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* (1984), 466 U.S. 668, followed.)

To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial court have been different.

State v. Bradley (1988), 42 Ohio St.3d 136, paragraphs one and two of the syllabus.

Heather was declared incompetent to testify during her *voir dire* hearing. Thus, any gestures or statements made during that hearing were inadmissible, even if one, relatively unreliable gesture tended to exonerate the Appellant. The Appellant cannot claim as ineffective the failure of counsel to introduce this gesture as part of his defense, when counsel is procedurally prohibited from doing so. Under the standard set forth in *Strickland*, Appellant has failed to prove a deficient standard of representation no less prejudice from same. Appellant's ninth assignment of error is therefore, overruled.

X

THE COURT DENIED THE DEFENDANT DUE PROCESS OF LAW IN FAILING TO ENTER A JUDGMENT OF ACQUITTAL AS TO THE ELEMENT OF "FORCE."

XI

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DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT AMENDED THE STATUTORY DEFINITION OF FORCE.

In his tenth and eleventh assignments of error, Appellant claims that the court erred by including in its jury instruction the definition that force "can be subtle and psychological such as when a child is told to do something by an important figure of authority and commanded not to tell anybody about it." (Tr. at 384)

In the absence of plain error, under Crim.R. 52(B), an appellate court will not review alleged errors in the giving or failure to give jury instructions to a jury, unless the party objects thereto, before the jury retires to consider its verdict, pursuant to Crim.R. 30.

State v. Lockett (1976), 49 Ohio St.2d 48, paragraph five of the syllabus.

The record demonstrates that the Appellant failed to object to the court's instruction with respect to the element of force either before, during or after the jury retired to consider its verdict. Moreover, under *State v. Eskridge* (1988), 38 Ohio St.3d 56, it was not error for the court to give the above cited jury instruction. Appellant's tenth and eleventh assignments of error are therefore, overruled.

Accordingly, the judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

*12 A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JOHN F. CORRIGAN and NUGENT, JJ., concur.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

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State v. Wilson Ohio App. 4 Dist., 2000. Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Adams County.
STATE of Ohio, Plaintiff-Appellee,

v.

Charles A. WILSON, II, Defendant-Appellant.

No. 99CA672.

Feb. 18, 2000.

Timothy J. Kelly, Mt. Orab, for Appellant.

John H. Lawler, Adams County Prosecuting Attorney, West Union, for Appellee.

DECISION AND JUDGMENT ENTRY

HARSHA, J.

*1 Charles A. Wilson, II, appeals his convictions for one count of felonious sexual penetration, a violation of R.C. 2907.12(A)(1)(b), and one count of rape, a violation of R.C. 2907.02(A)(1)(b). He assigns the following errors for our review:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DETERMINING THAT THE ALLEGED VICTIM, A MINOR CHILD UNDER TEN YEARS OF AGE, WAS COMPETENT TO TESTIFY AS A WITNESS AGAINST DEFENDANT-APPELLANT.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBITS 3 AND 5 INTO EVIDENCE OVER THE OBJECTIONS OF DEFENDANT-APPELLANT.

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THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S MOTION FOR A DIRECTED VERDICT.

FOURTH ASSIGNMENT OF ERROR

IT WAS ERROR FOR THE TRIAL COURT TO CONVICT AND/OR SENTENCE DEFENDANT-APPELLANT TO TWO SEPARATE CONSECUTIVE SENTENCES.

Finding no reversible error, we affirm the judgment of the Adams County Court of Common Pleas.

I.

In May 1997, an Adams County grand jury returned an indictment that ultimately charged appellant with one count of felonious sexual penetration and one count of rape, occurring between June 1995 and October 1996. These charges arose after Alexandria Hanson, appellant's former stepdaughter, accused appellant of molesting her. Specifically, Alexandria claimed that appellant inserted his finger into and licked her vagina when she was four or five years old.

At trial, Alexandria testified that appellant digitally penetrated and inserted his tongue into her vagina on more than one occasion. Alexandria stated that she was on the couch in the living room, wearing her nightgown, when appellant removed her underwear and molested her. Alexandria's two brothers were asleep on the living room floor at the time.

