[Cite as *In re. T. A. F.*, 2010-Ohio-3000.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

IN RE: T. A. F.	C.A. No. 09CA0046-M
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 2008 04 DQ 0340

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

MOORE, Judge.

{¶1} Appellant, T.A.F., appeals from the judgment of the Medina County Court of Common Pleas, Juvenile Division. This Court affirms.

I.

{¶2} On April, 29, 2008, a complaint was filed in the Medina County Court of Common Pleas, Juvenile Division, alleging that T.A.F. was a delinquent child by reason of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree if committed by an adult. The complaint alleged that the incident occurred on March 14, 2008.

{¶3} Due to the victim's age, a competency hearing was held prior to the adjudicatory hearing. As a result of that hearing, the trial judge found that the victim was incompetent to testify in court. The trial judge found that "C.J. lacks the intellectual capacity and emotional maturity to be competent as a witness in a court. *** The Court cannot say, based upon the

examination, that C.J. is capable of receiving just impressions of fact, retaining those impressions and accurately relating those facts to questions asked of her."

{¶4} T.A.F. entered a denial of the charge and on November 12, 2008, the magistrate held an adjudicatory hearing.

{¶5} At the hearing, Daphne Abrams testified that the victim, C.J., is her daughter. T.A.F. was the best friend of Abrams' son, K.S., and she considered him to be another son. T.A.F. was typically over at Abrams' house four or more days per week. On March 14, 2008, T.A.F. came over even though K.S. was spending the night at another friend's house. He told Abrams that his dad was going to call her at 8:00 p.m. because T.A.F. told his father he would be at K.S.'s house. Abrams told him to pass the time in K.S.'s room, which was in the basement of the home. Abrams was upstairs on the first floor completing homework assignments at her computer while T.A.F. used K.S.'s computer downstairs. C.J., who was three years old at the time, wanted to watch a movie that was kept in K.S.'s room. T.A.F. told Abrams that he did not mind if C.J. watched the movie downstairs. Abrams occasionally checked on C.J. and never heard any suspicious sounds from K.S.'s room. When the movie was over, however, and Abrams was walking C.J. upstairs, C.J. stated that T.A.F. "touched his peanut on my pee-pee." Abrams questioned T.A.F. and noticed that C.J.'s underwear was on incorrectly at that time. She sent T.A.F. home and called the police.

{¶6} C.J. was examined by a doctor at Akron Children's Hospital. The doctor examined her with a blacklight but did not perform a rape kit. A detective and police officer from the Wadsworth Police Department questioned T.A.F. early the next morning. T.A.F. repeated the explanation he gave to Abrams, that he had played a tickle game with C.J. and that when he tossed her in the air her underwear and pants came off completely.

{¶7} The magistrate found T.A.F. delinquent by reason of gross sexual imposition. T.A.F. timely filed objections to the magistrate's decision. The trial judge overruled the objections.

{¶8} T.A.F. timely filed a notice of appeal, raising three assignments of error for our review. We have rearranged his assignments of error in order to facilitate our discussion.

II.

ASSIGNMENT OF ERROR II

> "THE JUVENILE COURT ERRED TO THE PREJUDICE OF [T.A.F.] BY INCORRECTLY ADMITTING AT THE ADJUDICATORY HEARING, OVER [T.A.F.]'S OBJECTIONS, THE STATEMENTS OF THE THREE YEAR-OLD ALLEGED VICTIM TO DR. LESURE, A PSYCHOLOGIST. [SIC] AS 'STATEMENTS FOR THE PURPOSE OF MEDICAL DIAGNOSIS OR TREATMENT' UNDER EVID.R. 803(4), WHERE THE STATE FAILED TO DEMONSTRATE THE ALLEGED VICTIM'S MOTIVATION FOR PARTICIPATING IN THOSE INTERVIEWS WITH DR[.] LESURE AND THAT THE VICTIM EVEN UNDERSTOOD THE PURPOSE OF THOSE INTERVIEWS."

ASSIGNMENT OF ERROR I

> "THE JUVENILE COURT ERRED TO THE PREJUDICE OF [T.A.F.] BY INCORRECTLY ADMITTING AT THE ADJUDICATORY HEARING, OVER [T.A.F.]'S OBJECTIONS, THE STATEMENTS OF THE THREE YEAR-OLD ALLEGED VICTIM TO HER MOTHER AS AN 'EXCITED UTTERANCE' UNDER EVID.R. 803(2), WHERE THE JUVENILE COURT PREVIOUSLY FOUND THE ALLEGED VICTIM INCOMPETENT TO TESTIFY AT THAT HEARING AND WHERE THE STATEMENTS THEMSELVES DID NOT QUALIFY AS EXCITED UTTERANCES."

