

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MICHAEL S. ARNOLD,

Defendant-Appellant

Case No.: **08-1693**

On Appeal From the  
Franklin County Court of Appeals,  
Tenth Appellate District

Court of Appeals  
Case No. 07AP-789

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MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-  
APPELLANT MICHAEL S. ARNOLD

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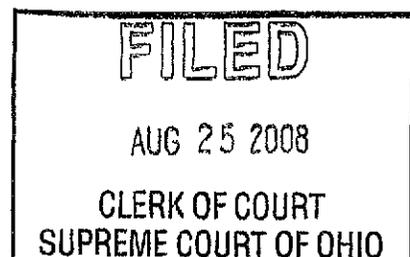
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**Explanation of Why This Case Presents a Substantial  
Constitutional Question and Matters of Public or Great  
General Interest**

The Court of Appeals concluded that a trial court may admit out-of court statements made by a child to a forensic examiner at a child advocacy center without violating the Confrontation Clause. Unless this Court accepts jurisdiction and reverses this erroneous judgment, Ohio law will be contrary to the majority of jurisdictions<sup>1</sup> that have considered this issue. These courts hold that such statements made during child advocacy center interviews “inevitably are testimonial”<sup>2</sup> and are therefore barred by the Confrontation Clause pursuant to the analysis set forth by the United States Supreme Court.

This Court should accept jurisdiction to address both a substantial constitutional question and matters of public or great general interest.

**STATEMENT OF THE CASE AND FACTS**

On September 15, 2005, the Franklin County Grand Jury returned an indictment charging Michael Scott Arnold with two counts of rape. The case came on for jury trial on May 16, 2007.

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<sup>1</sup> See, e.g., *People v. Sisavath* (Cal. App. 2004), 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753, 757 (holding as testimonial under *Crawford* interview of child victim of sexual abuse taken and videotaped at county facility designed and staffed for interviewing children suspected of being victims of sexual abuse); *In re Rolandis G* (Ill App. 2004), 352 Ill.App.3d 776, 288 Ill.Dec. 58, 817 N.E.2d 183, 189-90 (seven-year-old made the same statement to his mother, a police detective, and a child abuse investigator, but only the statement to his mother was nontestimonial); *State v. Snowden* (2005), 867 A.2d 314, 325-26. (testimony of sexual abuse investigator employed by Child Protective Services as to statements made by child sexual abuse victim held testimonial under *Crawford*); *Florida v. Contreras* (Fl. 2008), 979 So.2d 896 (finding that child victim's videotaped statement to nurse was testimonial); *State v. Pitt* (Ore. 2006), 147 P.3d 940 (admission of videotaped statements made by children to child advocacy center personnel violated *Crawford* and was plain error). But see *People v. Vigil* (Colo.2006), 127 P.3d 916, 921-26; *People v. T.T. (In re T.T.)* (Ill.App.2004), 351 Ill.App.3d 976, 287 Ill.Dec. 145, 815 N.E.2d 789, 803-05.

<sup>2</sup> *North Dakota v. Blue*, 2006-ND-134, 717 N.W.2d 558, 563-64.

Charles Fritz, a firefighter paramedic with the Columbus Fire Department was dispatched to Appellant's residence at 11:11 p.m. on December 7, 2005. (Tr. 49-50; 55) Upon his arrival he discovered a "chaotic scene" with many Columbus police officers present and a helicopter in the air. (Tr. 50)

He discovered Wendy Otto, the mother of four year old Makaela Arnold, obviously distracted. She told him that her daughter had been sexually assaulted. She was quite upset and angry. (Tr. 51-52)

Fritz met the child, whom he described as "very anxious, almost withdrawn". (Tr. 51) The child reported that she had been "touched in a private area" and that "Daddy was being mean". (Tr. 53; 58) The child was transported to Children's Hospital. (Tr. 53)

Wendy Otto, the mother of the child and the former spouse of Appellant, testified that she and Appellant have two small children. They lived in Las Vegas, but he moved to Columbus early in 2006. At some point, she and her children drove to Columbus to reunite with him. (Tr. 68)

On the night of December 7, she fell asleep on the couch with her son. (Tr. 71) The couple did not have bedroom furniture, and had inflatable beds in their room. (Tr. 74) Around midnight, she woke up because she heard someone running upstairs, or a thumping noise. (Tr. 76)

She went upstairs and found the bedroom door locked. She yelled "open the door now" and Appellant unlocked the door. She shoved it open. She stated that "Michael Arnold had his boxers halfway off on his side." Makaela was lying next to him on the bed, and was not moving. (Tr. 77) She had her underwear off. (Tr. 78)

She noticed the underwear when she was starting to leave the room. She pulled the underwear onto her daughter, and asked Appellant what was

going on. She yelled at him to get out, and called Appellant's uncle, and then the police. (Tr. 80) Appellant went downstairs, got her car keys, and left. (Tr. 82)

After the police arrived, they took the child to Children's Hospital. (Tr. 84) That night, they did a rape kit. The next day they took her to the child advocacy center, the Center for Child and Family Advocacy ("CCFA"). (Tr. 86)

Kerri Marshall testified on voir dire that she was a social worker for CCFA, and is not employed by the Columbus Police Department or Franklin County Children Services. (Tr. 123) Her job is to interview children when there are allegations of sexual or physical abuse. (Tr. 124) Children are not made aware that police or prosecutors are present during this process. After the interview, the child will meet with a doctor or nurse practitioner, and has a medical examination. This was done in Makaela's case.

The court permitted the State to play a recording of this interview.

During the interview the child stated that her parents were fighting and that her dad was smacking her brother Scottie in the face. (Tr. Of Interview, 12) When presented with anatomical drawings, the child denied that anyone had ever touched her "pee-pee" (*Id.*, 19), and later said that she told her mom that dad had touched her "pee-pee". (*Id.*, 20)

When asked why the police came to her house, the child said that someone was fighting. She also said that there was a time when she and her dad were sleeping. Her mom came in. When this happened, her underwear was off. She stated that her dad took her underwear off and was doing "pee-pee". She stated that "him was touching my pee-pee. But he was doing pee-pees with me. That's why he got in jail." (*Id.*, 23) When asked what her dad's "pee-pee" looked like, she said "green". (*Id.*, 23-24)

She stated that daddy took his boxers off, and that his “pee-pee” touched hers, and that it felt not very nice. She said that his ears touched her “pee-pee” and that his “pee-pee” went inside hers. (*Id.*, 26) She also said that his butt touched hers, and that he touched her butt with a needle. (*Id.*, 27) Daddy was on top of her. (*Id.*, 28) She also said that daddy’s mouth touched her “pee-pee” and touched outside of her butt. (*Id.*, 29)

