[Cite as *State v. Waskelis*, 2012-Ohio-3030.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0035**
- vs -	:	
LARRY W. WASKELIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2011 CR 0027.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Timothy Young, Ohio Public Defender, and *Sarah G. Lopresti*, Assistant Ohio Public Defender, 250 East Broad Street, #1400, Columbus, OH 43215 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Larry W. Waskelis, appeals his convictions, following a jury trial in the Portage County Court of Common Pleas, for six counts of Rape and three counts of Gross Sexual Imposition. The issues to be determined by this court are whether a trial court must expressly declare a witness to be an expert for him to be properly qualified under Evid.R. 702; whether an expert witness may offer his opinion regarding the sexual abuse of a victim; and whether convictions for Rape and Gross

Sexual Imposition are supported by the evidence, even in the absence of physical evidence. For the following reasons, we affirm the decision of the court below.

{¶2} On January 27, 2011, Waskelis was indicted by the Portage County Grand Jury for the following: six counts of Rape, felonies of the first degree, in violation of R.C. 2907.02(A)(1)(b); two counts of Sexual Battery, felonies of the second degree, in violation of R.C. 2907.03; and three counts of Gross Sexual Imposition, felonies of the third degree, in violation of R.C. 2907.05(A)(4).

{¶3} A trial was held from April 12 to April 14, 2011. The following testimony was presented.

{¶4} On January 20, 2011, A.B., a twelve year old girl and the victim in the present case, made a phone call to 911. A recording of this call was played at the trial. During the call, A.B. stated that she was being "sexual abuse[d]" by her "stepdad," Waskelis. She stated that he "touches her in places." At one point during the call, A.B.'s mother, Jennifer Beer, spoke to the operator and stated that she was unaware that any abuse was occurring.

{¶5} In response to the 911 call, Deputy Matthew Skilton of the Portage County Sheriff's Department responded to Beer's address in Mantua, Ohio, early on the morning of January 21, 2011. Skilton explained that he went to the home to arrest Waskelis on a warrant unrelated to the allegations made by A.B. He was let into the home by Beer and placed Waskelis under arrest.

{¶6} Lieutenant Gregory Johnson, with the Portage County Sheriff's Department, interviewed Waskelis on January 21. A portion of the recorded interview was played for the jury. According to Lieutenant Johnson, Waskelis stated that he had

a good relationship with A.B. and she was "truthful." During the interview, Waskelis stated that he was unsure why the allegations were being made but did describe one incident where A.B. inquired to him about "shaving her vaginal hair." Waskelis described that, while showing her how to shave, his knuckle may have touched her vagina. According to Lieutenant Johnson, at any time Waskelis was asked about the allegations made by A.B., he stated that he could not "recall" or "remember" any such events happening.

{¶7} Carlin Johnson, a registered nurse employed by the Akron City Hospital, is also a pediatric sexual assault nurse at the Portage County Children's Advocacy Center. In this capacity, she interviews children who are suspected to have been physically or sexually abused, as well as their family members. She also performs physical exams on suspected abuse victims.

{¶8} Johnson testified regarding the events that occurred on January 25, 2011, when Beer brought A.B. to the Advocacy Center. The process Johnson followed in this case was to first talk to Beer about A.B.'s medical history. She noted that Beer did not tell her of any personality or emotional changes that had recently occurred with A.B.

{¶9} Johnson then interviewed A.B. alone. Johnson described A.B.'s demeanor during the interview as "calm" and "very matter of fact." Johnson asked A.B. who she was living with, and A.B. responded that she used to live with her mother and Waskelis but Waskelis did not live there at the present time because of this "incident." A.B. was then asked to describe the incident. A.B. explained that Waskelis "touched [her] in places he shouldn't." A.B. said that Waskelis "touched her in her bathing suit areas" while her mother was at work. She explained that it first started when she was

about seven or eight and that it continued until January 11, 2011. A.B. told Johnson that Waskelis usually put a bandana over her eyes and would then place something in her mouth, which Waskelis called "a hot dog or a sausage" and that it tasted bitter. She also described that Waskelis put that same object in her vaginal area and would also touch her "down there with his fingers." A.B. explained that Waskelis also touched her on her chest.

{¶10} After this discussion, Johnson performed a medical examination. During the examination, she used a colposcope, which has a bright light and magnifies objects. Upon completing the examination, Johnson did not notice any injuries.