{¶9} In his second assignment of error, T.A.F. contends that the juvenile court erred in admitting the statements made by the victim to a psychologist under the medical diagnosis or treatment exception to the hearsay rule because the State failed to demonstrate the victim's motivation for participating in the medical interviews or that she even understood the purpose of those interviews. In his first assignment of error, T.A.F. contends that the juvenile court erred by

admitting the victim's statements to her mother under the excited utterance exception to the hearsay rule because the victim was previously found incompetent to testify and the statements themselves did not qualify as excited utterances. We disagree.

{¶10} In reviewing T.A.F.'s objections, the court below conducted an independent review of the record pursuant to Juv.R. 40. See Juv.R. 40(D)(4)(d) ("In ruling on objections, the court shall undertake an independent review as to the objected matters[.]"). This Court has previously set forth its standard of review in appeals from a trial court's independent review and adoption of a magistrate's decision.

{¶11} Generally, this Court reviews a trial court's action with respect to a magistrate's decision for an abuse of discretion. *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. In so doing however, we consider the trial court's action with reference to the nature of the underlying matter. *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. A trial court has broad discretion in considering the surrounding circumstances and determining whether a child's out-of-court declaration is admissible under the hearsay exception. *State v. Dever* (1992), 64 Ohio St.3d 401, 410.

{¶12} With regard to the statements made to Dr. LeSure, the magistrate and the trial judge each relied upon *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, in admitting the testimony repeating C.J.'s statements pursuant to the hearsay exception found in Evid.R. 803(4). T.A.F., however, cites *In re Corry M.* (1999), 134 Ohio App.3d 274, for the proposition that,

because the State did not demonstrate C.J.'s motivation for participating in Dr. LeSure's interviews or that she understood the purpose of the interviews, her statements did not qualify for admission pursuant to Evid.R. 803(4). T.A.F. contends that the selfish-interest rationale does not apply to C.J., who was unlikely to comprehend at the time that her wellbeing was dependent upon truthful interaction with Dr. LeSure. T.A.F. also contends that the trial court's finding that C.J. was incompetent to testify necessarily means she was unable to communicate truthfully so as to assist in her course of treatment.

{¶13} In *Muttart*, the Supreme Court of Ohio held that

> "regardless of whether a child less than ten years old has been determined to be competent to testify pursuant to Evid.R. 601, the child's statements may be admitted at trial as an exception to the hearsay rule pursuant to Evid.R. 803(4) if they were made for purposes of medical diagnosis or treatment." (Citation omitted.) *Muttart* at ¶46.

{¶14} The *Muttart* court observed that the "presumption of reliability in the medical hearsay exception depends not only on the selfish-motive doctrine, but also on the 'professional-reliance factor.'" *In re I.W. & S.W.*, 9th Dist. Nos. 07CA0056, 07CA0057, 2008-Ohio-2492, at ¶14, citing *Muttart* at ¶40.

> "The general reliance upon 'subjective' facts by the medical profession and the ability of its members to evaluate the accuracy of statements made to them is considered sufficient protection against contrived symptoms. Within the medical profession, the analysis of the rule appears to be that facts reliable enough to be relied on in reaching a diagnosis have sufficient trustworthiness to satisfy hearsay concerns. Although physicians and psychotherapists are not infallible when diagnosing abuse, we believe that their education, training, experience, and expertise make them at least as well equipped as judges to detect and consider those possibilities. To the extent that the applicability of the selfish-motive doctrine is limited with respect to young children, the presumption of reliability is more heavily dependent upon the professional-reliance factor." (Internal citations and quotations omitted.) *In re I.W. & S.W.* at ¶14.

{¶15} *Muttart* also provided a non-exhaustive list of matters for consideration by trial courts of the purpose of the child's statements:

> "(1) whether the child was questioned in a leading or suggestive manner; (2) whether there is a motive to fabricate, such as a pending legal proceeding such as a bitter custody battle; and (3) whether the child understood the need to tell the physician the truth. In addition, the court may be guided by the age of the child making the statements, which might suggest the absence or presence of an ability to fabricate, and the consistency of her declarations. In addition, the court should be aware of the manner in which a physician or other medical provider elicited or pursued a disclosure of abuse by a child victim, as shown by evidence of the proper protocol for interviewing children alleging sexual abuse." (Internal quotations and citations omitted.) *Muttart* at ¶49.

{¶16} In this case, the magistrate qualified Dr. LeSure as an expert in the area of child psychology, specifically child-sex-abuse cases. Dr. LeSure estimated that she had testified in fifty cases and had treated hundreds of children. Additionally, Dr. LeSure described her meetings with C.J. and testified that she asked C.J. to explain why she was meeting with her. C.J. stated that she was there because of T.A.F. Dr. LeSure testified over objection that C.J. stated that, "He touched his peanut to my pee-pee." Dr. LeSure testified that her appointments with C.J. were for the purpose of diagnosis and treatment and that she eventually diagnosed C.J. with an adjustment disorder. There is no indication that Dr. LeSure was unable to critically evaluate any statements made to her in the context of diagnosing and treating C.J.