Scientific evidence showed that bloodstains from a pillow were from an unknown male; that bloodstains from a tan cushion, green fitted bed sheet and comforter were from a second unknown male, and a stain from a recovered piece of toilet paper came from Makaela. (Tr. 212-14) Semen was found on a green fitted sheet was a “very old” stain. (Tr. 215)

DNA types from the sheet came from an unknown female (Tr. 216); those from the male fraction of the semen stain matched samples from Appellant (Tr. 217). Appellant was excluded as a contributor to the bloodstains on the tan cushion, green fitted bed sheet and comforter. (*Id.*) Vaginal swabs obtained from Makaela were negative for semen. (Tr. 221)

Gail Hornor, a pediatric nurse practitioner for CCFA testified that examined the child. The results of the general physical exam were normal. There were two abrasions or scratches on the child’s hymen. (Tr. 239) She characterized these as a sign of acute trauma, and that something had attempted to penetrate it with him the last 24-72 hours. (Tr. 239)

In the defense case, Cheryl Arnold, Appellant’s mother, testified that the relationship between Appellant and his ex-wife was volatile, with a lot of fighting from the beginning. (Tr. 272) She had witnessed Wendy Otto accusing Appellant of cheating on her. She believed that Wendy would make up a story to get back at Appellant, and would involve the children in those stories. (Tr. 273)

The jury returned a verdict of guilty of one count of rape. The case came on for sentencing on August 29, 2007. The court imposed a life sentence, and adjudicated Appellant as a sexual predator.

On September 25, 2007, Appellant filed his notice of appeal to the Franklin County Court of Appeals, Tenth Appellate District. By Opinion rendered July 10, 2008, the Court of Appeals affirmed the conviction.

Appellant now seeks further review by this Honorable Court.

## **ARGUMENT**

### **Proposition of Law**

In a criminal prosecution, the admission of out-of-court statements made by a child to an interviewer employed by a child advocacy center violates the constitutional right to confront witnesses provided by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

The Sixth Amendment gives the defendant in any criminal prosecution the right to confront witnesses against him. Similarly, the rights guaranteed by Section 10, Article I of the Ohio Constitution provide that the accused shall be allowed “to meet the witnesses face to face. . .” Recent United States Supreme Court decisions have reviewed—and revised---constitutional law governing the admission of hearsay statements in criminal prosecutions.

In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the Court held that the Sixth Amendment “commands, not that [hearsay] evidence be reliable, but that the reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” 541 U.S. at 61. The Court concluded that if the statement proffered is testimonial in nature, it must be subjected to cross-examination regardless of its reliability.

*Id.*, at 68. The key inquiry is whether the statement is “testimonial in nature”.

More recently, in *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed. 224, the Court refined the distinction between testimonial and non-testimonial statements. The Court reviewed a pair of domestic disturbance cases in which the defense raised *Crawford* objections. In the first, the issue was whether statements made to a 9-1-1 emergency operator by a woman in the midst of an altercation with her boyfriend were testimonial. The Court held that there were not, because the circumstances showed that the primary purpose of the call was not to assist in the investigation of a crime, but to “enable police assistance to meet an ongoing emergency.” 126 S.Ct. at 2273.

In the second case, the issue was the admissibility of statements made by a woman to police officers who had responded to a report of a domestic disturbance. The woman described to the responding officers how she and her daughter had been attacked by her husband before the police had arrived on the scene. The Court held that those statements were testimonial because the circumstances showed that the statements were made “As part of an investigation into possibly criminal past conduct”. *Id* at 2278.

The decision in *Davis* helped to distinguish between testimonial and non-testimonial by drawing at least one bright line:

“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the ***primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.***”

*Davis v. Washington*, 126 S.Ct. at 2273 (Emphasis added.)

In *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, this Court adopted this “primary purpose” test:

To determine whether a child declarant's statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington* (2006), \_\_ U.S. \_\_, 126 S.Ct. at 2273- 2274, 165 L.E.2d 224.

*State v. Siler*, *supra*, at paragraph 1.

The issue presented here is whether statements made by the alleged victim during an interview at the Child Advocacy Center were testimonial or nontestimonial under the *Davis/Siler* test. This requires analysis of the statutory and regulatory system that created Child Advocacy Centers in Ohio. With the enactment of S.B. 66<sup>3</sup> in 2004, Ohio joined a number of states that have adopted these centers to assist in the evaluation and ultimate prosecution of child abuse cases. The Act created R.C. 2151.425-2151.428. Of particular relevance is R.C. 2151.426, which provides for the creation of child advocacy centers such as the Center for Child and Family Advocacy at issue here:

**2151.426 Children's advocacy center - memorandum of understanding.**

(A)(1) A children's advocacy center may be established to serve a single county by execution of a memorandum of understanding regarding the participation in the operation of the center by any of the following entities in the county to be served by the center:

- (a) The public children services agency;

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<sup>3</sup> 150 v. S. 66.

***(b) Representatives of any county or municipal law enforcement agencies serving the county that investigate any of the types of abuse specified in the memorandum of understanding creating the center as being within the center's jurisdiction;***

***(c) The prosecuting attorney of the county or a village solicitor, city director of law, or similar chief legal officer of a municipal corporation in the county who prosecutes any of the types of abuse specified in the memorandum of understanding creating the center as being within the center's jurisdiction in the area to be served by the center;***

\* \* \*

(B) Each entity that participates in the execution of a memorandum of understanding under this section shall cooperate in all of the following:

(1) Developing a multidisciplinary team pursuant to section 2151.427 of the Revised Code to perform the functions and activities and provide the services specified in the interagency agreement entered into under section 2151.428 of the Revised Code, regarding reports received under section 2151.421 of the Revised Code of alleged sexual abuse of a child and reports of allegations of another type of abuse of a child that is specified in the memorandum of understanding that creates the center as being within the center's jurisdiction, and regarding the children who are the subjects of the reports;

\* \* \*

***(3) Employing the center's staff.***

(C) A center shall do both of the following:

***(2) Register annually with the attorney general.***

(Emphasis added.)

R.C. 2151.427 provides for the creation of the “multidisciplinary team” required by R.C. 2151.426(B)(1):

**2151.427 Children's advocacy center - multidisciplinary team.**

(A) The entities that participate in a memorandum of understanding executed under section 2151.426 of the Revised Code establishing a children's advocacy center shall assemble the center's multidisciplinary team.

