[Cite as *State v. Romo*, 2010-Ohio-4067.]

STATE OF OHIO))ss: COUNTY OF LORAIN)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE OF OHIO Appellee v. DANIEL ROMO Appellant	C. A. No. 09CA009647 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 07CR072533

DECISION AND JOURNAL ENTRY

Dated: August 30, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Daniel Romo allegedly molested H.M. while riding with her in the back of her family's sport-utility vehicle. The Grand Jury indicted him for rape and gross sexual imposition. Mr. Romo waived his right to a jury trial and was tried to the court. The trial judge found him guilty of both offenses and sentenced him to life in prison on the rape charge. Mr. Romo has appealed, arguing that the court incorrectly concluded that statements H.M. made to her mother following the incident were excited utterances and that her statements to a nurse practitioner were for the purpose of medical diagnosis or treatment. He has also argued that there was insufficient evidence to support his rape conviction and that it is against the manifest weight of the evidence. This Court affirms because the statements H.M. made to her mother and the nurse practitioner were admissible, there was sufficient evidence to support his rape conviction, and his conviction is not against the manifest weight of the evidence.

BACKGROUND

{¶2} Mr. Romo worked at a restaurant owned by Victor Zapata's father. Because Mr. Romo did not have family in the area, Mr. Zapata invited him to spend Thanksgiving with his family in Sandusky. Mr. Romo rode with the Zapatas in a sport-utility vehicle that had three rows of seats. Mr. Zapata and his wife Michelle sat in the front, Mr. Zapata's cousin Louis sat in the middle row with the Zapatas' one-year-old son, and Mr. Romo sat in the back row with the Zapatas' four-year-old daughter H.M.

{¶3} Mrs. Zapata testified that she drove home. It took 40 minutes to get to their first stop in Avon to drop off Louis. During the drive, H.M. fell asleep. Mrs. Zapata estimated that she fell asleep about 25 minutes into the trip, because after that she did not hear anything from her. She said that H.M. woke up when they got to Louis's house. Mrs. Zapata then drove another 15 minutes to drop off Mr. Romo in Lorain.

{¶4} According to Mrs. Zapata, as soon as Mr. Romo got out of the car, H.M. began sobbing and told her that Mr. Romo "touched [her] pee-pee and I don't like that guy." After calming down, H.M. also told her that Mr. Romo had said "that she was his girlfriend and not to tell anybody." Mrs. Zapata testified that H.M. told her that she had fallen asleep and when she woke up, it was happening. Mrs. Zapata said that she took H.M. to a child advocacy center, the Nord Center, where she was examined by a nurse practitioner after about an hour wait.

{¶5} The nurse practitioner who examined H.M. testified that she works at the Nord Center as a supervisor for Emergency Services and as a sexual assault nurse examiner for the "Children's Advocacy Center and Rape Crisis." She performed a sexual assault exam on H.M., but, because it is a very invasive procedure, began by giving her "a full health assessment" to "try to build . . . a rapport" with her. According to the nurse practitioner, H.M. told her that

"[Mr. Romo] put his finger inside [her] pee-pee and it hurt me." During the exam, the nurse documented injuries to H.M.'s inner vaginal area that were consistent with sexual abuse and that would not normally have been caused by scratching. In her report, the nurse practitioner indicated that medical treatment was not required, but recommended that the Zapatas follow up with H.M.'s physician if she complained of any discomfort.

{¶6} Mr. Romo's pediatric expert agreed that H.M.'s injuries were caused by sexual abuse. In addition to redness and inflammation, he noted a laceration that was likely caused by a fingernail. According to him, the injuries would likely have been very painful.

{¶7} Mr. Romo testified that he had seven beers during the visit. On the way home, he played games with H.M. in the back seat. He said that one game was called "ghost." During the game, H.M. sat on his lap and he laid his head down on the seat. When there was traffic, H.M. would cover his head with a blanket so that the vehicle's headlights would cause a shadow or "ghost" to pass over the blanket. Mr. Romo denied that H.M. fell asleep during the ride back from Sandusky or that he inappropriately touched her. He said that she was wearing black pants during the trip.

