

[Cite as *State v. Cashin*, 2009-Ohio-6419.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-367
	:	(C.P.C. No. 08CR05-3899)
Christopher E. Cashin,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 8, 2009

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Christopher E. Cashin ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas convicting him on two charges of gross sexual imposition and one charge each of rape, kidnapping, and felonious assault. For the reasons that follow, we affirm.

{¶2} On the night of April 19 and 20, 2008, P.B., who was 10 years old at the time, was staying at his Uncle Joe's house. Appellant, who was a friend of Uncle Joe's, was also at the house that night. P.B. testified at trial that he was sleeping in the basement when appellant came downstairs and removed his and P.B.'s clothes. P.B. also testified that appellant touched and licked P.B.'s "private," and then forced P.B. to touch appellant's "private." (Tr. 39-41.) P.B. further testified that appellant held him down during this time, and then threatened P.B. P.B. also testified that appellant put his hand over P.B.'s mouth when he tried to yell for help.

{¶3} The next day, P.B. went home and told his mother what had happened. Columbus police were called, and Officer Gregory Kellough responded. Officer Kellough testified that he asked P.B. some limited questions about what had happened, and that it was clear to him from P.B.'s demeanor that P.B. was nervous and upset. Officer Kellough also testified that while he was at P.B.'s house, appellant walked up to the house. Upon questioning, appellant told Officer Kellough that he is HIV positive.

{¶4} P.B. was taken to Children's Hospital to be examined. Sha Clark, a medical social worker at the hospital, testified that she interviewed P.B. Clark testified that P.B. was very nervous and anxious, and spoke softly. Clark then recounted P.B.'s description to her of the assault, including his identification of appellant as the perpetrator. Clark testified that she passed the information she had received on to the medical personnel so P.B. could receive treatment.

{¶5} Theresa Warnimont, a nurse at Children's Hospital, also testified. She explained the process for dealing with reports of sexual abuse of children and how

physical examinations of victims are conducted. Warnimont testified that she took a swab from P.B.'s neck after P.B. told her appellant had licked him there. Warnimont further testified that there was no evidence of physical or sexual assault, but that this was not outside the norm for cases such as this.

{¶6} Raman Tejwani, a forensic scientist with the Columbus police crime lab, testified that he conducted a DNA test on the swab taken from P.B.'s neck. He stated that the swab tested positive for the presence of saliva, that the major donor for the sample matched P.B.'s DNA, and that the minor donor matched appellant's DNA.

{¶7} Appellant testified on his own behalf at trial. He stated that he was not aware until he went down to the basement that P.B. was sleeping there. He further testified that when he first went to the basement, P.B. appeared to be having a nightmare, and that he woke P.B. up and then rubbed his back until he went back to sleep. He also testified that he then went back upstairs and slept on a couch.

{¶8} The jury convicted appellant on all five counts in the indictment, and further found that the victim was under 13 years of age and that force was used. The trial court imposed a sentence of life imprisonment with parole eligibility after 25 years.

{¶9} Appellant filed this appeal, asserting a single assignment of error:

I. WHEN COUNSEL'S PERFORMANCE IS DEFICIENT IN THE CONDUCT OF TRIAL COUPLED WITH PREJUDICE INURING TO THE DETRIMENT OF THE APPELLANT, HIS RIGHT TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL ARE VIOLATED CONTRA THE OHIO AND FEDERAL CONSTITUTIONS.

{¶10} In order to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate that trial counsel's representation fell below an objective standard of

reasonableness and that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In evaluating a trial counsel's performance, there is a strong presumption that all decisions fall within a wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343.

{¶11} Appellant argues that his trial counsel's conduct was deficient because counsel failed to object to the state's introduction of testimony from Clark regarding statements made by P.B. during her interview of him at the hospital. Appellant argues, among other things, that this testimony violated his constitutional right to confront the witnesses against him, citing *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354.

{¶12} In evaluating a claim of ineffective assistance of counsel based on counsel's failure to file a motion or make an objection, we must consider whether such an objection would have been meritorious. See *State v. Lott* (1990), 51 Ohio St.3d 160, 175 ("Lott claims defense counsel should have moved to suppress * * * eyewitness identification of Lott. However, Lott has not demonstrated that the trial court would have granted such a motion.").

{¶13} The first issue in this case is whether the introduction of Clark's testimony regarding her interview with P.B. violated appellant's right to confrontation under *Crawford*. In *Crawford*, the United States Supreme Court held that the introduction of out-of-court testimonial statements violates the Sixth Amendment's Confrontation Clause unless the witness who made the statements was unavailable to testify at trial, and the defendant had a prior opportunity to cross-examine the witness. *Crawford* at 53-54.