(B)(1) The multidisciplinary team for a single county center shall consist of the following members who serve the county:

***(a) Any county or municipal law enforcement officer;***

(b) The executive director of the public children services agency or a designee of the executive director;

***(c) The prosecuting attorney of the county or the prosecuting attorney's designee;***

\* \* \*

(Emphasis added.)

These statutes are implemented by the administrative regulations set forth, *inter alia*, Ohio Administrative Code Section 5101:2-33-26:

**5101:2-33-26 The county child abuse and neglect memorandum of understanding.**

(A) The county child abuse and neglect memorandum of understanding, hereinafter referred to as the memorandum, is a document that sets forth the normal operating procedures to be employed by all concerned officials in the execution of their respective responsibilities pursuant to division (J)(2) of section 2151.421 of the Revised Code when conducting a child abuse or neglect assessments/investigation. The purpose of the memorandum is to clearly delineate the role and responsibilities of each official or agency in assessing or investigating child abuse or neglect in the county. The respective duties and requirements of all involved shall be addressed in the memorandum.

(B) Each public children services agency (PCSA) shall prepare a memorandum that is signed by all of the following parties:

(1) The juvenile judge of the county or the juvenile judge's representative; or if there is more than one juvenile judge in the county, a juvenile judge or the juvenile judge's representative selected by the juvenile judges or, if they are unable to do so for any reason, the juvenile judge who is senior in point of service or the senior juvenile judge's representative.

***(2) The county peace officer.***

***(3) All chief municipal peace officers within the county.***

***(4) Other law enforcement officers who handle child abuse and neglect cases in the county.***

***(5) The prosecuting attorney of the county.***

\* \* \*

(Emphasis added.)

The emphasized language is of pivotal importance here, because it establishes beyond question that child advocacy centers are intricately connected and involved with law enforcement and prosecution. This distinguishes child advocacy centers—even those connected with hospitals—from facilities that are created for diagnosis, treatment, and the administration of health care. The critical issue is not that Children’s Hospital employed these personnel. Rather, the issue is the role that these individuals served in the Child Advocacy Center which, by virtue of the very statutes and regulations that created it, serves a law enforcement function.

Ohio does not stand alone in the use of child advocacy centers, for there is a national model for such facilities. As a result, case authority from other jurisdictions addressing the inadmissibility of out-of-court statements of alleged abuse victims is important if not controlling here.<sup>4</sup>

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<sup>4</sup> Interestingly, the social work literature sees this process as testimonial. The Forensic Interviewing Protocol developed by the Michigan Department of Human Services makes this important observation:

***“The goal of a forensic interview is to obtain a statement from a child, in a developmentally-sensitive, unbiased and truthseeking manner, that will support accurate and fair decision-making in the criminal justice and child welfare systems. Although information obtained from an investigative interview might be useful for making treatment decisions, the interview is not part of a treatment process. Forensic interviews should not be conducted by professionals who have an on-going or a planned therapeutic relationship with the child.”***

State of Michigan. Governor’s Task Force on Children’s Justice and Department of Human Services, Forensic Interviewing Protocol, page 1,

In a well-reasoned opinion in *North Dakota v. Blue*, 2006-ND-134, 717 N.W.2d 558, the North Dakota Supreme Court considered this issue, and found that a child's statement to a forensic interviewer at a child advocacy was testimonial and therefore inadmissible under *Crawford* and *Davis*:

[¶ 15] In cases since *Crawford*, other states with the functional equivalent of the Children's Advocacy Center involved in this case have held that similar statements made by a child with police involvement inevitably are testimonial. *See, e.g., People v. Sisavath*, 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753, 757 (2004) (holding as testimonial under *Crawford* interview of child victim of sexual abuse taken and videotaped at county facility designed and staffed for interviewing children suspected of being victims of sexual abuse); *Contreras v. State*, 910 So.2d 901, 903-06 (Fla. Dist.Ct.App.2005) (videotaped statement of defendant's thirteen-year-old daughter by a coordinator of Florida's child protection team, while working with a county sheriff connected electronically in another room, was testimonial and could not be used at trial); *In re Rolandis G.*, 352 Ill.App.3d 776, 288 Ill.Dec. 58, 817 N.E.2d 183, 189-90 (2004) (seven-year-old made the same statement to his mother, a police detective, and a child abuse investigator, but only the statement to his mother was nontestimonial); *State v. Snowden*, 867 A.2d 314, 325-26, 867 A.2d 314 (2005) (testimony of sexual abuse investigator employed by Child Protective Services as to statements made by child sexual abuse victim held testimonial under *Crawford*); *Rangel v. State*, No. 2-04-514-CR, 2006 Tex.App. LEXIS 633, at \*14, \_\_\_ S.W.2d \_\_\_, \_\_\_ (Tex. App. June 5, 2006) (videotape recording of interview between a six-year-old child and a forensic investigator with the Child Protective Services was held to be testimonial); *see also* Heather L. McKimmie, Note, *Repercussions of Crawford v. Washington: A Child's Statement to a Washington State Child Protective Services Worker May Be Inadmissible*, 80 Wash. L.Rev. 219, 242-43 (2005) (arguing that *Crawford* requires a prior opportunity to cross-examine before a child's statement to a child protective services worker can be properly admitted). *But see State v. Bobadilla*, 709 N.W.2d 243, 254 (Minn.2006) (holding child's statement to child-protection worker with government involvement was nontestimonial because interview was not done in order to produce a statement for trial); Erin Thompson, Comment, *Child Sex Abuse Victims: How Will Their Stories Be Heard After Crawford v. Washington?*, 27 Campbell L.Rev. 279, 300 (2005) (arguing that the United States Supreme Court

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found at [http://traversecityfamilylaw.com/Documents/FIA-Pub779\\_13054\\_7.pdf](http://traversecityfamilylaw.com/Documents/FIA-Pub779_13054_7.pdf). (Emphasis added.)

should declare exceptions from *Crawford* for child sex abuse victims for face-to-face confrontations).

[¶ 16] ***We are in agreement with the majority of jurisdictions that have dealt with a similar factual scenario.*** In this case, the videotape of the child's statement to the forensic interviewer was testimonial as defined under *Crawford*. The statement was made with police involvement. Statements made to non-government questioners acting in concert with or as an agent of the government are likely testimonial statements under *Crawford*. The *Davis* court declined to consider the precise nature of when statements made to someone other than law enforcement personnel are testimonial. *Davis*, 126 S.Ct. at 2274 n. 2. Nonetheless, like the 911 operator in *Davis*, we conclude the forensic interviewer in this case was either acting in concert with or as an agent of the government and thus we too need not decide the precise scope of this question. We thus look to the purpose of the questioner.