{¶11} Dr. Paul McPherson, a doctor with the Akron Children's Hospital and the Medical Director of the Portage County Child Advocacy Center, testified that on January 31, 2011, he reviewed the medical reports related to A.B.'s examination and interview conducted at the Advocacy Center. He did not personally examine or meet A.B., but reviewed the record and "some images that were taken of [A.B.'s] private parts" in order to make a diagnosis. He testified that, "[w]ithin a reasonable degree of medical certainty, her evaluation is consistent with child sexual abuse." He explained that, based on his evaluation, everything in A.B.'s vaginal area "looked healthy and normal." He did not see any injuries or scarring.

{¶12} A.B., who was born on May 12, 1998, and was twelve years old at the time of the trial, testified regarding the incidents that she alleged occurred with Waskelis. She testified that Waskelis, who was dating her mother, moved into their home in approximately July of either 2004 or 2005, when she was six or seven years old. She explained that Waskelis was responsible for watching her while her mother

was at work during the day. She testified that while her mother was at work, Waskelis would rub A.B.'s chest and touch her in her vaginal area. She explained that he also played what he referred to as "a game" with her, where he put something in her mouth and she was supposed to guess what it was. During these incidents, he would put a bandana over her eyes and she could not see. She identified bandanas presented by the State as those worn by Waskelis and used to cover her eyes. She explained that these activities started occurring about a year after he moved in, at the most. These incidents occurred "whenever [A.B.] wasn't at school and mom wasn't home."

{¶13} She explained that while she was blindfolded, Waskelis would put something in her mouth, which she could not see. She stated that it "felt like * * * [a] hotdog or sausage or something." She said he would "move it around in [her] mouth." She said that he also "touched down there" with his fingers and that this hurt. She explained that these incidents lasted half an hour to 45 minutes and that they ended when the thing he put in her mouth had a "bad taste to it."

{¶14} She explained that although these incidents occurred over several years, she finally called 911 because, after she refused to participate in these incidents, Waskelis was "going to find someone different." She testified that she did not want him to "put anyone else through this."

{¶15} A.B. explained during cross-examination that she had a class about abuse in fourth grade and remembered being told to tell an adult or friend if she was being abused, but that she did not do so in this case until she made the 911 call. She explained that Waskelis did not threaten to hurt her if she told what happened but she felt if she told her mother, there might be a confrontation.

{¶16} A.B. testified that her mother and Waskelis argued over money and other problems and would sometimes break up. After these arguments, A.B. would see her mother cry. She also found out in the summer of 2010 that Waskelis had been cheating on her mother, which led to more fighting. A.B. said this made her feel upset and she did not want her mother to continue dating Waskelis.

{¶17} A.B.'s mother and Waskelis' girlfriend, Beer, testified for the defense. She explained that she was previously engaged to Waskelis, and that they had a son together. She testified that she and Waskelis had an "on and off again" relationship for seven years and they lived together, with A.B. and their son, for a majority of their relationship, which began in July of 2004. She explained that A.B. did not see her biological father often and that Waskelis would sometimes take her to father/daughter events. Beer explained that she and Waskelis fought toward the end of their relationship because he was seeing another woman.

{¶18} Beer explained that A.B. told her that she did not want her to continue dating Waskelis and that he was "using" Beer. She also explained that on the night A.B. called 911, an altercation occurred in the home which made A.B. upset.

{¶19} Beer testified that she believed that "something happened" to A.B. but she did not elaborate further.

{¶20} At the conclusion of the State's case, Waskelis' moved for acquittal, pursuant to Crim.R. 29. He did the same at the end of the trial. Both motions were denied.

{¶21} On April 15, 2011, the trial court issued a Judgment Entry, finding that the State dismissed the two counts of Sexual Battery.

{¶22} Also on April 15, 2011, the jury found Waskelis guilty of all of the remaining counts of the indictment, including all six counts of Rape. On four counts of Rape (counts three through six of the indictment), the jury made additional findings that the victim was "less than ten [years old]" at the time of the offense. Waskelis was also found guilty of three counts of Gross Sexual Imposition. The trial court memorialized the verdict in a Judgment Entry on the same date. On April 21, 2011, the trial court issued a nunc pro tunc entry on this matter, adding that the jury made findings on four of the Rape counts that the victim was under the age of ten, which was excluded from the first Entry. On May 9, 2011, the trial court issued a second nunc pro tunc entry, adding that Waskelis had renewed his motion for acquittal at the conclusion of the trial.