Delores Wilson, Alexandria's mother, testified that she first learned of the molestation when Alexandria's behavior changed and she took Alexandria to a psychotherapist, Elaine Harffman. Mrs. Wilson also testified that Alexandria had been sexually expressive since she was one-and-a-half-years-old. In particular, Alexandria wrote on herself with markers "down there," placed Barbie dolls in sexual positions and was caught with a nine-year-old friend with their pants down.

Ms. Harffman testified that Alexandria revealed during a counseling session that she had been sexually abused. Dr. Ann Saluke, a physician at the Social and Medical Clinic ("SAM Clinic") of Children's Hospital in Cincinnati, Ohio, testified that following a physical examination she concluded that Alexandria was likely the victim of sexual abuse.

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Defense witnesses testified to incidents of sexual activity involving Alexandria that they had observed. These included an incident where Alexandria inserted crayons into her vagina in her mother's presence and an instance when Alexandria was squatting over a stack toy and appeared as though she would sit directly on top of it. Defense witnesses also testified that Mrs. Wilson previously stated that a sixteen-year-old boy molested Alexandria. When called in the defense case, Mrs. Wilson denied ever seeing Alexandria insert crayons into her vagina or stating that a sixteen-year-old boy had inappropriately touched her daughter.

*2 Appellant testified that he had not sexually abused his stepdaughter.

Following several hours of deliberation, the jury returned a verdict of guilty as to both charges. After appellant was sentenced and classified a sexual predator, he filed this appeal.

II.

In his first assignment of error, appellant asserts that the trial court erred in determining that Alexandria Hanson, a minor under ten years of age, was competent to testify. Appellant filed a pre-trial motion for a hearing to determine Alexandria's competency. The trial judge conducted an *in camera* competency interview and this matter proceeded to trial. Appellee argues that appellant made no objection to the trial court's competency finding and, therefore, failed to preserve the issue for appeal. Appellant contends that his motion to conduct a hearing regarding Alexandria's competency was essentially a motion to suppress the testimony of the minor child and any error in the trial court's ruling is preserved for our review.

Whether appellant's first assignment of error has been preserved hinges on whether appellant's motion was a motion *in limine* or a motion to suppress. Outside of the OMVI context, a motion to suppress is usually defined as a "[d]evice used to eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation[,] etc.), of U.S. Constitution." *State v. French* (1995), 72 Ohio St.3d 446, 449, citing Black's Law Dictionary (6 Ed.1990) 1014. An important characteristic of a motion to suppress is that finality attaches so that the ruling of the court at the suppression hearing prevails at trial and is, therefore, appealable without further action to preserve the issue. *Id.*, citing R.C. 2945.67(A); Crim.R. 12(J); see, also, *State v. Davidson* (1985), 17 Ohio St.3d 132.

A motion *in limine* is defined as "[a] pretrial motion requesting [the] court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to [the] moving

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party that curative instructions cannot prevent [a] predispositional effect on [the] jury." *French, supra*, citing Black's Law Dictionary, *supra*, at 1013. The purpose of a motion *in limine* "is to avoid injection into [the] trial of matters which are irrelevant, inadmissible and prejudicial[,] and granting of [the] motion is not a ruling on evidence and, where properly drawn, granting of [the] motion cannot be error." *Id.* at 449-450, citing Black's Law Dictionary at 1013-1014. A ruling on a motion *in limine* reflects the trial court's anticipated treatment of the issue at trial and, therefore, is a tentative, interlocutory, precautionary ruling. *Id.* at 450. Accordingly, "the trial court is at liberty to change its ruling on the disputed evidence in its actual context at trial. Finality does not attach when the motion is granted." *Id.*, citing *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 4 (citation omitted).

*3 Here, appellant's motion was styled as a motion to conduct a competency hearing and not a motion to suppress. However, this factor alone does not preclude us from interpreting the motion as a request for suppression. Rather, we examine the substance of appellant's request. In the motion, appellant asked the trial court to conduct a hearing and determine Alexandria's competency to testify at trial pursuant to Evidence Rule 601(A) and R.C. 2317.01. In a literal sense, the trial judge granted appellant's motion by conducting the hearing.