[¶ 17] ***The forensic interviewer's purpose was undoubtedly to prepare for trial.*** Forensic by definition means "suitable to courts." *Merriam-Webster's Collegiate Dictionary* 490 (11th ed.2005). The police involvement also adds to the testimonial nature of the interview. Officer Murphy viewed the interview in another room and received the videotape immediately after the interview was completed. Police involvement under these facts indicates the purpose of the interview was in preparation for trial.

[¶ 18] Because there was no "ongoing emergency" and the primary purpose of the videotaped interview in this case was "to establish or prove past events potentially relevant to a later criminal prosecution," we hold the videotape recording constituted a testimonial statement. *Davis*, 126 S.Ct. at 2274.

(Emphasis added.)

In *Hernandez v. Florida* (Fla. App. 2007), 946 So.2d 1270 reached a similar conclusion in finding that the Confrontation Clause barred the introduction of statements by a child to a nurse who was a member of the local "Child Protection Team" (CPT). The court analyzed the issue thusly:

the dispositive question on the confrontation issue in this case is whether the statements by the child and her parents to Ms. Shulman were testimonial in nature. To answer this question, we look to whether the questioning by Ms. Shulman of the child and her parents was the functional equivalent of a police interrogation. The State correctly notes that Ms. Shulman was not a government employee. Based on this fact, the State argues

that Ms. Shulman's inquiries directed to the child and her parents could not reasonably be considered to be an interrogation by a police agent. We recognize that the questions that Ms. Shulman directed to the child and to her parents were asked in the context of a medical examination to determine whether a sexual battery had occurred. We also appreciate the importance of obtaining an accurate history from the patient to providing optimum medical care. Nevertheless, four factors persuade us that the questions that Ms. Shulman directed to the child and to her parents were the functional equivalent of a police interrogation. These four factors are (1) the effect of the Florida statutes pertinent to the establishment and functioning of the CPT, (2) the nature and extent of law enforcement involvement in the examination of the child by Ms. Shulman at TGH, (3) the purpose of the examination performed by Ms. Shulman in her capacity as a member of the CPT, and (4) the absence of any ongoing emergency at the time Ms. Shulman conducted her examination of the child.

These same four factors exist here: (1) Ohio statutes and regulations link CAC personnel with law enforcement; (2) law enforcement personnel were present, though out of sight of the child; (3) while the child's answers to some of these questions may have been useful for purposes of medical diagnosis and treatment the primary purpose of the interview was to develop evidence for purposes of investigation and prosecution; and (4) there was no ongoing emergency at the time of the interview—the child had been examined at the hospital hours earlier, and any emergency ended at that point.

An objective observer would reasonably expect the child's statement to be available for use in a prosecution. The possibility that forensic interview of child might have been intended for or designated as being for a therapeutic purpose is not determinative of the issue. See *People v. Sisavath* (Cal. App. 2004), 118 Cal. App.4th 1396, 13 Cal.Rptr.3d 753, 758 (2004); *State v. Snowden* (Md. 2005), 385 Md. 64, 867 A.2d 314, 330. The fact that the statements made by the child "may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not

indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial." *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir.2005);. See, also, *State v. Butcher*, 170 Ohio App.3d 52, 2007-Ohio-118 at ¶ 68. ("a doctor is not permitted, during a medical examination, to assume the role of a police investigator, elicit statements from the alleged victims, and, then, testify regarding those statements under the guise that they were given for the purpose of medical diagnosis or treatment.")

### CONCLUSION

For the reasons set forth herein, Defendant-Appellant Michael S. Arnold respectfully urges this Court to accept jurisdiction and decide this appeal on its merits.

Respectfully submitted,

**Yeura R. Venters 0014879**  
**Franklin County Public Defender**



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*Attorney for Defendant-Appellant*  
*Michael S. Arnold*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant was served upon Kimberly Bond, Assistant Franklin County Prosecuting Attorney 373 S. High Street, Columbus, Ohio 43215 by hand delivery this 25 day of August 2008.



\_\_\_\_\_  
David L. Strait 0024103

*Attorney for Defendant-Appellant  
Michael S. Arnold*

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

State of Ohio,

Plaintiff-Appellee,

v

Michael S Arnold,

Defendant-Appellant

No 07AP-789  
(C P C No 05CR12-8462)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on July 10, 2008, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed Costs assessed against appellant

KLATT, J , BRYANT & SADLER, JJ

By William A Klatt  
Judge William A Klatt

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellee,

v

Michael S Arnold,

Defendant-Appellant

No 07AP-789

(C P C No 05CR12-8462)

(REGULAR CALENDAR)

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O P I N I O N

Rendered on July 10, 2008

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*Ron O'Brien*, Prosecuting Attorney, and *Kimberly Bond*, for appellee

*Yeura R Venters*, Public Defender, and *David L Strait*, for appellant

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J

{¶1} Defendant-appellant, Michael S. Arnold, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas For the following reasons, we affirm that judgment

{¶2} In 2005, appellant and Wendy Otto were married and living together with their two children—a four-year old girl and a five-year old boy On the evening of December 7, 2005, all four fell asleep in their living room Otto awoke to find that

appellant and her daughter were no longer in the room. She heard noises upstairs and went to her bedroom to investigate. The bedroom door was locked, so she yelled for appellant to open the door. When he did, Otto saw that appellant's boxers were not on properly. She also saw her daughter lying on the couple's air mattress. Otto did not initially think anything was wrong, but when she pulled a blanket off of her daughter, she discovered that her daughter's underwear was down around her feet. At that point, Otto was concerned about what had happened and told appellant to leave. Appellant told Otto that he was not doing anything and that nothing happened. Otto called 911 and appellant left the house.

{¶3} Members of the Columbus Police and Fire Departments arrived at the house within minutes. Charles Fritz, a Columbus firefighter, observed the four-year old girl and thought she acted withdrawn and anxious. Fritz asked her what had happened, and she told him that someone had touched her in her private parts. Fritz took Otto and both children to Children's Hospital, where a rape kit was collected from Otto's daughter.