{¶17} In evaluating the purpose of C.J.'s statements, the magistrate questioned Dr. LeSure to ensure that C.J. was not improperly influenced by her mother's statements or by the use of leading questioning during her sessions. There is no relevant custody dispute or other legal matter. In fact, Abrams considered T.A.F. to be like another son. On cross-examination, Dr. LeSure admitted that any of mother's statements made during the month between the incident and C.J.'s first psychological evaluation session could have influenced C.J. C.J.'s statements, however, remained consistent throughout the investigation and her treatment. Further, before asking her any substantive questions Dr. LeSure asked C.J. if she knew why she

was there. Dr. LeSure also emphasized that what C.J. told her could not be a secret if it has to do with being hurt or hurting other people.

{¶18} T.A.F.'s final contention that C.J.'s inability to communicate truthfully in order to provide competent trial testimony made her incapable of assisting in her course of treatment is equally unavailing. We note that although "an incompetency ruling is a declaration that the witness is incapable of understanding an oath, or liable to give an incoherent statement as to the subject and cannot properly communicate to the [factfinder], it does not make for a conclusion that all out-of-court statements are per se inadmissible when a witness is declared incompetent." (Citation omitted.) *In re D.L.*, 8th Dist. No. 84643, 2005-Ohio-2320, at ¶28. *Muttart* specifically held that a child's competency is irrelevant for the purposes of Evid.R. 803(4). *Muttart* at ¶46. C.J.'s statements remained consistent throughout the investigation and treatment and her statement was corroborated by Abrams' testimony that C.J.'s underwear was on backwards with her waist through one leg hole, a leg through the other leg hole and her other leg through the waist opening. Accordingly, we cannot say that, under the requirements of *Muttart*, the trial court abused its discretion in overruling T.A.F.'s objection to the magistrate's admission of C.J.'s statements under Evid.R. 803(4). *Blakemore*, 5 Ohio St.3d at 219.

{¶19} The magistrate also allowed the admission of C.J.'s virtually identical statement made to Abrams immediately after the incident to the effect that "[T.A.F.] touched his peanut to my pee-pee." Assuming without deciding that this statement was inadmissible, the admission of C.J.'s statements to her mother constituted harmless error. "Harmless error *** includes '[a]ny error, defect, irregularity, or variance which does not affect substantial rights' and shall, therefore, 'be disregarded.' Crim .R. 52(A). Harmless error, by definition, would have no impact on the outcome of the trial." *State v. Bullard*, 9th Dist. No. 08CA0034, 2009-Ohio-1826,

at ¶10. In this case, C.J.'s nearly identical statements were repeated to the trier of fact via Dr. LeSure and Abrams. Because we have determined that the statements were properly admitted through Dr. LeSure, any error in admitting the statements through Abrams was harmless.

{¶20} Accordingly, T.A.F.'s first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

> "THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JUVENILE COURT'S FINDING AND ADJUDICATION OF DELINQUENCY-GSI, AND [T.A.F.]'S ADJUDICATION FOR DELINQUENCY-GSI WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶21} In his third assignment of error, T.A.F. contends that his adjudication of delinquency by way of gross sexual imposition was premised upon insufficient evidence and that his adjudication of delinquency by way of gross sexual imposition was against the manifest weight of the evidence. We disagree.

{¶22} It is well established that proceedings in juvenile court are civil in nature. *In re Agler* (1969), 19 Ohio St.2d 70, 74. However, due to the inherent criminal aspects of delinquency proceedings, the state must prove juvenile delinquency beyond a reasonable doubt.

> "Whatever their label, juvenile delinquency laws feature inherently criminal aspects that we cannot ignore. See [*In re Anderson* (2001), 92 Ohio St.3d 63, 65-66.] For this reason, numerous constitutional safeguards normally reserved for criminal prosecutions are equally applicable to juvenile delinquency proceedings. Id. at 66, citing *In re Gault*, 387 U.S. 1, 31-57 [] (holding that various Fifth and Sixth Amendment protections apply to juvenile proceedings), and *In re Winship* (1970), 397 U.S. 358, 365-368 (holding that the state must prove juvenile delinquency beyond a reasonable doubt)[.]" *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, at ¶26.

{¶23} To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "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 crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶24} T.A.F.'s sufficiency argument is predicated on the belief that the trial court erroneously admitted C.J.'s hearsay declarations and that, had the statements been properly omitted, the evidence at trial would have been insufficient to adjudicate him delinquent because only his explanation of events would have been before the juvenile court. Even if the magistrate had erroneously admitted C.J.'s hearsay declarations, on appellate review we must consider all of the evidence admitted at trial, including improperly admitted evidence, when determining whether the state met its burden of proof. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, at ¶19. Accordingly, we review the sufficiency of the evidence in this case based on all of the evidence admitted at the adjudicatory hearing.