{¶14} Cases considering the issue post-*Crawford* have turned on the issue of whether the statements were testimonial or nontestimonial. See *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840. This distinction revolves around the issue of whether an objective witness would reasonably believe that the statements made would be available for use at a later trial. *Melendez-Diaz v. Massachusetts* (2009), ___ U.S. ___, 129 S.Ct. 2527, citing *Crawford* at 52. See also *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482. We have held that statements made by a victim of sexual abuse to a hospital social worker are generally not testimonial in nature for purposes of Confrontation Clause analysis. *State v. Jordan*, 10th Dist. No. 06AP-96, 2006-Ohio-6224; *State v. Martin*, 10th Dist. No. 05AP-818, 2006-Ohio-2749.

{¶15} In this case, we need not decide whether the statements made by P.B. about which Clark testified were testimonial or nontestimonial in nature. P.B. testified at trial and was therefore subject to cross-examination. When a declarant testifies at trial, the Confrontation Clause is not implicated, and therefore places no constraints on the use of prior testimonial statements. *Jordan*, citing *Crawford* at 59, fn. 9.

{¶16} Appellant also argues that Clark's testimony regarding the statements made by P.B. during their interview violated constituted inadmissible hearsay, and that counsel was ineffective for failing to object on that basis. Evid.R. 803(4) establishes a hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." This exception extends to statements made to hospital social workers, if the purpose of the statement was to help initiate

medical diagnosis or treatment. *State v. Nasser*, 10th Dist. No. 02AP-1112, 2003-Ohio-5947, ¶52. The exception also includes statements made by a child victim identifying the perpetrator of sexual abuse, as such statements assist both in treating any physical injuries and in formulating a treatment plan to address any psychological injuries. *State v. Dever*, 64 Ohio St.3d 401, 1992-Ohio-41.

{¶17} The admissibility of statements made by child victims under Evid.R. 803(4) depends on the facts and circumstances of a particular case, and includes consideration of factors such as (1) whether the child was questioned in a misleading or suggestive manner, (2) whether there is a motive to fabricate, and (3) whether the child understood the need to tell the truth. *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267. A trial court's decision on the admission of such evidence is subject to review for abuse of discretion. *Id.*

{¶18} In this case, appellant does not dispute that some of P.B.'s statements about which Clark testified were for the purpose of obtaining diagnosis and treatment. Instead, appellant argues that the form of Clark's testimony, which was a lengthy narrative, went beyond the scope of the rule's exception. However, appellant does not identify any specific examples of testimony that should not have been admitted under the rule, nor does appellant point to any of the factors set forth in *Muttart*. Thus, the trial court was within its discretion to admit Clark's testimony under Evid.R. 803(4), and trial counsel was therefore not ineffective for failing to raise a hearsay objection.

{¶19} Finally, appellant argues that his counsel should have objected to Clark's testimony regarding the statements made by P.B. during their interview on the grounds that the effect of the testimony was to bolster P.B.'s credibility with the jury. Appellant

argues that this testimony violated the general prohibition against use of expert testimony regarding the veracity of statements made by a child declarant. *State v. Boston* (1989), 46 Ohio St.3d 108, 128 (improper for a witness to testify that a child victim had not "fantasized" abuse, and had not been "programmed to make accusations").

{¶20} However, a review of Clark's testimony shows no indication that Clark was testifying as to P.B.'s veracity. Clark testified as to the substance of the statements made by P.B. during their interview, and about P.B.'s general demeanor, but did not make any direct statement expressing any opinion about whether P.B.'s statements were true. Only statements directly supporting the veracity of a child witness are prohibited under *Boston*. *State v. Rosas*, 2d Dist. No. 22424, 2009-Ohio-1404, fn. 1. Appellant does not argue that Clark's testimony directly attested to P.B.'s veracity, but instead argues that the entirety of Clark's testimony had the effect of bolstering P.B.'s credibility by repetition of the testimony P.B. had already provided. However, this type of indirect bolstering of a victim's credibility is not the same as the direct rendering of an opinion as to a victim's veracity that was involved in *Boston*. Because Clark's testimony did not include any expressions of opinion as to whether P.B. was telling the truth, her testimony regarding P.B.'s statements did not violate *Boston*, and any attempt to exclude the testimony on that basis would not have been successful.

{¶21} Because it does not appear that any objection made by appellant's trial counsel regarding Clark's testimony about statements made by P.B. during their interview would have been successful, appellant's trial counsel was not ineffective. Consequently, appellant's assignment of error is overruled.

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

Judgment affirmed.

BROWN and TYACK, JJ., concur.