{¶4} The next day, Otto took her daughter to the Child and Family Advocacy Center at Children's Hospital. A licensed social worker, Kerri Marshall, interviewed the child about the previous night's events. Although the child was alone in the room with the interviewer, other people watched the interview from another room via closed-circuit television: a detective, a nurse practitioner, a victim's advocate, and a case worker from Franklin County Children Services. The interview was recorded. During the interview, the child accused appellant of conduct that would constitute sexual abuse. After the interview, the nurse practitioner, Gail Hornor, performed a physical examination of the

child She observed recent abrasions on the child's hymen, the tissue inside the labia that surrounds the vagina

{¶5} A Franklin County grand jury subsequently indicted appellant for two counts of rape in violation of R C 2907 02 Both counts alleged that the victim was less than 13 years of age One count alleged that appellant engaged in vaginal intercourse with the victim while the other count alleged that he engaged in cunnilingus Appellant entered a not guilty plea and proceeded to a jury trial

{¶6} At appellant's trial, the trial court ruled that the victim was unavailable to testify The trial court allowed the State to present, in lieu of the victim's live testimony, her recorded interview from the Child and Family Advocacy Center Nurse Hornor testified that she examined the victim after the interview She stated that the abrasions on the victim's hymen were recent and indicated that an object penetrated the labia in an attempt to penetrate the vagina one to three days before the examination The jury found appellant guilty of rape by vaginal intercourse but not guilty of the other rape count The jury also found that the victim was less than 10 years of age The trial court, after designating appellant a sexual predator, sentenced him to life in prison R C 2971 03(A)(2)

{¶7} Appellant appeals and assigns the following errors

First Assignment of Error

The trial court violated Defendant's right to confrontation as guaranteed by the Sixth Amendment to the United States Constitution, and Section 10, Article I of the Ohio Constitution, by admitting into evidence the out of court declarations by the alleged victim

Second Assignment of Error

The trial court erred in admitting the out of court declarations of the alleged victim contrary to the Rules of Evidence because the statements were not admissible under Evidence Rule 803(4)

Third Assignment of Error

Appellant's conviction is not supported by sufficient evidence

Fourth Assignment of Error

Appellant's conviction is against the manifest weight of the evidence

{¶8} Appellant contends in his first assignment of error that the admission of the victim's out-of-court videotaped interview violated his constitutional right to confront witnesses. We disagree.

{¶9} The Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right \* \* \* to be confronted with the witnesses against him." The Sixth Amendment is made applicable to the states through the Fourteenth Amendment of the United States Constitution. *Pointer v Texas* (1965), 380 U.S. 400, 403-406, 85 S.Ct. 1065. We review a claim that a criminal defendant's rights have been violated under the Confrontation Clause de novo. *State v Babb*, Cuyahoga App. No. 86294, 2006-Ohio-2209, at ¶17, citing *United States v Robinson* (C.A.6, 2004), 389 F.3d 582, 592, *State v Pasqualone*, Ashtabula App. No. 2007-A-0005, 2007-Ohio-6725, at ¶42.

{¶10} The State argues that we should apply a plain error standard to this assignment of error because appellant did not object to the admission of the victim's videotaped interview. We disagree. Before Marshall was allowed to testify about the child's statements, appellant's counsel objected on the record and asked to proffer his

objection Marshall was then questioned outside the presence of the jury to allow the trial court to determine the admissibility of her testimony After the trial court ruled to admit her testimony, it noted appellant's objection and stated that the objection would be preserved for purposes of appeal Therefore, a plain error review is not appropriate

{¶11} In *Crawford v Washington* (2004), 541 U S 36, 124 S Ct 1354, the Supreme Court of the United States held that out-of-court statements that are testimonial are barred, under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether the statements are deemed reliable by the trial court Id at 68-69 Therefore, the threshold issue we must determine in this case is whether or not the victim's videotaped statements are testimonial *State v Martin*, Franklin App No 05AP-818, 2006-Ohio-2749, at ¶19, citing *State v Crager*, Marion App No 9-04-54, 2005-Ohio-6868, at ¶28

{¶12} The *Crawford* Court did not have to define what the term "testimonial" meant because the statements in that case were taken by police officers in the course of a police interrogation, which the court noted would be testimonial under any definition of the word *Crawford*, at 52-53, 68 ("Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations ")

{¶13} Two years later, in *Davis v Washington* (2006), 547 U S 813, 126 S Ct 2266, the Court crafted the "primary purpose" test to more precisely determine whether statements made in response to police interrogations were testimonial or nontestimonial

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency They are

testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution

Id at 822 In *Davis*, the "interrogation" was performed by a 911 telephone operator The *Davis* Court noted that such an individual "may at least be an agent of law enforcement" when questioning 911 callers Therefore, the *Davis* Court considered the operator's questioning to be acts of the police Id at fn 2 The *Davis* Court held that the circumstances surrounding the questioning by the 911 telephone operator indicated that the primary purpose of the questioning was to enable police to meet an ongoing emergency and, therefore, the responses were nontestimonial Id at 828

{¶14} Shortly after the Supreme Court of the United States decided *Davis*, the Supreme Court of Ohio decided *State v. Stahl*, 111 Ohio St 3d 186, 2006-Ohio-5482 In that case, the court was faced with a confrontation clause challenge to the admission of statements made by an adult crime victim to a nurse at a hospital's specialized unit for victims of sexual assault The unit provided the same services as a traditional emergency room but in a more efficient and timely manner Id at ¶2 Before the nurse's physical examination of the victim, the nurse took a detailed history from the victim In giving that history, the victim provided details of her assault The victim passed away before the defendant's trial The trial court allowed the nurse to testify that during the examination, the victim identified the defendant as the person who assaulted her

{¶15} The Supreme Court of Ohio declined to apply the primary purpose test articulated in *Davis* in determining whether or not the statements were testimonial It did so because of the difference in the nature of the questioning that led to the statements in each of the two cases The court distinguished the statements in *Davis*, which were

made in response to questioning by agents of law enforcement officers, from the statements in *Stahl*, which were made in response to questioning by a medical professional at a medical facility. The court concluded that the primary purpose of the questioning in *Stahl* was to determine proper medical treatment for the victim—not to conduct a criminal investigation. *Id.* at ¶25.

{¶16} In light of this factual distinction, the *Stahl* court applied the "objective witness" test articulated in *Crawford*. *Stahl* at ¶36, *Crawford*, at 52. Under that test, a testimonial statement includes one "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Stahl* at ¶36. In making this determination, a court should focus on the declarant's expectation at the time of making the statement, the intent of the questioner would only be relevant if it could affect the declarant's expectations. *Id.* The *Stahl* court determined that the victim's statements were nontestimonial because no reasonable person in the victim's position would believe that her statements were made for prosecutorial purposes.

