[Cite as *State v. Weaver*, 2019-Ohio-2715.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

BRUCE ALLEN WEAVER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 CO 0015

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2017 CR 306

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Robert Herron, Columbiana County Prosecutor, and *Atty. Megan Bickerton*, Assistant Prosecuting Attorney, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Atty. John D. Falgiani, Jr., P.O. Box 8533, Warren, Ohio 44484, for Defendant-Appellant.

Atty. Wesley Johnston, P.O. Box 6041, Youngstown, Ohio 44501, for Defendant-Appellant.

Dated: June 27, 2019

WAITE, P.J.

{¶1} Appellant Bruce Weaver appeals the April 17, 2018, decision of the Columbiana County Common Pleas Court convicting him on one count of gross sexual imposition and one count of public indecency following a jury trial. Appellant argues that the verdict was against the manifest weight of the evidence and that the trial court erred in admitting hearsay testimony. Based on the foregoing, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} At the time of this incident, A.B. was a fifty year old female residing in Columbiana County, Ohio with her adult son. According to several witnesses' testimony at trial, A.B. exhibited certain physical and mental disabilities. (4/16/18 Tr., pp. 167, 184, 252-253.) Her right side, including her right arm, was at least partially paralyzed, and she was described as functioning at a mental level below average for her age. Appellant was A.B.'s next door neighbor. She was acquainted with Appellant through the friendship she developed with Appellant's ex-girlfriend, J.H., who formerly resided with Appellant. A.B. would occasionally be invited to Appellant's home when J.H. lived there. A.B. and J.H. continued to see each other after Appellant and J.H. ended their relationship, as they worked together at a local food pantry. Appellant testified that he would occasionally mow A.B.'s lawn and take out her trash.

{¶3} On April 17, 2017, Appellant invited A.B. to his home to sit by the fire pit in his back yard. A.B. testified that Appellant seemed intoxicated and at some point invited

her into his home to have sex. She repeatedly declined Appellant's advances before leaving. On April 18, 2017, A.B. arrived home from working at the food pantry. She went out to sit on her front porch and play a handheld video game. A short while later she was approached by Appellant, who again appeared to be intoxicated. Appellant came up the steps on to the porch and proceeded to pull down his pants, exposing himself. A.B. testified that she was afraid. She continued to play her video game, ignoring Appellant and hoping he would go away. A.B. was seated at a table on her porch with her left side facing the railing and her right, paralyzed, side nearest to the front door of her home. Appellant stood at her right side while exposing himself, which impeded A.B.'s ability to leave. Appellant grabbed A.B.'s head and forced it in the direction of his penis, saying "[s]uck me," and rubbed his penis on her face and shirt. A.B. repeatedly told him "[n]o." Appellant eventually gave up and left, saying "don't tell anybody, because you and I will get in trouble" and "[w]e'll do it again tomorrow night." (4/16/18 Tr., pp. 209-210.)

{¶4} After Appellant left, A.B. went into her house. Her adult son had been sleeping during the incident. She woke her son and told him what had happened. Although her son told her to call the police, A.B. testified she was unsure what action to take and remained afraid. She feared another visit from Appellant the following evening as he had threatened, especially since he had solicited her for sex for two nights in a row. A.B. testified, "[y]eah, then the next day, I was so worried about it all night that – I didn't know if he would come back, or if he would do it again, or maybe rape me or something[.]" (4/16/18 Tr., p. 211.) Hence, the day after the incident A.B. contacted J.H. as evening approached and asked if she could visit J.H. to tell her something important. As A.B. does not have a driver's license, she walked to J.H.'s residence. J.H. confirmed that she

worked with A.B. at the food pantry and had additionally been A.B.'s friend because she had lived with Appellant next door to A.B.. She testified that once she moved out of Appellant's house, it was unusual for A.B. to contact her outside of work. She testified that when A.B. called she "seemed real nervous" and "seemed like real nervous, jittery, and didn't seem like herself." (4/16/18 Tr., pp. 249, 250.) A.B. eventually disclosed to J.H. the incident on her front porch involving Appellant. She also informed J.H. about the incident at the fire pit the evening prior. J.H. advised her to contact the police from J.H.'s residence. A.B. agreed with this plan, as she was concerned that there would be trouble from Appellant if Appellant saw the police at A.B.'s house.

{¶5} Officer Elizabeth Perry of the Salem Police Department arrived at J.H.'s residence to take A.B.'s statement. A.B. said she was unable to write well, so Officer Perry wrote the statement as dictated to her by A.B. and read it back to ensure accuracy. Officer Perry immediately attempted to contact Appellant, without success. A short while later in the evening, Officer Perry did locate Appellant at his residence. She testified that she was unable to take Appellant's statement regarding the incident at that time because he appeared to be intoxicated. However, Officer Perry did warn Appellant about trespassing on to A.B.'s property. Appellant responded by denying that the incident happened and told Officer Perry that he had a hernia which rendered him unable to have sex. After Officer Perry spoke to Appellant at his home she turned the matter over to Detective David Talbert for further investigation. Detective Talbert interviewed A.B. with her mother present a few days later. He also attempted to make contact with Appellant multiple times, but Appellant failed to respond. At trial, A.B. testified that she obtained a protection order after she spoke with Detective Talbert and that the order was still in effect

on the date of trial. (4/16/18 Tr., p. 216.) A copy of the protection order was not made a part of the record.