EXCITED UTTERANCE

{¶8} Mr. Romo's first assignment of error is that the trial court incorrectly let the State introduce hearsay statements made by H.M. under the excited utterance exception. Under Rule 802 of the Ohio Rules of Evidence, "[h]earsay is not admissible except as otherwise provided by . . . these rules . . . ." "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid. R. 801(C). Excited utterances, which are statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or

condition," "are not excluded by the hearsay rule, even though the declarant is available as a witness." Evid. R. 803(2).

{¶9} "The excited-utterance exception is essentially a codification of Ohio common law governing spontaneous exclamations." *State v. Wallace*, 37 Ohio St. 3d 87, 89 (1988). "At common law, [courts] applied a four-part test in determining what constituted a spontaneous exclamation: '(a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination *continued* to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration." *Id*. (quoting *Potter v. Baker*, 162 Ohio St. 488, paragraph two of the syllabus (1955)). The staff notes for Rule 803(2) provide that "[t]o qualify as an excited utterance consideration must be given to (a) the lapse of time between the event and the declaration, (b) the mental and physical condition of the declarant, (c) the nature of the statement and (d) the influence of intervening circumstances."

{¶10} The Ohio Supreme Court has "continued to follow the *Potter* criteria since adoption of the Rules of Evidence." *State v. Taylor*, 66 Ohio St. 3d 295, 301 n.2 (1993). According to the Supreme Court, "[t]he standard for reviewing decisions of the trial judge on

excited-utterance exceptions was set forth by Judge Taft in *Potter* . . . : 'It is elementary that the trial judge is to decide those questions of fact which must be decided in order to determine whether certain evidence is admissible. . . . If his decision of those questions of fact, as reflected in his ruling on the admissibility of . . . [the] declaration, was a reasonable decision, an appellate court should not disturb it.'" *State v. Wallace*, 37 Ohio St. 3d 87, 90 (1988) (quoting *Potter v. Baker*, 162 Ohio St. 488, 500 (1955)).

{¶11} Mr. Romo objected to two answers by Mrs. Zapata. The first was that H.M. told her that he "touched [her] pee-pee." Mrs. Zapata said that H.M. told her that "as soon as [Mr. Romo] got out of [the] vehicle" and that she was crying at the time. According to the timeline that Mrs. Zapata gave, it would have been about 15 minutes after H.M. woke up and discovered that Mr. Romo was touching her. The second statement was that Mr. Romo had told H.M. "that she was his girlfriend and not to tell anybody." According to Mrs. Zapata, H.M. told her that after she "calmed her down."

{¶12} Regarding the first statement, it was reasonable for the trial court to conclude that there had been an "occurrence startling enough to produce a nervous excitement," that her statement to Mrs. Zapata was "made before there had been time for such nervous excitement to lose a domination over [her] reflective faculties," that her "statement . . . related to such startling occurrence," and that H.M. "had an opportunity to observe personally the matters asserted in [her] statement." *State v. Wallace*, 37 Ohio St. 3d 87, 89 (1988) (quoting *Potter v. Baker*, 162 Ohio St. 488, paragraph two of the syllabus (1955)). The trial court, therefore, correctly allowed it as an excited utterance.

{¶13} Regarding the second statement, this Court concludes that, even if the trial court incorrectly determined that it was an excited utterance because H.M. had calmed down, the error

was harmless beyond a reasonable doubt. *State v. DeMarco*, 31 Ohio St. 3d 191, 195 (1987). Under Rule 52(A) of the Ohio Rules of Criminal Procedure, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." See *State v. Brown*, 65 Ohio St. 3d 483, 485 (1992) ("Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal."). Mr. Romo's pediatric expert, who had reviewed H.M.'s medical records, testified that the veracity of young children like H.M. "is usually around 97 percent." When asked about H.M.'s statement that Mr. Romo had touched her, the doctor said that it is "very indicative" because "four-year-olds do not make statements like that up." He explained that "[t]hey are pre-sexual people." Accordingly, in light of the weight of H.M.'s excited utterance, there is no reasonable possibility that the statement she made after she calmed down, which did not directly concern the offensive touching, contributed to Mr. Romo's conviction. See *State v. O'Neal*, 87 Ohio St. 3d 402, 411 (2000) (concluding that improperly admitted hearsay testimony was harmless error because it merely duplicated other admissible testimony). Mr. Romo's first assignment of error is overruled.