Appellant did not object to the trial court allowing Alexandria to testify at any point following the interview.^{FN1} It is well-settled that an appellate court need not consider an error to which the complaining party, at a time when such error could have been corrected or avoided, did not direct the trial court's attention. *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph one of the syllabus, vacated on other grounds (1978), 438 U.S. 911; *Crim. R. 52(A)*. Here, the trial court granted appellant's request to determine Alexandria's competency; any objection to the court's permitting her to testify should have been raised at trial.

FN1. We note that there is no finding of competency in the record. However, given that a pre-trial motion pertaining to the manner in which Alexandria would testify at trial was filed after the competency hearing and that Alexandria actually testified at trial, it is evident that the trial court determined that Alexandria was competent.

In this non-OMVI context, appellant's motion cannot be interpreted as a motion to suppress as it does not address any constitutional issues and deals strictly with an evidentiary issue, i.e. competency. See *State v. Morgan* (1986), 31 Ohio App.3d 152, 154 (stating that the issue of a witness' competence to testify may be likened to other issues of admissibility). Even if we interpret appellant's motion as one requesting that Alexandria not be allowed to testify, the motion would be considered a motion *in limine* and not a motion to suppress. Therefore, appellant would be required to object at the time the evidence is admitted at trial.

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Appellant relies on *State v. Ullis* (1992), 65 Ohio St.3d 83, 85-86, for the proposition that the denial of a motion to suppress testimony of a witness is preserved for appellate review. In *Ullis*, the appellant filed a Crim.R. 12(B) motion to suppress the testimony of the victim's treating psychologist on the ground that the testimony would be hearsay based on the words of an incompetent declarant and violate appellant's constitutional rights. *Id.* After denial of his motion by the trial court, appellant pled no contest. *Id.* The Supreme Court of Ohio held that the ruling was preserved for appellate review because the trial court conducted a full-blown hearing where testimony was elicited upon the constitutional claims that were the subject of the motion, both parties were provided with cross-examination, and the parties stipulated that any error in the trial court's ruling on the motion would be preserved for review. *Id.* at 86. Further, the trial court treated appellant's motion as a motion to suppress and approved of the stipulation between the parties that the issue would be preserved for appellate review. *Id.*

*4 We note that several differences exist between the trial court's determination in appellant's case and that in *Ullis*. Most obviously, in *Ullis*, the motion was characterized as a motion to suppress and denied, whereas, in this case, the motion was characterized as a motion to conduct a competency hearing and granted by the trial judge. Furthermore, the result was not a full-blown hearing with cross-examination. Rather, the trial judge conducted an *in camera* interview without counsel's presence. Finally, the trial court never indicated to appellant that the issue was preserved for appeal; defense counsel had ample opportunity to object to the trial court's competency finding if he felt it was erroneous. For these reasons, we find that *Ullis* does not support appellant's contention that the issue of Alexandria's competency is preserved for appeal.

As appellant failed to object to the trial court's competency determination, we must determine whether the trial court committed plain error in finding Alexandria competent and allowing her to testify at trial. Plain error is reversible error to which no objection was lodged at trial; it is obvious and prejudicial, and if permitted it would have a material adverse effect on the character and public confidence in judicial proceedings. *State v. Craft* (1977), 52 Ohio App.2d 1, 7. See, also, Crim. R. 52(B). Notice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

Evid.R. 601 provides that "[e]very person is competent to be a witness except: (A) * * * children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." It is the trial judge's duty to *voir dire* a child under the age of ten to determine the child's competency to testify. The determination of competency is within the sound discretion of the trial judge as the judge has the opportunity to observe the child's appearance, manner of responding to the

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questions, general demeanor and other indicia of ability to relate the facts accurately and truthfully. Accordingly, the court must determine whether the child is capable of receiving just impressions of facts and events and accurately relating them. See *State v. Frazier* (1991), 61 Ohio St.3d 247, 251.

In *Frazier*, the Supreme Court of Ohio established a test for determining the competency of a child under the age of ten to testify. The Court stated that:

In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful.

*5 *Id.* at 251.