{¶23} On April 20, 2011, the trial court entered an Order and Journal Entry, sentencing Waskelis. A new sentencing Entry was issued on May 9, 2011, nunc pro tunc, correcting errors in the original Entry. In the May 9, 2011 Entry, the court found that Waskelis was a Tier III Sex Offender. On the first count of Rape, Waskelis was sentenced to life in prison, with eligibility for parole after ten years, with the second count of Rape merging with count one. On the third count of Rape, Waskelis was sentenced to life in prison with no parole, and count four was merged with count three. On the fifth count of Rape, Waskelis was sentenced to life in prison with parole eligibility after fifteen years, and the sixth count of Rape was merged with count five. The three counts of Gross Sexual Imposition were merged with the sentence in count one of Rape. All sentences were to be served consecutively.

{¶24} On December 27, 2011, Waskelis filed a postconviction motion, a Petition to Vacate and Set Aside Conviction and Sentence, with the trial court. The trial court stayed the hearing on those proceedings, pending Waskelis' appeal to this court.

{¶25} Waskelis timely appeals and raises the following assignments of error:

{¶26} "[1.] Appellant's convictions of multiple counts of Rape and Gross Sexual Imposition were contrary to the manifest weight of the evidence.

{¶27} "[2.] The trial court erred in failing to grant appellant's Criminal Rule 29 motion to dismiss the Rape and Gross Sexual Imposition charges at the conclusion of the state's case and at the conclusion of the evidence."

{¶28} Subsequent to filing his initial brief with this court, Waskelis requested the appointment of new appellate counsel. On October 31, 2011, this court allowed Waskelis' original appellate counsel to withdraw and appointed new counsel. New counsel was granted leave to file a supplemental brief. In the supplemental brief, Waskelis' new counsel raised three additional assignments of error.

{¶29} "[3.] The trial court committed plain error and denied Mr. Waskelis his constitutional rights to due process of law and a fair trial by allowing expert medical opinion to be rendered without any physical medical evidence as to the alleged abuse and when it allowed the expert to testify as to the veracity of the alleged victim, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

{¶30} "[4.] The trial court committed plain error and denied Mr. Waskelis due process of law by allowing a witness not qualified as an expert to give expert testimony that improperly bolstered his own testimony in violation of the Fifth and Fourteenth

Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

{¶31} "[5.] Mr. Waskelis was deprived of effective assistance of counsel in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution."

{¶32} As Waskelis' first and second assignments of error address the sufficiency and manifest weight of the evidence, we will address them jointly.

{¶33} "'[S]ufficiency' is a term of art meaning that legal standard which is 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*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), quoting Black's Law Dictionary (6 Ed.1990), 1433. Essentially, "sufficiency is a test of adequacy," that challenges whether the State's evidence has created an issue for the jury to decide regarding each element of the offense. *Id.* In reviewing the sufficiency of the evidence to support a criminal conviction, "[t]he 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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶34} Weight of the evidence, in contrast to its sufficiency, involves "the inclination of the greater amount of credible evidence." (Citation omitted.) (emphasis omitted.) *Thompkins* at 387. Whereas the "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief."

(Citation omitted.) *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25. "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Id.*

{¶35} Generally, the weight to be given to the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. Thomas*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982), syllabus. When reviewing a manifest weight challenge, however, the appellate court sits as the "thirteenth juror." (Citation omitted.) *Thompkins* at 387. The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses, to determine 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." *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "Since there must be sufficient evidence to take a case to the jury, it follows that 'a finding that a conviction is supported by the *weight* of the evidence necessarily must include a finding of sufficiency.'" (Emphasis sic.) *State v. Seijo*, 11th Dist. No. 2011-A-0011, 2012-Ohio-645, ¶ 45, citing *Willoughby v. Wutchiett*, 11th Dist. No. 2002-L-165, 2004-Ohio-1177, ¶ 8.

{¶36} In order to convict Waskelis of Rape, the State was required to prove, beyond a reasonable doubt, that Waskelis "engage[d] in sexual conduct with another who is not the spouse of the offender * * * when * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." 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." R.C. 2907.01(A).

{¶37} In the present case, the parties stipulated to the birth date and the age of A.B. There is no dispute that the age element of R.C. 2907.02(A)(1)(B) was met. Regarding the remaining element, whether the parties engaged in sexual conduct, the State presented A.B.'s testimony regarding the events that occurred. Although A.B. did not actually see the object placed in her mouth, she described the object as being shaped like a hot dog or sausage, as having a "bad" or "bitter" taste, and as having something coming out of it that tasted bad. She also stated that Waskelis moved the object around in her mouth. In addition, Dr. McPherson explained that A.B.'s description was consistent with sexual abuse. Such a description is sufficient to show that fellatio occurred, which falls into the definition of sexual conduct under R.C. 2907.01(A).