{¶17} The Supreme Court of Ohio revisited the confrontation clause in *State v Siler*, 116 Ohio St 3d 39, 2007-Ohio-5637. In that case, the court considered whether or not statements made by a child to a deputy sheriff were testimonial. There was no doubt that the statements in *Siler* were made in response to a police interrogation. Therefore, the *Siler* court applied the primary purpose test articulated in *Davis* and determined that the statements were testimonial because there was not an ongoing emergency at the time of the questioning and the primary purpose of the questioning was to investigate a possible crime. *Id.* at ¶43-46. The *Siler* court noted in its decision that the primary A-8

purpose test should be applied to statements made by a child in response to interrogations by police "or those determined to be police agents " Id at ¶29

{¶18} As this review of confrontation clause cases indicates, the Supreme Court of Ohio applies different tests to determine whether or not statements are testimonial based on the identity of the questioner and the purpose of the questioning *Siler*, at ¶28 ("Stahl is factually distinguishable from the instant case based on the identity of the interrogator and the purpose of the questioning ") If the questioner is a law enforcement officer or an agent thereof, the court applies the primary purpose test to determine whether the statements are testimonial *Siler* If the questioner is not a law enforcement officer or agent thereof, the court applies the objective witness test *Stahl*

{¶19} Thus, in the case at bar, we must first examine the identity of the questioner in order to determine whether or not the victim's statements were testimonial Appellant contends that the Child and Family Advocacy Center serves a law enforcement function and that, necessarily, its employees should be considered as police agents We disagree

{¶20} Child advocacy centers, such as the Child and Family Advocacy Center at Children's Hospital, were established in 2005 by the adoption of R C 2151 425 through 2151 428 These statutes authorize collaboration between children services agencies, local law enforcement, prosecutors, and other appropriate entities through a memorandum of understanding Local law enforcement and prosecutors are permitted to access information at the centers when investigating alleged abuse This collaboration does not make the centers' employees agents of the police when providing services to alleged victims of sexual abuse

{¶21} Although this court has not specifically addressed whether interviewers at the Child and Family Advocacy Center are police agents, we have considered challenges to the admissibility of statements made during interviews at the center in a number of cases. In *State v Edinger*, Franklin App No 05AP-31, 2006-Ohio-1527, we determined that questioning of a child by a social worker at the center did not amount to police interrogation and, therefore, the statements made in response to the questioning were nontestimonial. *Id.* at ¶82. In making that determination, we noted that (1) the center is not run or managed by any government officials, (2) that its employees are employed by Children's Hospital and not the government, (3) the social worker testified that her function in interviewing the child was solely for medical treatment and diagnosis and not to develop testimony for trial, (4) the social worker did not act at the discretion of the police, (5) although the police were permitted to watch the interview, they did not control it, and, (6) the police were not overtly present and the child did not know of their presence. *Id.*

{¶22} In *Martin*, *supra*, this court again found a child's statements made to a social worker at the center to be nontestimonial after considering the factors set forth in *Edinger*. *Id.* at ¶21. See, also, *State v Jordan*, Franklin App No 06AP-96, 2006-Ohio-6224, at ¶26 (statements made to social worker at the center were nontestimonial, where social worker not employee of the state and purpose of interview was to gather information for treatment and not to investigate alleged sexual abuse).

{¶23} Although not faced with a confrontation clause challenge, this court in *In re M.E.G.*, Franklin App No 06AP-1256, 2007-Ohio-4308, analyzed whether or not a social worker interview at the center was a subterfuge to gather information for law enforcement.

We rejected that contention. As in *Edinger*, we noted that the social worker testified that her interview was done only for medical diagnosis and treatment of the sexual abuse victim. After the interview, the social worker communicated the information she obtained to the doctor who then performed a physical examination of the child. There was no indication that law enforcement officers initiated the interview or that the child was aware that law enforcement officers were watching the interview. *Id.* at ¶¶28-29. We also noted that even though the center's policy provided for the preservation of potential evidence, such a policy was secondary to the medical examination and did not automatically convert the questioner's purpose from gathering medical evidence to one of gathering information for law enforcement. *Id.*

{¶24} Finally, this court considered another confrontation clause challenge to statements made during an interview at the center in *State v. D.H.*, Franklin App. No. 07AP-73, 2007-Ohio-5970. In *D.H.*, there were a number of people, including law enforcement officers, watching the interview in real time through a closed-circuit television. The victim was unaware that law enforcement officers were monitoring the interview. The interviewer shared the information from the interview with a medical examiner who then performed a physical examination of the victim, based in part on the information learned in the interview.

{¶25} We concluded in *D.H.* that the statements made in the interview were nontestimonial. *Id.* at ¶53. In so doing, we applied the objective witness test articulated in *Stahl* and determined that one could "reasonably conclude that the interview \* \* \* was for medical diagnosis and treatment, and not for the availability of a criminal trial." *Id.* We again noted that simply because information gathered in the interview was subsequently

used by the State does not alter the result. *Id.*, see, also, *State v. Muffart*, 116 Ohio St 3d 5, 2007-Ohio-5267, at ¶62 (noting, in finding that child statements were nontestimonial, that the "fact that the information gathered by the medical personnel in this case was subsequently used by the state does not change the fact that the statements were not made for the state's use.")

{¶26} In the present case, Otto brought her daughter to the center, law enforcement did not initiate the interview. Kerri Marshall, a licensed social worker employed by Children's Hospital, interviewed the child alone in a room. Although other people watched the interview from another room via closed-circuit television, these people did not enter the interview room and the child was unaware of their presence. There is no indication that any law enforcement officers were involved in the interview. Marshall testified that the purpose of the interview was for medical diagnosis and treatment. She told the child at the beginning of the interview that the child would be examined by a nurse after the interview.

{¶27} Following the interview, Marshall shared the information she learned with Nurse Horner, who then performed a complete physical examination of the child. Horner testified that the details Marshall provided guided her exam of the victim and was important to insure an accurate diagnosis. For example, if Marshall told Horner that the victim stated that her vagina was touched by a penis, Horner would make sure that the victim was tested for sexually transmitted diseases.

{¶28} In light of these circumstances, we conclude that Marshall did not act as an "agent of the police" when she questioned the victim. She was not an employee of the State but, rather, was employed by the hospital. She testified that her purpose in

interviewing the child was for medical diagnosis and/or treatment. She passed along the information she obtained to a nurse who used that information to guide the physical examination of the victim. Other than passive observation, there was no police involvement during the interview and the victim did not have any indication of a police presence. The fact that the interview was recorded and subsequently provided to the State for use in the prosecution of a sexual offense does not make Marshall an agent of the police or a law enforcement officer. *In re M E G*, at ¶29, cf. *Muttart*, at ¶62.