During the competency interview, Alexandria knew her age, her birthday, that she was in first grade and that she had two brothers, a stepbrother and a stepsister. She knew the ages of her siblings, except for her stepbrother, and where each of her siblings resided. Alexandria indicated that she lived with her mother and her brothers, Zachary and Andrew. When the trial judge asked whether Alexandria remembered the doctor's name, Alexandria corrected the trial judge and stated that it was a female doctor but she did not recall her name. Alexandria further stated that the doctor gave her tests by herself and then her mother came in and they talked together with the doctor. When asked if her mom helped her remember things, Alexandria stated that "[s]he forgot and I remembered." She did not know how long ago the events had happened and stated that she was "only like six when he done it." Alexandria indicated that no one else ever touched her "there" and that appellant had also put his tongue "there."

Appellant contends that none of the criteria of the *Frazier* test were satisfied by the judge's *voir dire*. While Alexandria could not answer all the trial judge's questions, we believe that Alexandria demonstrated an ability to receive accurate impressions of fact, could recollect those impressions and observations, and communicate what she observed. However, the trial judge erred in failing to question Alexandria regarding her understanding of truth and falsity or her appreciation of her responsibility to be truthful. Therefore, we must determine whether this oversight resulted in a manifest miscarriage of justice.

At trial, appellee questioned Alexandria regarding her understanding of truthfulness. Appellee asked Alexandria what a promise is and Alexandria replied that, "[a] promise is to not tell people * * * like if there's a stranger * * * who tells you not to do something, and you tell

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anyways, that's a promise * * *." Clearly, Alexandria was confusing a promise and a secret. Appellee then asked Alexandria whether, if she promised not to tell and then went out and told, she would be keeping a promise or breaking a promise. Alexandria stated that she would be breaking her promise. Appellee asked Alexandria if she was going to tell the truth and Alexandria responded affirmatively. When asked, "If you didn't tell the truth, what would that be about your promise?", Alexandria responded that she would be lying.

In *State v. Lewis* (1982), 4 Ohio App.3d 275, the Third District held that any doubt regarding competency could be eliminated by subsequent testimony which justified a finding that the child is competent to testify. We agree with this rationale and believe that appellee's direct examination was sufficient to establish that Alexandria understood truth and falsity. While Alexandria was obviously confused when asked to define a promise, it is equally clear that she could identify the difference between truth and a lie and appreciated that she was required to tell the truth. Because the trial court's error was cured by subsequent events, it does not have a material adverse effect on the character and public confidence in judicial proceedings. Thus, we find no plain error.

*6 Appellant argues that inconsistencies in Alexandria's testimony demonstrate her incompetence. Inconsistency relates to Alexandria's credibility and not her competency as a witness. The jury had the opportunity to observe Alexandria and determine how much credence and weight should be given to her testimony.

Therefore, we overrule appellant's first assignment of error.

III.

In his second assignment of error, appellant argues that the trial court erred in admitting State's Exhibit 5, a diagnostic assessment prepared by Elaine Harffman, and State's Exhibit 3, an examination report from the SAM Clinic prepared by Amy Herbert.

Questions regarding the admissibility of evidence are left to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An abuse of discretion will be found only if the trial court's attitude was unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

The trial court found that both exhibits were admissible pursuant to Evid.R. 803(4), which states that a hearsay statement is admissible if it is "made for the purposes of medical diagnosis

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or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis." Statements which are admissible under Evid.R. 803(4) are assumed to be reliable since (1) the effectiveness of treatment often depends upon the accuracy of the information related to the physician (self-interest motivation), and (2) the expertise of doctors in evaluating the accuracy of those statements is a safeguard against falsehoods (reliance rationale). See *State v. Dever* (1992), 64 Ohio St.3d 401.

However, when the patient is a young child, it is not certain that the child understands the need to be truthful to medical personnel. *Id.* Consequently, the Ohio Supreme Court held that in the case of young children, courts must consider the circumstances surrounding the making of statements to a medical professional before admitting those statements under Evid.R. 803(4). *Id.* The Supreme Court went on to state that a court should not presume * * * that the statements are unreliable merely because there is no indisputable evidence of the child's motivation. Rather, in a case such as this, when an examination of the surrounding circumstances casts little doubt on the motivation of the child, it is permissible to assume that the factors underlying Evid.R. 803(4) are present.