{¶6} On September 13, 2017, the Columbiana County Grand Jury indicted Appellant on one charge of gross sexual imposition, a fourth degree felony in violation of R.C. 2907.05(A)(1); and public indecency, a violation of R.C. 2907.09(A)(1) a fourth degree misdemeanor. Appellant was arraigned on September 28, 2017, where he entered a plea of not guilty. After several status conferences and multiple continuances, trial was held on April 17, 2018. The jury returned a guilty verdict on both counts. A sentencing hearing was held on April 18, 2018 and Appellant was sentenced to fifteen months in prison for gross sexual imposition and thirty days in jail for public indecency. The sentences were to be served concurrently, with credit for time served. Appellant was also ordered to register as a Tier I sex offender.

{¶7} Appellant filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

THE JURY'S VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶8} Appellant cites four bases to support his contention that his convictions are against the manifest weight of the evidence. First, the victim did not immediately report the incident to police. Second, there was no physical evidence or other corroboration of her story. Third, there was no credible evidence of force or compulsion by Appellant. Fourth, the jury was unfairly influenced by A.B.'s disabilities.

{¶9} A review of the manifest weight of the evidence focuses on the state's burden of persuasion. *State v. Merritt,* 7th Dist. Jefferson No. 09 JE 26, 2011-Ohio-1468, ¶ 34. A reviewing court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 484 N.E.2d 717 (1st Dist.1983).

{¶10} A reversal should be granted only "in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Andric*, 7th. Dist. Columbiana No. 06 CO 28, 2007-Ohio-6701, ¶ 19, citing *Martin* at 175. Determinations regarding witness credibility, conflicting testimony and evidence weight "are primarily for the trier of the facts." *State v. Hunter,* 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 995, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh all evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). It is within the purview of the jury whether to believe some, all, or none of the testimony from witnesses and the jury can separate credible portions of testimony from incredible portions. *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 N.E.2d 650 (1971). Moreover, when presented with two fairly reasonable perspectives regarding the evidence or with two conflicting versions of events, neither of which can be ruled out as unbelievable, a

reviewing court's job is not to determine which one is more credible. *State v. Gore,* 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶11} Appellant was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(1). The version in effect at the time Appellant was convicted provides:

> 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:
>
> (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

{¶12} Appellant was also convicted of public indecency, in violation of R.C. 2907.09(A)(1). However, as Appellant does not challenge this conviction in his brief to the Court, it will not be addressed.

{¶13} Appellant first contends that it is significant A.B. delayed reporting the incident to the police. Appellant underscores that, rather than contacting the police or calling out to her adult son who was asleep inside the house while the incident was occurring, A.B. waited until the next day to contact J.H.. In so doing, Appellant implies that Appellant's credibility was in doubt. Appellant also contends that J.H. was the one person who had an ulterior motive to cause trouble for Appellant, because their relationship ended badly.

{¶14} A.B. discussed her delay in contacting the police at trial. During direct testimony, A.B. stated:

[A.B.]. I kinda [sic] -- I went in after he left and everything. And I was kinda [sic] like -- sat on my chair, and I'm sitting there, taking a deep breath and stuff, and then -- then I called my mom the next day. Well, I called my -- I talked to [J.H.].

Q. Okay.

[A.B.]. The next day. And then I also called my mom.

(4/16/18 Tr., p. 210.)

{¶15} A.B. also testified about why she decided to contact J.H.:

[A.B.]. I was thinking that -- I didn't know if he was drunk or not, but I was scared, and I didn't know what to do and.

Q. Okay.

[A.B.]. And --

Q. And then the next day comes. Did you --

[A.B.]. Yeah, then the next day, I was so worried about it all night that -- I didn't know if he would come back, or if he would do it again, or maybe rape me or something, and.

(4/16/18 Tr., p. 211.)

{¶16} During cross-examination, A.B. was also asked about waiting to contact the police:

> [Appellant's Counsel]. Okay. So after this occurred, honey, you waited about 24 hours, maybe a little bit less than that, before you called anybody, and the first person you thought to call was your friend, [J.H.]; right?
>
> [A.B.]. Yeah.
>
> [Appellant's Counsel]. Okay. And you called your friend, [J.H.], who is [Appellant's] ex-girlfriend; right?
>
> [A.B.]. Yeah.
>
> [Appellant's Counsel]. And they don't get along so well; right?
>
> [A.B.]. Not too good, no.

(4/16/18 Tr., p. 228.)