{¶29} Because Marshall was not acting as a police agent during her questioning of the child, we must apply the objective witness test to determine whether or not the child's statements were testimonial. *Stahl*, at ¶36. Under that test, a testimonial statement includes one "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.* In making this determination, a court should focus on the declarant's expectation at the time of making the statement, the intent of the questioner is only relevant if it could affect the declarant's expectations. *Id.*

{¶30} Here, there is no evidence that the child realized that her statements would be available for use at a later trial. The child was only four-years old at the time of the interview. It is highly unlikely that she realized her statements would be available for later use. *Martin*, at ¶21 (noting that it would be "highly unlikely" that a six-year old would realize that her statements were to be available for use at a later trial). The interview occurred at Children's Hospital and not a jail or police headquarters. There were no police officers or other law enforcement officials in the interview room. Marshall testified that she attempted to ask open-ended questions and avoided leading questions.

Marshall also told the child at the beginning of the interview that she would be examined by a nurse after the interview. In light of these facts, we conclude that an objective witness would not reasonably believe that the statements made in the interview would be available for use at a later trial. Accordingly, the victim's statements during the interview were nontestimonial.

{¶31} Courts in other states have found similar statements to be nontestimonial. *State v Arroyo* (Conn 2007), 935 A 2d 975, 998 (child's statements made to social worker at abuse clinic nontestimonial, where no evidence of law enforcement involvement with questioning and purpose of interview was for the child's welfare), *Seely v State* (Ark 2008), \_\_\_ S W 3d \_\_\_ (statements made to social worker at children's hospital nontestimonial where social worker not agent of government, primary purpose of interview was to define scope of medical exam, and there was no police participation in interview); *State v Krasky* (Minn 2007), 736 N W 2d 636, 641 (statements made to nurse who did not act as government actor), *People v Vigil* (Colo 2006), 127 P 3d 916, 922-925 (statements made to doctor who was part of a child protection team were nontestimonial, where purpose of questioning was for medical assistance), cf *Commonwealth v DeOliveira* (Mass 2006), 849 N E 2d 218, 225 (noting that police presence at hospital does not turn physician into agent of law enforcement)

{¶32} We recognize that courts in some states have found statements in similar situations to be testimonial because the interviewer acted as a police agent or proxy. However, the excessive amount of police involvement in those cases distinguishes them from the case at bar, where there was only passive police involvement in the interview. See, e g , *In re S R* (Pa 2007), 920 A 2d 1262, 1267 (police called in questioner, viewed

proceedings through one-way glass, conferred with questioner and had questioner prepare questions as if on direct examination), *State v Henderson* (Ks 2007), 160 P 3d 776, 789-790 (detective actively involved in investigation and sat in on interview, even asking questions), *State v Snowden* (Md 2005), 867 A 2d 314, 325-327 (detective initiated questioning and was present during questioning), *State v Contreras* (Fla 2008), 979 So 2d 869 (although law enforcement officer not in room, he was connected electronically to interviewer in order to suggest questions), *State v Bentley* (Iowa 2007), 739 N W 2d 296, 299-300 (police arranged interview, child told of police presence, and midway through interview, interviewer discussed interview with police to see if she missed anything)

{¶33} In other cases, courts have also found statements to be testimonial where the purpose of the interview was to gather evidence or to preserve or develop testimony for trial. *Snowden*, at 326 (purpose of interview to develop testimony in contemplation of later trial), *State v Mack* (Or 2004), 101 P 3d 349 (interviewer who began questioning victim when police could not do so for police to videotape statements for use at trial), *State v Hooper* (Idaho 2007), 176 P 3d 911, 917-918 (noting that primary purpose of interview, done separately and after medical assessment, was to prove past events), *Bentley* (child implored to talk because "it's just really important the police know about everything that happened"), *State v Justus* (Mo 2006), 205 S W 3d 872, 880 (interview performed to preserve testimony for trial, interviewer knew that her interview was "an official interview done for law enforcement"), *State v Blue* (N D 2006), 717 N W 2d 558, 564-565 (primary purpose of interview was to prepare for trial, "forensic interview" occurred after physical examination of victim) These cases are also not persuasive here,

because Marshall testified that the purpose of the interview was for medical diagnosis or treatment, she told the child that she would be seen by a nurse after the interview, and she related what she learned in the interview to the examining nurse

{¶34} Inherent in the duties of medical personnel seeking to help a child abuse victim is to attempt to determine what happened to the child. Such an inquiry does not mean that the medical personnel are acting as law enforcement officers whose primary purpose is to gather evidence. Here, Marshall acted without police involvement during the interview and questioned the child so that the child could be properly treated. Marshall provided the information she obtained from the child to the examining nurse, who then examined the child based on that information. The primary purpose of Marshall's interview was to gather information for the child's proper treatment and diagnosis and not to produce evidence for a future prosecution, even though such evidence may have been produced as a result of the interview. For these reasons, we find that the child's statements are not testimonial for purposes of the Confrontation Clause. Accordingly, the admission of those statements did not violate appellant's Sixth Amendment right to confrontation. Appellant's first assignment of error is overruled.

{¶35} Appellant contends in his second assignment of error that the child's interview was improperly admitted pursuant to Evid R 803(4) because the statements were not made for purposes of medical diagnosis or treatment. We disagree.

{¶36} Initially, we note that a trial court has broad discretion to determine whether a declaration should be admissible under a hearsay exception. *State v. Dever* (1992), 64 Ohio St 3d 401, 410. A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner. *State v. Finnerty* (1989), 45 Ohio St 3d 104, 107.

{¶37} This court has repeatedly determined that statements made to a social worker at the Child and Family Advocacy Center may be admissible under Evid R 803(4) if they were made for purposes of medical diagnosis or treatment. *State v Vance*, Franklin App No 06AP-1016, 2007-Ohio-4407, at ¶70, *Martin*, at ¶15-17, *M E G*, at ¶26, *In re D H*, at ¶37-48, *Edinger*, at ¶62.<sup>1</sup> The Supreme Court of Ohio also has recently held that a child's statements may be admitted pursuant to Evid R 803(4) if they were made for purposes of medical diagnosis or treatment, regardless of the child's competency to testify. *Muttart*, supra, at syllabus.