Id. at 410-12. In sum, the court may admit a child's statements if they are made for purposes of medical diagnosis or treatment and there is no evidence to cast doubt upon the child's motivation for making the statements.

Appellant objects to the admissibility of these two exhibits on several grounds. First, appellant argues that it was error to admit State's Exhibit 5 because the trial court limited defense counsel in his cross-examination of Elaine Harffman and expressly stated that Exhibit 5 would not be admitted. We agree with appellant that the trial court was, at best, unclear regarding the admissibility of State's Exhibit 5 during cross-examination of Ms. Harffman. However, if appellant was concerned that he was unfairly limited in his cross-examination, he could have requested permission to recall the witness and continued his cross or recalled Ms. Harffman as an adverse witness in his case-in-chief. As appellant did neither, he was not denied his right to confront the witness regarding the exhibit.

*7 Appellant further contends that neither exhibit should have been admitted because Ms. Harffman is not a medical expert or a doctor and there was no testimony regarding the qualifications of Amy Herbert, who prepared State's Exhibit 3.

Evid.R. 803(4) does not require that the statements be made to a specific type of health care provider as long as made for purposes of diagnosis or treatment. Thus, a statement may still be within the scope of the exception if it is directed to other physical and mental health

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professionals, including nurses, psychiatrists, psychologists, and therapists. *State v. Chappell* (1994), 97 Ohio App.3d 515, 530. Furthermore, because Evid.R. 803(4) is not limited to statements relating to physical condition, statements made during the course of a psychological examination may also be admissible provided that the purpose of the examination is to diagnose or treat the victim's psychological condition. See *State v. Vaughn* (1995), 106 Ohio App.3d 775, 780; *State v. McWhite* (1991), 73 Ohio App.3d 323, 329-330.

Ms. Harffman testified that she is a licensed social worker who was employed as a psychotherapist and was diagnosing and treating Alexandria for her psychological condition. As to State's Exhibit 3, there was testimony from Ms. Herbert that she was employed as a graduate intern at the SAM Clinic and that her duties were to interview Alexandria and then discuss Alexandria's statements with the doctor for purposes of her examination. Furthermore, State's Exhibit 3 includes Ms. Herbert's signature followed by the letters LSW, which indicates that Ms. Herbert is a licensed social worker. See *State v. Dumas* (Feb. 19, 1999), Franklin App. No. 98AP-581, unreported (holding that statements made to a social worker whose duty was to interview children and provide the information to the medical staff were admissible pursuant to Evid.R. 803(4)). Ms. Herbert was acting as part of the medical team for purposes of treating Alexandria. Both Ms. Harffman and Ms. Herbert are licensed social workers who were diagnosing and treating Alexandria. The fact that they are not medical doctors does not *per se* require exclusion of the reports.

Appellant also argues that the trial court erred in failing to make a determination as to Alexandria's competency at the time she made the statements to Ms. Harffman and Ms. Herbert. There is, however, no requirement that the court make such a determination. *State v. Ullis* (1993), 91 Ohio App.3d 656, 665 (stating that Ohio courts have previously ruled that Evid.R. 803(4) has no prerequisite of determining whether the declarant is competent to testify). Accordingly, Alexandria's statements to Ms. Harffman and Ms. Herbert could be admitted pursuant to Evid.R. 803(4) without a ruling on Alexandria's competency.

We do note, however, that the trial court must determine whether there are facts which impugn the child's motivations such that her statements should not be admitted pursuant to Evid.R. 803(4). *Dever, supra*, at 412. Here, Ms. Herbert testified that part of her duties were to explain to the child what would happen that day and then interview the child to collect information for the medical examination. Therefore, there is sufficient evidence to support the trial court's finding that Alexandria understood that the statements she made were for the purpose of medical treatment. Further, there was no evidence that Alexandria was unduly influenced when she made the statements to Ms. Herbert.

*8 As to State's Exhibit 5, Ms. Harffman testified that Mrs. Wilson brought Alexandria in to

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speak to her due to several behavioral changes. Neither party questioned Ms. Harffman as to whether she explained to Alexandria the purpose of her visit. Appellant cross-examined Mrs. Wilson regarding her divorce from appellant and introduced testimony regarding Mrs. Wilson's mental condition. However, we believe that the lack of evidence indicating undue influence on Alexandria is adequate to support the trial court's determination that the exhibits were sufficiently trustworthy pursuant to *Dever*.