{¶38} In order to convict Waskelis of Gross Sexual Imposition, the State was required to prove, beyond a reasonable doubt, that Waskelis had "sexual contact with another, not the spouse of the offender [or] cause[d] another, not the spouse of the offender, to have sexual contact with the offender" when "[t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person." R.C. 2907.05(A)(4). Sexual contact "means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶39} Regarding the conviction for Gross Sexual Imposition, the evidence is undisputed that A.B. was under the age of thirteen. As to whether sexual contact occurred, A.B.'s testimony established that on many different occasions, Waskelis touched her genital area or pubic region with his hands. She also testified that he touched her breasts on many occasions as well. These areas are included as "erogenous zones" under the sexual contact definition.

{¶40} The remaining requirement for Gross Sexual Imposition, that the touching occurred "for the purpose of sexually arousing or gratifying either person," was also proven by the State. "[I]t is sufficient to present circumstantial evidence from which the finder of fact can infer the purpose of the act was for sexual gratification; no direct evidence of the accused's mental state is required." (Citations omitted.) *State v. Hake*, 11th Dist. No. 2007-T-0091, 2008-Ohio-1332, ¶ 26. "A sexual purpose can be inferred from the nature of the act itself if a reasonable person would find that act sexually stimulating to either the offender or the victim." *State v. Tennyson*, 11th Dist. No. 98-L-219, 2001 Ohio App. LEXIS 5211, *8 (Nov. 21, 2001), citing *In re Bloxson*, 11th Dist. No. 97-G-2062, 1998 Ohio App. LEXIS 420, *4 (Feb. 6, 1998).

{¶41} In the present matter, we find that the State proved that Waskelis touched A.B. for the intention of arousal or gratification. He purposely touched her on numerous occasions in both her chest and genital areas, often in a course of conduct that involved other sexual acts. Such acts allow a reasonable person to infer that Waskelis was sexually stimulated or gratified under R.C. 2907.01(B). *See Bloxson* at *5 (evidence that the defendant touched a female's buttocks was "more than adequate to support the inference that appellant did so for the purpose of sexually gratifying himself"). The fact

that this conduct occurred on more than one occasion further supports the evidence that the incidents were intentional and not accidental, as Waskelis asserted. *See In re Whitlock*, 11th Dist. No. 2008-A-0018, 2008-Ohio-4672, ¶ 24 (testimony that the touching of the victim occurred twice supported the inference that it was for the purpose of sexual gratification).

{¶42} The convictions are also supported by the manifest weight of the evidence. A.B.'s statement to Nurse Johnson and her testimony established that both sexual conduct and sexual contact occurred on many occasions, as described above. This testimony was further supported by Dr. McPherson, who described the evidence as being consistent with sexual abuse. The State also presented into evidence bandanas belonging to Waskelis, which reinforced A.B.'s version of the events, that she was blindfolded and then forced to participate in fellatio. Such evidence supports a finding that Waskelis' conviction was not against the weight of the evidence.

{¶43} Waskelis also raises several specific arguments in support of his contention that his conviction was not supported by the weight of the evidence. First, he asserts that there were conflicts in the evidence and the testimony. He asserts that A.B. did not act like someone who was sexually abused, acted calm, and did not tell anyone about the abuse, including her mother, for several years.

{¶44} The credibility of A.B.'s testimony is an issue for the finder of fact. *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986) (when examining witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact"); *State v. Hall*, 11th Dist. No. 2005-A-0007, 2006-Ohio-

1446, ¶ 31 (when a "trier of fact chose to believe appellee's witnesses over appellant's testimony," the verdict was not against the manifest weight of the evidence). Based on the evidence presented, the jury could properly determine that A.B. was credible. A.B. told a consistent story both during trial and in the interview with Nurse Johnson, with the same or similar version of the events given on both occasions. As noted by Dr. McPherson, the testimony and the record were consistent with sexual abuse. Moreover, A.B. gave a description of the events that occurred in a manner that appears to accurately describe sexual activity or conduct. The fact that A.B. may have been calm is not enough to find that the jury made an error, and, as noted above, such an evaluation of A.B.'s demeanor was for the jury to make.