MEDICAL DIAGNOSIS OR TREATMENT

{¶14} Mr. Romo's second assignment of error is that the trial court incorrectly let the State introduce statements that H.M. made to the nurse practitioner under the medical exception to the hearsay rules. Under Evidence Rule 803(4), hearsay statements are admissible if they are "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." The Ohio Supreme Court has held that, "[r]egardless of whether a child less than ten years old has been

determined to be competent to testify pursuant to Evid.R. 601, [her] 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." *State v. Muttart*, 116 Ohio St. 3d 5, 2007-Ohio-5267, at syllabus.

{¶15} Mr. Romo has argued that H.M. was seen by the nurse practitioner "not for the primary purpose of medical diagnosis or treatment, but for the purpose of gathering evidence for a criminal case against [him]." In *Muttart*, the Supreme Court explained that "[t]he trial court's considerations of the purpose of the child's statements will depend on the facts of the particular case." *State v. Muttart*, 116 Ohio St. 3d 5, 2007-Ohio-5267, at ¶49. "At a minimum, . . . a nonexhaustive list of considerations includes (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." *Id*. (quoting *State v. Dever*, 64 Ohio St. 3d 401, 409 (1992)).

{¶16} Recently, the Ohio Supreme Court examined the purpose of child advocacy centers like the one where H.M. was examined. *State v. Arnold*, __ Ohio St. 3d __, 2010-Ohio-2742, at ¶29-30. It recognized that "[t]he objective of a child-advocacy center . . . is neither exclusively medical diagnosis and treatment nor solely forensic investigation." *Id*. at ¶29. "Child-advocacy centers are unique. Multidisciplinary teams cooperate so that the child is

interviewed only once and will not have to retell the story multiple times. Most members of the team retain their autonomy. Neither police officers nor medical personnel become agents of the other. However, to ensure that the child victim goes through only one interview, the interviewer must elicit as much information from the child as possible in a single interview and must gather the information needed by each team member. Thus, the interview serves dual purposes: (1) to gather forensic information to investigate and potentially prosecute a defendant for the offense and (2) to elicit information necessary for medical diagnosis and treatment of the victim. The interviewer acts as an agent of each member of the multidisciplinary team." *Id*. at ¶33.

{¶17} In *Arnold*, the Supreme Court determined that, although some of the child's statements during her interview at the advocacy center were "related primarily to the [S]tate's forensic investigation, . . . other statements provided information that was necessary to diagnose and medically treat [her]." *State v. Arnold*, __ Ohio St. 3d __, 2010-Ohio-2742, at ¶37. In particular, it noted that "[t]he history obtained during the interview is important for the doctor or nurse practitioner to make an accurate diagnosis and to determine what evaluation and treatment is necessary. For example, the nurse practitioner conducts a 'head to toe' examination of all children, but only examines the genital area of patients who disclose sexual abuse. That portion of the exam is to identify any trauma or injury sustained during the alleged abuse." *Id*. It concluded that the child's "statements that described the acts that Arnold performed, including that Arnold touched her 'pee-pee' . . . were . . . necessary for . . . proper medical diagnosis and treatment." *Id*. at ¶38.

{¶18} The facts of this case are similar to those in *Arnold*. H.M. told a nurse practitioner at a child advocacy center that Mr. Romo had "put his finger inside [her] pee-pee and it hurt me." The nurse practitioner testified that she did "a full health assessment" of H.M.

that included listening to her lungs and heart and looking in her ears. She also did a sexual assault exam. In her report, she recorded what H.M. and Mrs. Zapata told her about why H.M. was at the center, her findings, and her treatment recommendations. Although she concluded that there was "[n]o medical treatment[ ] indicated" at that time, she recommended that the Zapatas "[f]ollow up [with] child's doctor for any [complaint of] vaginal discomfort."