Lastly, we address appellant's argument that portions of State's Exhibit 5 should have been excluded as they were not made for purposes of diagnosis or treatment or were unduly prejudicial. Specifically, appellant refers to statements indicating that appellant sexually molested Alexandria, that appellant had previously been charged with domestic assault, an anecdotal overview of Alexandria's condition and statements indicating that Alexandria is a sexual abuse victim, implying that she was speaking truthfully in accusing appellant of sexually assaulting her.

While statements of fault generally fail to meet the criteria for admission under Evid.R. 803(4), statements by a child abuse victim that the abuser is a member of the victim's household are reasonably pertinent to diagnosis and treatment. *State v. Miller* (1988), 43 Ohio App.3d 44, 47, citing *United States v. Renville* (C.A.8, 1985), 779 F.2d 430, 436, 438. Familial child abuse involves more than physical injury as the identity of the offender might be necessary for psychological diagnosis and treatment. *Miller, supra*, at 47. As appellant was Alexandria's step-father, the admission of Alexandria's statements to Ms. Harffman indicating that appellant had sexually abused her was not improper.

Appellant also argues that a portion of State's Exhibit 5 stating that "there have been domestic violence charges against the step-father during the summer of 1996 due to an episode when he grabbed Alex by the neck and shoved her mother and bruised her mother and choked her" should have been excluded. We agree that the trial court should not have allowed this section of the report to go to the jury. We conclude, however, that this error was harmless beyond a reasonable doubt in light of the admissible evidence presented to the jury.

While we are also troubled by the admission of references to Alexandria as a sexual abuse victim and an overview of Alexandria's condition, we do not believe they require reversal. Appellant contends that the tone of the report and Ms. Harffman's classification of Alexandria as a sexual abuse victim indicate that Ms. Harffman believed Alexandria was telling the truth. In *State v. Boston* (1989), 46 Ohio St.3d 108, 128, the Supreme Court held that an expert can testify as to whether a child was sexually abused but cannot testify as to whether a child is testifying truthfully. In so distinguishing, the Court indicated that testimony confirming a child had been abused does not equate to testimony that a child was truthful. Therefore, Ms.

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Harffman's classification of Alexandria as a sexual abuse victim or other statements in State's Exhibit 5 do not violate the prohibition on testimony regarding a witness' credibility. This portion of State's Exhibit 5, however, is not admissible under Evid.R. 803(4) as it is the psychotherapist's diagnosis and not a statement of the patient made for purposes of diagnosis or treatment; nor is it admissible under Evid.R. 803(6), the business records exception which does not provide for the admission of diagnoses and opinions. See *Bush v. Burchett* (June 13, 1995), Scioto App. No. 94CA2237, unreported. Nonetheless, their admission does not require reversal. The references in Exhibit 5 to Alexandria's status as a victim of sexual abuse were cumulative in light of similar properly admitted testimony from Dr. Saluke.

*9 Therefore, we overrule appellant's second assignment of error.

IV.

In his third assignment of error, appellant alleges that the trial court erred in overruling appellant's motion for a directed verdict. Specifically, appellant avers that the evidence was insufficient to support a conviction beyond a reasonable doubt and/or the manifest weight of the evidence does not support a conviction beyond a reasonable doubt.

The "sufficiency" of evidence refers to the legal standard applied to determine whether the case may go to the jury, i.e. whether the evidence is legally sufficient to support the jury verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. This is a question of law which we review *de novo*. See *id.* In analyzing the "sufficiency" of evidence to sustain a criminal conviction, an appellate court must construe the evidence in a light most favorable to the prosecution. *State v. Hill* (1996), 75 Ohio St.3d 195, 205; *State v. Grant* (1993), 67 Ohio St.3d 465, 477; *State v. Rojas* (1992), 64 Ohio St.3d 131, 139. After construing the evidence in this manner, the test for determining the sufficiency is whether any rational trier of fact considering the evidence could have found all essential elements of the charged offenses proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