{¶45} Although Waskelis argues that A.B.'s delay in reporting the incidents was suspicious, the testimony presented by Dr. McPherson at trial established that such a delay can be explained in child abuse cases. He explained that a delay in reporting an incident often occurs when the abuser is a "trusted caregiver," such as a parent or a stepparent. In the present matter, A.B. explained that Waskelis was her caregiver, as he was frequently left to watch her while her mother was at work and lived in her home. There was also a special relationship between the two, as A.B. referred to Waskelis as her "stepfather," although Waskelis and Beer were not married. It was a matter for the jury to determine whether A.B.'s reasons for failing to report the incidents were credible.

{¶46} Waskelis also argues that the State did not present any physical or medical evidence supporting the verdict on either the Rape or Gross Sexual Imposition charges. The State, however, is not required to present such evidence in order to convict Waskelis of the foregoing charges. *State v. Henderson*, 11th Dist. No. 2001-T-

0047, 2002-Ohio-6715, ¶ 36 (in a rape case, the State may prove that sexual conduct occurred "through either physical evidence and/or witness testimony"); *In re N.Z.*, 11th Dist. Nos. 2010-L-023, 2010-L-035, and 2010-L-041, 2011-Ohio-6845, ¶ 79 (no physical evidence is required to corroborate a victim's testimony in a rape case, and the sole testimony of the victim can support a conviction). As explained by Dr. McPherson in his testimony, physical evidence of rape is often not present. The testimony of A.B., as well as the testimony given by Nurse Johnson and Dr. McPherson, could establish the charges without the support of medical or physical evidence.

{¶47} Waskelis finally argues that there was no evidence that any touching of A.B. was done for the purpose of sexual gratification. However, as outlined above, the evidence supported a finding that Waskelis' actions were taken with the intent of achieving sexual arousal or gratification.

{¶48} The first and second assignments of error are without merit.

{¶49} In his third assignment of error, Waskelis argues that the trial court erred by allowing Dr. McPherson to testify that, "within a reasonable degree of medical certainty, [A.B.'s] evaluation is consistent with child sexual abuse." He asserts that an expert medical opinion cannot be rendered without physical evidence and that an expert cannot testify as to the veracity of the victim.

{¶50} Waskelis concedes that plain error is the applicable standard in this case, as trial counsel failed to object to the admission of the testimony of Dr. McPherson.

{¶51} Crim.R. 52(B) provides: "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." An alleged error is plain error only if the error is obvious, and "but for the error, the outcome

of the trial clearly would have been otherwise." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus.

{¶52} Regarding the issue of expert testimony in child sexual abuse cases, the Ohio Supreme Court has held that "the use of expert testimony is perfectly proper [in cases involving alleged child abuse] and such experts are not limited to just persons with scientific or technical knowledge but also include other persons with 'specialized knowledge' gained through experience, training or education." *State v. Boston*, 46 Ohio St.3d 108, 126, 545 N.E.2d 1220 (1989), overruled, in part, on other grounds by *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944. "[A]n expert's opinion testimony on whether there was sexual abuse would aid jurors in making their decision and is, therefore, admissible pursuant to Evid.R. 702 and 704." *Id.* at 128. However, "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *Id.* at syllabus.

{¶53} In a later decision, the Ohio Supreme Court affirmed its position that it is permissible for an expert to convey the belief that a child was actually abused to the jury. *State v. Stowers*, 81 Ohio St.3d 260, 261, 690 N.E.2d 881 (1990). In *Stowers*, the Court recognized a distinction "between expert testimony that a child witness is telling the truth and evidence which bolsters a child's credibility insofar as it supports the prosecution's efforts to prove that a child *has* been abused." (Emphasis sic.) *Id.* at 262. While the former is the sort of testimony prohibited by *Boston*, the other type, "which is additional support for the truth of the *facts testified to* by the child, or which assists the fact finder in assessing the child's veracity," does not violate this prohibition. (Emphasis sic.) *Id.* at 262-263.

{¶54} "In practice, the decision of whether to allow an expert to offer an opinion on the issue of whether abuse has occurred often turns on the foundation of the expert's opinion. While there must not always be 'physical evidence present before an expert can render a valid opinion on whether a child has been sexually abused * * *, there simply has to be something other than the child's unsupported allegations that assisted the expert in arriving at his or her opinion.'" *State v. Britta*, 11th Dist. No. 2009-L-017, 2010-Ohio-971, ¶ 69, citing *State v. Schewirey*, 7th Dist. No. 05 MA 155, 2006-Ohio-7054, ¶ 48. This includes physical evidence, "but could also involve the expert's observations of the child's demeanor or other indicators tending to show the presence of sexual abuse." *Id.,* citing *Schewirey* at ¶ 48. This court has found this additional factor may include testimony of expert witnesses based on "their training, experience, and interactions with other abused children." *State v. Poling*, 11th Dist. No. 2008-A-0071, 2010-Ohio-1155, ¶ 48.