{¶38} The Supreme Court of Ohio in *Muttart* identified a number of factors that a court should consider when determining whether a child's statements were for medical diagnosis or treatment. *Id.* at ¶49. Applying those considerations, we note that Marshall testified that the purpose of the interview was for medical diagnosis or treatment and that she tried to avoid leading or suggestive questions in the interview. There was no indication of a motive to fabricate, such as a custody dispute, and the child was only four-years old. We also note that Marshall told the child at the beginning of the interview that she would be examined by a nurse after the interview. Marshall repeated all of the information she obtained in the interview to Hornor, the nurse who then examined the child. Hornor testified that she used that information to guide her physical examination of the child. The child's statements were made for purposes of medical diagnosis or treatment. The fact that other people, including law enforcement officers, watched the interview did not change that purpose. *Martin*, at ¶17.

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<sup>1</sup> Appellant's reliance on *State v Butcher*, 170 Ohio App 3d 52, 2007-Ohio-118, in support of this assignment of error is misplaced. This court has specifically rejected the holding in that case. *In re D H*, at ¶40-41. A-17

{¶39} Because the child's statements were made for the purpose of medical diagnosis or treatment, Evid R 803(4) did not prohibit the admission of the child's statements. See, also, *State v Walker*, Hamilton App No C-060910, 2007-Ohio-6337, at ¶38. The trial court did not abuse its discretion by admitting those statements. Appellant's second assignment of error is overruled.

{¶40} Appellant's third and fourth assignments of error contend that his rape conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v Thompkins* (1997), 78 Ohio St 3d 380, paragraph two of the syllabus. Therefore, we will separately discuss the appropriate standard of review for each.

{¶41} In *State v Jenks* (1991), 61 Ohio St 3d 259, the Supreme Court of Ohio delineated the role of an appellate court presented with a challenge to the sufficiency of the evidence:

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

*Id.*, at paragraph two of the syllabus.

{¶42} Whether the evidence is legally sufficient is a question of law, not fact. *Thompkins*, at 386. Indeed, in determining the sufficiency of the evidence, an appellate court must "give full play to the responsibility of the trier of fact fairly to resolve conflicts in

the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts " *Jackson v Virginia* (1979), 443 U S 307, 319, 99 S Ct 2781  
Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v Yarbrough*, 95 Ohio St 3d 227, 2002-Ohio-2126, at ¶79, *State v Thomas* (1982), 70 Ohio St 2d 79, 80 A jury verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact *State v Treesh* (2001), 90 Ohio St 3d 460, 484, *Jenks*, at 273

{¶43} In order to convict appellant of rape, the State had to prove beyond a reasonable doubt that he engaged in sexual conduct with the victim when she was less than 13 years of age R C 2907 02(A)(1)(b) Sexual conduct is defined as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex, and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another Penetration, however slight, is sufficient to complete vaginal or anal intercourse " R C 2907 01(A) It is not disputed that the victim was less than 13 years of age at the time of the offense

{¶44} In the child's interview that was played to the jury, she stated that appellant did "pee-pees" with her<sup>2</sup> She said that this was the reason appellant was now in jail She said that appellant took his boxers off and touched his pee-pee with her pee-pee and that she did not like the way it felt. She also stated that appellant's pee-pee went inside

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<sup>2</sup> "Pee-pees" was the child's term for a person's private parts

her pee-pee This evidence alone would be sufficient to prove that appellant engaged in sexual conduct with the child.

{¶45} Aside from the child's statements, however, there was additional evidence of appellant's conduct Otto testified that the door of her bedroom was locked with appellant and her daughter inside the room When he unlocked the door, Otto saw appellant's boxers were not on correctly She then pulled a blanket off her daughter and saw that her daughter's underwear was down around her ankles Hornor, the nurse who examined the child, observed recent abrasions on the child's hymen, which indicated to her that something penetrated the child's labia

{¶46} The State presented sufficient evidence for a rational trier of fact to have found the essential elements of rape by vaginal penetration proven beyond a reasonable doubt See *State v Roberts*, Hamilton App No C-040547, 2005-Ohio-6391, at ¶62 (evidence of penetration of labia sufficient to show vaginal penetration), *State v Schuster*, Lucas App No L-05-1365, 2007-Ohio-3463, at ¶67 (same), *State v Gilbert*, Franklin App No 04AP-933, 2005-Ohio-5536, at ¶28-35 (same) Accordingly, appellant's third assignment of error is overruled

{¶47} Appellant's manifest weight of the evidence claim requires a different review The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v Brndley*, Franklin App No 01AP-926, 2002-Ohio-2425, at ¶16 When presented with a challenge to the manifest weight of the evidence, an appellate court, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly

lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered " ' *Thompkins*, supra, at 387, quoting *State v Martin* (1983), 20 Ohio App 3d 172, 175 An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction " ' Id

{¶48} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial *State v Raver*, Franklin App No 02AP-604, 2003-Ohio-958, at ¶21. The trier of fact is free to believe or disbelieve all or any of the testimony *State v Jackson* (Mar 19, 2002), Franklin App No 01AP-973, *State v Sheppard* (Oct 12, 2001), Hamilton App No C-000553 The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible *State v Williams*, Franklin App No 02AP-35, 2002-Ohio-4503, at ¶58, *State v Clarke* (Sept 25, 2001), Franklin App No 01AP-194 Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder's determination of the witnesses' credibility *State v Covington*, Franklin App No 02AP-245, 2002-Ohio-7037, at ¶28, *State v Hairston*, Franklin App No 01AP-1393, 2002-Ohio-4491, at ¶74

{¶49} Appellant claims that his conviction is against the manifest weight of the evidence because the child's statements were confused, meandering, and the product of leading questions We disagree While the child's statements, at times, are not clear, one cannot expect absolute clarity from a four-year old The child simply described what happened in her own words The questioning, while at times pointed, consisted mainly of

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open-ended questions in an attempt to encourage the child to talk and was not unduly suggestive

{¶50} Additionally, other evidence supports the child's accusation. Otto described finding her daughter alone in a bedroom with appellant with her underwear down to her ankles. A fireman who responded to the scene testified that the child told him that someone had touched her in her private parts. Finally, Nurse Hornor performed a physical examination of the child and observed fresh abrasions on her hymen. These abrasions indicated to her that something recently penetrated the child's labia.

{¶51} In light of this evidence, we cannot say that the jury clearly lost its way. Appellant's conviction for rape is not against the manifest weight of the evidence. Appellant's fourth assignment of error is overruled.

{¶52} Having overruled appellant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed*

BRYANT and SADLER, JJ , concur

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