[Cite as *In re T.W.*, 2010-Ohio-77.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93239

IN RE: T.W.
A Minor Child

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL08 124970

BEFORE: Cooney, P.J., Gallagher, A.J., and Kilbane, J.

RELEASED: January 14, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, T.W., appeals the judgment of the juvenile court finding him delinquent for committing rape and committing him to the custody of the Ohio Department of Youth Services (ODYS) for an indefinite term. Finding no merit to the appeal, we affirm.

{¶ 2} This case arose in June 2008, when a complaint was filed charging thirteen-year-old T.W. with three counts of rape. At trial, the victim, ten-year-old A.M., testified that when she was eight years old, T.W. had digitally raped her and touched her breasts on numerous occasions. The trial court determined that T.W. was delinquent on one of the charges of rape and committed him to the custody of ODYS for an indefinite term consisting of a minimum of two years, maximum to the age of 21.

{¶ 3} T.W. appeals, arguing in his sole assignment of error that the trial court erred in admitting the hearsay testimony of social worker Patricia Altiere ("Altiere") and Detective Carl Lessmann ("Lessmann") as to A.M.'s prior statements.

{¶ 4} We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 567 N.E.2d 1291. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is

unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 5} A.M. testified regarding a stick-figure drawing that Altiere had used while interviewing her. Next, Altiere testified regarding the same drawing, stating that A.M. drew circles around the areas where T.W. had touched her, to which A.M. referred as "titties" and "peach." Altiere labeled the drawing accordingly. Similarly, Lessmann testified that when he showed A.M. the same drawing, she described the body parts in the same manner as she described them to Altiere.

{¶ 6} T.W. argues that the trial court's decision to admit these "hearsay" statements amounted to plain error because the statements did not meet the standards of Evid. R. 803 and 807. "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). The Ohio Supreme Court recently explained in *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, that "[p]lain error exists only if 'but for the error, the outcome of the trial clearly would have been otherwise,' and is applied 'under exceptional circumstances and only to prevent a manifest miscarriage of justice.' *State v. Long* (1978), 53 Ohio St.2d 91, 97, 7 O.O.3d 178, 372 N.E.2d 804."

{¶ 7} In the instant case, A.M.'s statements were not hearsay. They were not offered for the truth of the matter asserted but merely to identify what A.M. called these body parts.

{¶ 8} Furthermore, T.W. has not demonstrated that admission of A.M.'s prior statement constituted plain error. He has not shown that without Altiere's and Lessmann's testimony, the outcome of the trial would have been different. The trial court found A.M.'s testimony highly persuasive, stating, "The victim's testimony was very compelling, though. Very compelling. For her to come in here as scared as she was and say what occurred, that was very believable."

{¶ 9} Finding no plain error or abuse of discretion, we overrule the sole assignment of error.

{¶ 10} Judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution. The finding of delinquency having been affirmed, any bail or stay of execution pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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COLLEEN CONWAY COONEY, PRESIDING JUDGE

MARY EILEEN KILBANE, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS WITH SEPARATE OPINION.

SEAN C. GALLAGHER, A.J., CONCURRING:

{¶ 11} I concur with the majority. In my view, Evid.R. 807 is not applicable to the facts in this case. The victim testified in open court and was cross-examined regarding her statements. The issue here is whether the admission of testimony by the social worker and police officer improperly "bolstered" the victim's testimony or was used improperly "to prove the truth of the matter asserted"; however, regardless of the nature of this testimony, I would find the admission of such testimony did not reach the level of plain error.

{¶ 12} Under Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Plain error exists only if but for the error, the outcome of the trial clearly would have been otherwise, and is applied under exceptional circumstances and only to prevent a manifest miscarriage of justice." (Citation omitted.) *State v. Harrison*, 122 Ohio St.3d 512, 522, 2009-Ohio-3547, 912 N.E.2d 1106.

{¶ 13} Even if the victim's descriptions of abuse offered by both the social worker and the police officer are viewed as hearsay, they do not amount to plain

error. Social workers are responsible for determining if an alleged incident requires reporting to an appropriate investigative agency. The questioning of the victim and the creation and use of a diagram were part of that process. Conversely, law enforcement officers are charged with investigating allegations of criminal wrongdoing. Assembling information obtained from the social worker and, likewise, questioning the victim are also part of that process.

{¶ 14} In this case, the testimony relating to the victim's responses to these investigative efforts should be viewed in light of the fact that the victim testified directly about these statements and was subject to cross-examination. Further, both the social worker and the police officer appeared in open court and were fully cross-examined about their respective investigations. The testimony concerning the victim's statements was only a small part of the collective evidence offered against the appellant.

{¶ 15} For these reasons, I would find the admission of this testimony did not amount to plain error.