Appellant questions Alexandria's credibility and urges us to find the evidence insufficient to support a conviction. We note, however, that a sufficiency of the evidence analysis is a question of law that does not allow courts to independently weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Evaluations of weight and credibility are jury issues. *State v. Hill, supra*, at 205. Accordingly, our inquiry is not whether Alexandria's testimony should have been believed but, rather, whether it would support a conviction if believed by the jury. See *Thompkins, supra*, at 390 (Cook, J., concurring). Mrs. Wilson testified to Alexandria's age and

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Alexandria testified that appellant sexually assaulted her by inserting his tongue and his finger into her vagina on more than one occasion. Construing the evidence most favorably for the prosecution, this testimony established each element of both charges against appellant. The evidence was legally sufficient, leaving it up to the jury to decide whether it was credible.

Appellant also argues that his conviction is not supported by the manifest weight of the evidence. While a "sufficiency" challenge tests whether a state's case is legally adequate to go to the jury, a "weight" of the evidence argument concerns the "rational persuasiveness" of the evidence and tests whether the evidence was enough to sustain the state's burden of proof. See *State v. Thompkins, supra*, at 386-87; see, also, *State v. Martin, supra*, at 175.

Our role in a manifest weight of the evidence inquiry is to determine whether the evidence produced at trial "attains the high degree of probative force and certainty required of a criminal conviction." *State v. Getsy* (1998), 84 Ohio St.3d 180, 193. To make this determination, we must "review the record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted." *State v. Stepp* (1997), 117 Ohio App.3d 561, 567. If the record contains substantial evidence upon which a trier of fact could conclude that the state proved its case beyond a reasonable doubt, we will not reverse a conviction. *Getsy, supra*, at 193-94; *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph two of the syllabus.

*10 Appellant's argument primarily focuses on Alexandria's credibility, Alexandria's uncertainty as to certain details such as where she was residing when the abuse occurred and Mrs. Wilson's alleged motivation to convince Alexandria to lie. Appellant also relies on the testimony of several witnesses who indicated that Alexandria had a prior history of "sexual activity." Even though a manifest weight of the evidence challenge requires us to review the record and weigh the evidence, our review is tempered by the principle that questions of weight and credibility are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus; *State v. Garrow* (1995), 103 Ohio App.3d 368, 371. In this case, the jury's verdict conclusively shows that it found Alexandria to be a credible witness and did not believe that Mrs. Wilson had coerced Alexandria into falsely accusing appellant. If the jury did not find Alexandria credible and believed Ms. Wilson had coaxed Alexandria into lying, it would have undoubtedly acquitted appellant. We refuse to second-guess a jury's determination of a witness' credibility when the jury was able to observe the witness firsthand. To do so on this record would be an inappropriate usurpation of the jury's role. We overrule the third assignment of error.

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V.

In his final assignment of error, appellant challenges the imposition of consecutive sentences for felonious sexual penetration and rape. Appellant contends that consecutive sentencing for these offenses violates constitutional and statutory proscriptions of multiple punishments for the same offense. We conduct a *de novo* review of these issues.

The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect against multiple punishments being imposed upon an accused for the same offense. See *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656; *State v. Thomas* (1980), 61 Ohio St.2d 254, 259-60, overruled on other grounds in *State v. Crago* (1990), 53 Ohio St.3d 243. Moreover, R.C. 2941.25, the "multiple-count statute," codifies Double Jeopardy principles by prohibiting multiple punishments for the same criminal conduct in violation of the state and federal constitutions. *Thomas*, 61 Ohio St.2d at 260.

R.C. 2941.25 provides:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

*11 Appellant contends that the trial court impermissibly sentenced him to consecutive terms for felonious sexual penetration and rape because those two crimes are allied offenses of similar import within the meaning of R.C. 2941.25.