{¶55} In the present case, Dr. McPherson did testify that, "within a reasonable degree of medical certainty, [A.B's] evaluation is consistent with child sexual abuse." He further explained what led to his diagnosis in the case. He testified that A.B. gave a detailed account of the events that occurred. He stated that she described what happened in "sensory motor detail," meaning that she was able to describe "how things felt, what she felt inside her, [and] what she felt of the person that was doing it to her." He testified that such a description was consistent with one that would be given by a person who actually experienced abuse.

{¶56} This testimony provides an adequate foundation to admit Dr. McPherson's opinion "that sexual abuse was probable." Such opinion testimony was expressly

sanctioned by the Ohio Supreme Court in *Boston* and *Stowers*. The opinion offered by Dr. McPherson was based on his training and experience and his review of the interview and physical examination of A.B. The testimony expresses Dr. McPherson's professional opinion that A.B. was actually abused without directly commenting on A.B.'s veracity. The fact that the opinion supports the veracity of A.B.'s testimony and may have assisted the jury in concluding that A.B.'s testimony was true does not render the opinion inadmissible. *Britta* at ¶ 76, citing *Stowers*, 81 Ohio St.3d at 262-263; *State v. Eben*, 81 Ohio App.3d 341, 344, 610 N.E.2d 1109 (4th Dist.1992) (a doctor's testimony that the victim was sexually abused "is precisely the sort of expert testimony sanctioned by the Supreme Court in *Boston*").

{¶57} This court has previously found that an experienced medical professional's conclusion that sexual abuse was probable, supported by testimony about the detailed description given by the victim regarding abuse, was admissible testimony. *Britta*, 2010-Ohio-971, at ¶ 73, 76. Provided that the witness has experience regarding abuse victims and the testimony given does not directly comment on the truth of the victim's statements, it is not prohibited under *Boston*. *See Poling* at ¶ 48; *State v. Barnes*, 12th Dist. No. CA2010-06-009, 2011-Ohio-5226, ¶ 57 (statements that the victim's assertions are "*consistent* with sexual contact" are not prohibited under *Boston*, as they do not directly render an opinion as to a witness' veracity).

{¶58} Waskelis asserts that this court should adopt the court's finding in *State v. Knight*, 8th Dist. No. 87737, 2006-Ohio-6437, that permitting the introduction of an expert's opinion which relies only on a child's statements is improper. This court has not followed such reasoning, as discussed in the cases above. *See Britta* at ¶ 78. Dr.

McPherson did not rely only on the testimony of the child but also on his past experience, training, and a review of the entire record, including the medical record and history. Based on the foregoing, we find that the testimony of Dr. McPherson regarding the occurrence of sexual abuse was admissible.

{¶59} Dr. McPherson also testified regarding the delay in reporting and explained that it is uncommon to find physical evidence of sexual abuse. Both types of expert testimony have also been found to be admissible. *Britta* at ¶ 74 (allowing testimony relating to the expectations of finding physical indications of sexual abuse); *Stowers* at 263 (testimony regarding delayed disclosure in sexual abuse cases is admissible).

{¶60} The third assignment of error is without merit.

{¶61} In his fourth assignment of error, Waskelis argues that the trial court failed to qualify Dr. McPherson as an expert witness, pursuant to Evid.R. 702 and, therefore, his statement as to his diagnosis of sexual abuse was inadmissible.

{¶62} A trial court's determination as to whether a person qualifies as an expert witness will not be overturned absent an abuse of discretion. *State v. Rock*, 11th Dist. No. 2004-L-127, 2005-Ohio-6285, ¶ 74. We initially note that, in the present matter, trial counsel failed to object to the admission of the expert testimony. Due to this failure, we will apply the plain error standard outlined above.

{¶63} Pursuant to Evid.R. 702, a witness may testify as an expert if "[t]he witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons, * * * [t]he witness is qualified as an expert by specialized knowledge, skill, experience,

training, or education regarding the subject matter of the testimony," and "[t]he witness' testimony is based on reliable scientific, technical, or other specialized information."