{¶19} H.M. told the nurse practitioner, while providing her medical history, what Mr. Romo had done to her. Her description let the nurse practitioner know what sort of injury or trauma to look for during her exam. It also helped the nurse practitioner make appropriate recommendations regarding her treatment. Accordingly, this Court concludes that H.M.'s hearsay statement was admissible because it was for the purpose of medical diagnosis or treatment. See *State v. Arnold*, __ Ohio St. 3d __, 2010-Ohio-2742, at ¶38. Mr. Romo's second assignment of error is overruled. Mr. Romo's third assignment of error, regarding whether his lawyer was ineffective for not objecting when the nurse practitioner testified about what H.M. told her is overruled because he has not demonstrated that his lawyer's performance was deficient and that there is a reasonable probability that, if his lawyer had objected, the result of his trial would have been different. *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, at ¶204 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)).

RAPE

{¶20} Mr. Romo's fourth assignment of error is that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most

favorable to the prosecution, it could have convinced the average finder of fact of his guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991). When a defendant argues that his convictions are against the manifest weight of the evidence, however, this 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[s] must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶21} Because Mr. Romo's gross sexual imposition conviction merged into his rape conviction at sentencing, it is only necessary to review his rape conviction. See *State v. Smith*, 10th Dist. Nos. 08AP-736, 09AP-72, 2009-Ohio-2166, at ¶27. Under Section 2907.02(A)(1)(b) of the Ohio Revised Code, "[n]o person shall engage in sexual conduct with another . . . when . . . [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." "'Sexual conduct' means vaginal intercourse between a male and female . . . 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).

{¶22} Mrs. Zapata testified that her four-year-old daughter H.M. told her that Mr. Romo had "touched [her] pee-pee." A nurse practitioner testified that H.M. told her that Mr. Romo "put his finger inside [her] pee-pee." According to the nurse practitioner, the inside of H.M.'s vagina had injuries that were consistent with H.M.'s description. Mr. Romo's pediatric expert also noted inflammation, redness, and a laceration that made him "feel very confident that this child had been a victim of child sexual abuse." He said that the laceration was "most likely"

caused by someone's fingernail and agreed with the nurse practitioner that H.M. had suffered "extensive vaginal injuries." This Court concludes that the circumstantial evidence that Mr. Romo inserted one or more of his fingers into H.M.'s vaginal opening was sufficient to support his conviction.

{¶23} Regarding whether his conviction is against the manifest weight of the evidence, Mr. Romo has noted that the evidence in the case came from a four-year-old child who was declared incompetent to testify at trial. He has noted that the nurse practitioner who examined H.M. said that H.M. was not able to understand a lot of things and that nobody testified about whether H.M. had the capacity to comprehend and relate events or whether she understood the difference between the truth and a lie. He has also noted that the alleged act would have had to occur in the back seat of a vehicle in close proximity to H.M.'s parents. It also would have been extremely invasive and painful, yet nobody in the vehicle noticed anything unusual.

{¶24} Although the Zapatas were also in the sport-utility vehicle, they were in the front row of seats while Mr. Romo and H.M. were alone in the back row, sharing a blanket in the dark. According to Mr. Romo, H.M. was on his lap. Mrs. Zapata testified that H.M. tried to tell her something during the ride home, but she could not hear it because they had the radio on too loud. She said that, immediately after Mr. Romo exited the vehicle, H.M. told her what had happened. She said that H.M. was crying at the time, which was consistent with the pain that the pediatrician said she would have likely experienced. Furthermore, both medical professionals who reviewed H.M.'s medical records agreed that she had been sexually abused. They also denied that a child of H.M.'s age could have inflicted the injuries on herself.

{¶25} This Court has reviewed the entire record and concludes that the trial court did not lose its way when it convicted Mr. Romo of rape. His conviction, therefore, is not against the manifest weight of the evidence. Mr. Romo's fourth assignment of error is overruled.

CONCLUSION

{¶26} The trial court correctly let H.M.'s mother and the nurse practitioner who examined her testify about what H.M. had told them. Mr. Romo's conviction for rape is supported by sufficient evidence and is not against the manifest weight of the evidence. The judgment of the Lorain County Common Pleas Court 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 Lorain, 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.

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CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

PAUL A. GRIFFIN, attorney at law, for appellant.

DENNIS WILL, prosecuting attorney, and MARY R. SLANCZKA, assistant prosecuting attorney, for appellee.