{¶25} T.A.F. was adjudicated delinquent by reason of gross sexual imposition in violation of R.C. 2907.05(A)(4). The statute provides, in pertinent part, that:

> "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> "***
>
> "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶26} "Sexual contact," as defined by R.C. 2907.01(B), 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."

> "The statute does not define 'sexually arousing or gratifying.' This Court has held that the trier of fact must infer from the evidence whether the defendant's purpose in touching the victim was to achieve sexual arousal or gratification for either person. In making its decision, the trier of fact may consider the type, nature and circumstances of the contact, along with the personality of the defendant." (Internal quotation and citation omitted.) *State v. Morgan*, 9th Dist. No. 07CA0124-M, 2008-Ohio-5530, at ¶16.

{¶27} The magistrate admitted C.J.'s statement to Dr. LeSure that T.A.F. "touched his peanut to my pee-pee." Under R.C. 2907.01(B), such contact constitutes sexual contact if done for the purpose of sexually arousing or gratifying either person. The contact took place while T.A.F. and C.J. were alone in a basement bedroom and involved skin-on-skin contact, evidenced by the fact that C.J.'s underwear was on incorrectly when Abrams brought her upstairs. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of gross sexual imposition proven beyond a reasonable doubt. *Jenks*, 61 Ohio St.3d at paragraph two of the syllabus.

{¶28} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. CA19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine

> whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id

{¶29} In this case, Dr. LeSure testified to C.J.'s statement that T.A.F. "touched his peanut to my pee-pee." The State also introduced Exhibit 3, a picture C.J. drew with Dr. LeSure, on which C.J. drew an "X" in the genital area and referred to that area as her "pee-pee." Abrams testified that C.J. regularly used the word "peanut" in place of "penis." According to Abrams, the incident occurred during the evening of March 14, 2008. Abrams also testified that C.J. was four years old at the time of trial and that she was born on May 15, 2004. C.J. reported to Abrams what T.A.F. had done. Abrams questioned T.A.F. and checked C.J.'s underwear. Abrams testified that under C.J.'s sweatpants her underwear was on inside out, backwards and through her legs – which, upon questioning from the magistrate, she clarified meant that one leg hole was around C.J.'s waist, while one of C.J.'s legs was through the waist opening and the other leg was through the second leg hole. On cross-examination, however, Abrams admitted that in her statement to police she did not say anything about the underwear being inside out. She further admitted that her recollection could have been better on the day of the incident when she made the report than on the day of trial.

{¶30} T.A.F. explained to Abrams that he and C.J. had been playing a tickle game and that C.J.'s sweatpants and underwear had come off when he tossed her into the air. When Detective Daniel Boyd and Officer Peter Spoerke of the Wadsworth Police questioned him, T.A.F. provided a similar explanation of events. Detective Boyd testified that he told T.A.F. that C.J. was being taken to the hospital for a vaginal swab for DNA testing that would tell them if

T.A.F. had touched her there at all. T.A.F. explained that C.J. was squirming while he was trying to put her underwear and pants back on and that his hand may have "accidentally brushed up against the area[.]"

{¶31} At the hospital, a blacklight was shone on C.J. to identify bodily fluids but none were found. For that reason, the hospital personnel did not perform a rape kit. Although T.A.F. submitted a DNA sample, the State did not produce any DNA or other physical evidence that T.A.F. had sexual contact with C.J.

{¶32} The magistrate could credit the testimony of Detective Boyd and Abrams over the statements that T.A.F. made to them. Further, their testimony and C.J.'s statement were corroborated by the state of C.J.'s underwear immediately after the incident. These statements established that T.A.F. touched C.J.'s vagina with his penis and that C.J. was under 13 years old at the time. The magistrate could then reasonably infer from the circumstances that T.A.F.'s act of touching C.J.'s genitals with his penis was done to achieve sexual arousal or gratification. *Morgan* at ¶16. After reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we cannot say that the magistrate's decision finding T.A.F. delinquent by gross sexual imposition created a manifest miscarriage of justice. *Otten*, 33 Ohio App.3d at 340. Accordingly, the trial judge did not err in overruling the objections to the magistrate's decision because the magistrate's decision was supported by sufficient evidence and was not against the manifest weight of the evidence. *Blakemore*, 5 Ohio St.3d at 219.

{¶33} T.A.F.'s third assignment of error is overruled.

III.

{¶34} T.A.F.'s assignments of error are overruled. The judgment of the Medina County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

BELFANCE, J.
CONCURS

DICKINSON, P. J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

JOSEPH F. SALZGEBER, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MEGAN L. PAYNE, Assistant Prosecuting Attorney, for Appellee.