{¶64} In the present matter, the trial court did not explicitly state that Dr. McPherson was qualified as an expert witness. However, a trial court is not required to expressly state on the record that the witness is qualified as an expert prior to that witness offering opinion testimony. *State v. Skinner*, 2nd Dist. No. 11704, 1990 Ohio App. LEXIS 4178, *18 (Sept. 26, 1990) (a trial court is not required to specifically state on the record that a witness is qualified to testify as an expert); *State v. Shively*, 6th Dist. No. L-87-412, 1989 Ohio App. LEXIS 1798, *6 (May 19, 1989) ("it is not incumbent upon a trial judge to specifically say that a witness is an expert witness before he or she may offer opinion testimony"); *State v. Washington*, 1st Dist. No. C-950371, 1996 Ohio App. LEXIS 1441, *14 (Apr. 10, 1996).

{¶65} The evidence in the record shows that the trial court did not commit plain error by allowing Dr. McPherson to offer testimony regarding his opinion or diagnosis of A.B. Although the court did not specifically state that he was an expert witness, the State established that Dr. McPherson possesses the requisite skill, experience, training, and education required to qualify him as an expert witness who could offer his opinion pursuant to Evid.R. 702. His testimony established that he was the medical director of two separate Child Advocacy Centers, is a licensed physician who completed medical school in 2002, he specializes in child abuse and neglect, and has been working in that field for several years. He also testified that he was Board Certified in Pediatrics and is board eligible for a specialty in child abuse pediatrics. He explained that he evaluates approximately 400 children per year for suspected child abuse and child sexual abuse.

Such evidence supports the court's allowance of the testimony and does not render its admission plain error.

{¶66} The fourth assignment of error is without merit.

{¶67} In his fifth assignment of error, Waskelis argues that trial counsel was ineffective by failing to object to "improper and prejudicial testimony," including Dr. McPherson's testimony. Waskelis essentially argues that since counsel made the errors asserted in the third and fourth assignments of error, his counsel was ineffective.

{¶68} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A threshold issue in a claim of ineffective assistance of counsel is whether there was actual error on the part of appellant's trial counsel. *State v. McCaleb*, 11th Dist. No. 2002-L-157, 2004-Ohio-5940, ¶ 92.

{¶69} As discussed in the third and fourth assignments of error, trial counsel was not ineffective for failing to object to the admission of the testimony of Dr. McPherson, since such testimony was admissible under the law. Since there was no error made by counsel, we cannot find that Waskelis had ineffective assistance of counsel or that he suffered any prejudice as a result of counsel's actions. *See Poling*, 2010-Ohio-1155, at ¶ 63 ("counsel cannot be ineffective for failing to object to admissible testimony").

{¶70} The fifth assignment of error is without merit.

{¶71} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, finding Waskelis guilty of six counts of Rape and three counts of Gross Sexual Imposition, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in part, dissents in part, with a Dissenting Opinion.

TIMOTHY P. CANNON, P.J., dissenting in part.

{¶72} I respectfully concur in part, but dissent from the majority's conclusion as to appellant's third assignment of error and, consequently, to the disposition of the instant case.

{¶73} In this case, Dr. McPherson testified that he did not make direct contact with A.B.; however, based on a review of the information she gave to a third party, he was able to make a "diagnosis." Dr. McPherson noted A.B. did not have any physical indicators—the physical exam of A.B.'s genitals appeared to be normal at the time of the evaluation. Dr. McPherson then opined that, within a reasonable degree of medical certainty, A.B.'s evaluation was consistent with child sexual abuse. Dr. McPherson explained that A.B. gave a description of the events of abuse, including sensory motor detail. Apparently, Dr. McPherson based his opinion solely on A.B.'s description of the event; yet, Dr. McPherson did not even meet with or interview the victim. Although appellant's counsel did not object to Dr. McPherson's testimony at trial, I find this

testimony to be plain error, as it was highly prejudicial and affected appellant's substantial rights.

{¶74} In *State v. Boston*, the Ohio Supreme Court held that "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *State v. Boston*, 46 Ohio St.3d 108 (1989), syllabus. The *Boston* Court noted, "the admission of [such] testimony was not only improper—it was egregious, prejudicial and constitutes reversible error." *Id*. at 128.