In a recent decision, the Ohio Supreme Court clarified the test used to determine whether two crimes are allied offenses of similar import. *State v. Rance* (1999), 85 Ohio St.3d 632. The Court found that the State of Ohio intends to permit a defendant to be punished for multiple offenses of *dissimilar import*. *Id.* at 636. The applicable test for deciding whether the crimes are allied offenses of similar import is: If the elements of the crimes " 'correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import.' " *Id.*, citing *State v. Jones* (1997), 78 Ohio St.3d 12, 13-14. If the elements do not so correspond, the offenses are of dissimilar import and the court's inquiry ends-the multiple convictions are permitted. *Id.* The statutory elements of the crime must be

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considered in the abstract and the court need not consider the particular facts of the case. *Id.* If the elements do so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with separate animus. *Id.*

Here, appellant was convicted of felonious sexual penetration in violation of R.C. 2907.12(A)(1)(b)^{FN2} which states that:

FN2. We note that R.C. 2907.12 was repealed by Am.H.B. No. 445, effective September 3, 1996. Appellant was convicted of committing these crimes between June 1995 and October 1996. As of September 3, 1996, appellant's actions would still constitute a crime under R.C. 2907.02 which expands the definition of rape to include acts previously constituting felonious sexual penetration. Because appellant would be guilty of two sexual offenses regardless of whether the incident occurred before or after September 3, 1996 and because the crimes are effectively the same, we find this change is not relevant to our analysis.

No person, without privilege to do so, shall insert any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

Appellant was also convicted of rape in violation of R.C. 2907.02(A)(1)(b) which states:
No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

R.C. 2907.01(A) defines "sexual conduct" as "vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration,

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however slight, is sufficient to complete vaginal or anal intercourse.”

Applying the Supreme Court standard outlined in *Rance*, we find that felonious sexual penetration and rape are not allied offenses of similar import. While many of the elements are identical, the commission of one of the crimes will not necessarily result in the commission of the other when the offenses are examined in the abstract. For example, insertion of a non-anatomical object could be a violation of R.C. 2907.12 but does not satisfy the definition of sexual conduct and, consequently, could not be a violation of R.C. 2907.02.

*12 We also note that Alexandria testified that appellant performed these acts on more than one occasion. Therefore, there was sufficient evidence for the jury to determine that appellant committed rape on one occasion and felonious sexual penetration on another date. Even absent the *Rance* analysis above, sufficient evidence exists to uphold both convictions based on Alexandria's testimony.

Having found that appellant's double jeopardy rights have not been violated, appellant's fourth assignment of error is overruled.

Having found no reversible error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant

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to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

KLINE, P.J.: Concurs in Judgment and Opinion as to Assignment of Error IV; concurs in Judgment only as to Assignments of Error I, II and III.

EVANS, J.: Concurs in Judgment and Opinion.

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Ohio App. 4 Dist., 2000.

State v. Wilson

Not Reported in N.E.2d, 2000 WL 228242 (Ohio App. 4 Dist.)

END OF DOCUMENT

Evid R 601 General rule of competency

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

(1) a crime against the testifying spouse or a child of either spouse is charged;

(2) the testifying spouse elects to testify.

(C) An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

(D) A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school. This division shall not prohibit other medical professionals who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

(E) As otherwise provided in these rules.

Evid R 803 Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Evid.R. 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of division (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of division (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding,

however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Evid.R. 901(B)(10) or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in

published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Evid R. 804 Hearsay exceptions; declarant unavailable

(A) Definition of unavailability

"Unavailability as a witness" includes any of the following situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(B) Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) *Statement against interest.* A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly

indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (a) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Statement by a deceased or incompetent person. The statement was made by a decedent or a mentally incompetent person, where all of the following apply:

(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

(b) the statement was made before the death or the development of the incompetency;

(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

(6) Forfeiture by wrongdoing. A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

Evid R 807 Hearsay exceptions; child statements in abuse cases

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

(2) The court finds all of the following:

(a) the child is absent from the trial or hearing;

(b) the proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good faith effort to do so;

(c) it is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time.

(3) The court finds both of the following:

(a) the child is unable to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity;

(b) the illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.

The proponent of the statement has not established that the child's testimony or attendance is not reasonably obtainable if the child's refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.

(C) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.

2907.02 Rape; evidence; marriage or cohabitation not defenses to rape charges

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years. If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force or if the victim under division (A)(1)(b) of this section is less than ten years of age, whoever violates division (A)(1)(b) of this section shall be imprisoned for life. If the offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating a law of another state or the United States that is substantially similar to division (A)(1)(b) of this section or if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, whoever violates division (A)(1)(b) of this section shall be imprisoned for life or life without parole.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of

the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.