{¶75} In *State v. Britta*, I dissented from the opinion of the majority. *State v. Britta*, 11th Dist. No. 2009-L-017, 2010-Ohio-971. In that dissent, I recognized the Eighth Appellate District has reviewed a litany of cases where a nurse testified as expert witness and rendered an opinion as to whether a child had been sexually abused. *Id*. at ¶114. Each of these cases had similar fact patterns to *Britta*, with no physical findings and an opinion based on hearsay-laden reports. *Id*. In *State v. West*, *State v. Winterich*, *State v. Knight*, and *State v. Johnson*, the Eighth District reversed the appellants' convictions finding an expert's testimony in violation of the Ohio Supreme Court's holding in *State v. Boston*, 46 Ohio St.3d 108, 128-129 (1989). *State v. West*, 8th Dist. No. 90198, 2008-Ohio-5249; *State v. Winterich*, 8th Dist. No. 89581, 2008-Ohio-1813; *State v. Knight*, 8th Dist. No. 87737, 2006-Ohio-6437; and *State v. Johnson*, 8th Dist. No. 90961, 2008-Ohio-6657.

{¶76} Notably, in *Knight*, *supra*, the Eighth District stated, "[p]ermitting the introduction of an expert's opinion which relies solely on the child's statements is tantamount to permitting the expert to testify as to the child's veracity." *Id.* at ¶32. In a concurring opinion, Judge Corrigan observed the expert in *Knight* "only relied on the

victim's statements and her emotional state in making those statements, and whether they were consistent with statements made by similarly situated victims of abuse. These are not objectively verifiable and ultimately rest on whether the expert believed the victim." *Id*. at ¶37.

{¶77} That is precisely what occurred in this case. The holding of the majority here moves this line of cases down a new and troublesome course. First, in *Britta*, both the trial court and this court insisted the testimony of the "expert" could be used because it was not based solely on her interview with and statements from the victim, but on information from the victim's mother and other verified behavior characteristics "consistent with" the victim's account of abuse. This court found this to be an important distinction between *Britta* and the cases from the Eighth District (*Johnson*, *Knight*, *Winterich*, and *West*). In this case, there is *no* independent information, outside of the victim's statement to a third party, upon which the expert relied.

{¶78} Second, in the instant case, Dr. McPherson testified that he did not have *any* contact with the victim; he merely reviewed her statements as given to a third party. Dr. McPherson's expert opinion was nothing more than an opinion as to the veracity of a person to whom he had never met nor spoken, which is clearly impermissible under *Boston*. The majority actually agrees there has to be something more than the child's unsupported allegations that assisted the expert in formulating his opinion. It then explains: "this could include physical evidence, 'but could also involve the expert's observations of the child's demeanor or other indicators tending to show the presence of sexual abuse.'" However, in this case, there is neither physical evidence nor the expert's observation of the victim. There is simply the contention by the expert that the

child's account gave "sensory motor detail" and "how things felt," but he gleaned this information from written accounts of the victim's statements. At least the expert in *Britta* actually met the victim and interviewed her.

{¶79} Third, I agree with the majority in *State v. Stowers*, 81 Ohio St.3d 260, which held that it *is* permissible to admit testimony of an expert to explain things such as delayed disclosure and recantation of prior statements because these characteristics are consistent in some abuse victims, and it can *assist* jurors in assessing credibility. There is a significant difference between this and an opinion that the victim is telling the truth. The expert's testimony in this case went too far. There was no basis for *any* testimony to be given "to a reasonable degree of medical certainty" because there was no medical condition at issue. The only issue in this case is whether the victim was telling the truth. Allowing the doctor to opine that he is capable of rendering an expert "medical" opinion as to the veracity of someone he has never met impermissibly invades the province of the finder of fact.

{¶80} To be sure, the acts related by the victim that were perpetrated upon her were heinous and despicable. However, the instant case amounts to a credibility contest—L.B. versus the defendant. Testimony regarding the credibility of L.B. based on any degree of "medical certainty," however well intended, was improperly admitted. As the fact finder, the jury was capable of formulating this conclusion. Furthermore, without any evidence other than L.B.'s statements, the converse is equally plausible. Nothing in the record could be considered inconsistent with her fabricating these incidents. There is no testimony of unusual behavioral manifestations, unusual school performance, or any of the other numerous diverse emotional reactions of abuse

victims. The doctor's opinion testimony "to a reasonable degree of medical certainty" that sexual abuse had occurred was based solely on L.B.'s statement and was offered solely to bolster the credibility of the victim. Its admission was reversible error.

{¶81} For the foregoing reasons, I respectfully dissent.