{¶17} Hence, the jury was well aware that A.B. delayed informing police following this incident and was free to interpret the meaning of this delay. Likewise, the relationship between Appellant and his ex-girlfriend, and ex-girlfriend and A.B., was also fully revealed to the jury. The testimony at trial demonstrated that A.B. became familiar with Appellant when J.H. lived with Appellant, next door. Appellant testified that he occasionally took out A.B.'s trash and mowed her lawn from time to time so they were acquainted with each other. The testimony from A.B., J.H., and Appellant also reflected that A.B. had been friendly with J.H. for some time and continued to work with her regularly. Under those facts a jury could reasonably conclude that A.B. may seek out her friend to confide in and disclose the incident to before reporting it to the authorities. This matter ultimately comes

down to the credibility of the witnesses. The jury chose to believe A.B.. They judged her testimony regarding the reasons why she hesitated before contacting the police and ultimately confided in her friend before calling the police to be credible. While it is true that we act as a "thirteenth juror" when considering the manifest weight of the evidence, we also must give great deference to the factfinder's determination regarding witness credibility. *State v. Deltoro,* 7th Dist. Mahoning No. 07MA90, 2008-Ohio-4815, ¶ 62. There was no evidence presented showing that A.B. or J.H. were motivated by any animus toward Appellant to lie, or that a desire to see Appellant get in trouble with law enforcement served as a basis for A.B. to contact J.H. or for J.H.'s recommendation that A.B. contact the police and report the incident.

{¶18} Appellant also argues that there was no physical evidence presented, nor was A.B.'s story otherwise corroborated. Regarding physical evidence, there is no requirement that victim testimony must be corroborated by physical evidence. *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1536, 931 N.E.2d 143 (7th Dist.2010), ¶ 71. In this matter, the incident was not reported until the next day. It is possible that any physical evidence would not still be available. Moreover, the fact that physical evidence is not always present in every offense does not render testimony unlikely or improbable. The jury heard testimony from A.B., J.H., Officer Perry and Detective Talbert, as well as from Appellant himself. More than enough evidence was presented from which they could reach a reasonable conclusion as to the veracity of the testimony and the credibility of the witnesses. The jury chose to believe the testimony presented by the state's witnesses despite the fact that no physical evidence was present in this matter.

{¶19} As to a lack of corroboration, Officer Perry and J.H. both testified that A.B. told them the same story as to how the incident occurred. (4/16/18 Tr., p. 185.) The only testimony that did not support A.B.'s version of events was Appellant's. He testified that none of A.B.'s allegations were true and that he had a hernia which prevented him from obtaining an erection or having sex. Resolving the conflict in this testimony requires a credibility determination.

{¶20} Appellant also contends there was no credible evidence of force or compulsion presented to the jury. R.C. 2901.01(A)(1) defines "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." The victim is not required to prove that she physically resisted the offender. R.C. 2907.05(D). "Force can be inferred from the circumstances surrounding the sexual contact and is established if it is shown that the victim's will was overcome by fear or duress." *State v. Emerine,* 11th Dist. Trumbull No. 2016-T-0048, 2017-Ohio-1206, ¶ 39 quoting *State v. Dooley,* 8th Dist. Cuyahoga No. 84206, 2005-Ohio-628, ¶ 28. A threat of force can also be inferred from the circumstances surrounding the sexual conduct. *State v. Schaim*, 65 Ohio St.3d 51, 600 N.E.2d 661 (1992), paragraph one of the syllabus. Thus, proof of actual force in committing the offense is not necessary: a showing that the victim's will was overcome by fear or duress is sufficient. *State v. Eskridge*, 38 Ohio St.3d 56, 58-59, 526 N.E.2d 304.

{¶21} Appellant cites to our holding in *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1536, 931 N.E.2d 143 (7th Dist.2010) regarding the "force" analysis. *Kaufman* involved the rape of a four year old child by an adult. The *Kaufman* Court held that where the victim is a child, an offender can be convicted of rape with a force specification without

express evidence of harm or physical restraint due to the offender's apparent position of authority over the child. *Id.* at ¶ 53, citing *State v. Dye,* 82 Ohio St.3d 323, 695 N.E.2d 763, (1998), syllabus. *Kaufman*, like *Eskridge* and its progeny, involve cases where the defendant held a position of authority over a child. Appellant argues that the state created a hybrid charge by presenting lay witness testimony regarding A.B.'s disabilities, and also that the state's theory regarding force (that A.B. was blocked from escaping by Appellant and he forcibly moved her head to his penis) is undermined by A.B.'s failure to disclose the incident to police until the next day.

{¶22} A.B. testified that the evening prior to this incident, Appellant had made unwelcomed sexual advances and had tried to get her into his house. Her testimony also included a detailed description of the incident itself, including that Appellant blocked her only avenue of escape from the chair in which she was sitting and that he held her head to his penis repeatedly. Appellant also warned A.B. not to tell anyone or she would be in trouble, and threatened to return the following night. A.B. testified that she repeatedly said "no" and turned her head away while in Appellant's grasp. This account of the events remained unchanged throughout the investigation and was the same account she gave to both J.H. and Officer Perry. The jury, as trier of fact, knew that A.B. had delayed contacting police, but apparently believed her account of the events. If believed, Appellant's conduct, including physically trying to push A.B.'s head towards his penis and threatening her with further harm, constituted force as defined under the statute.

{¶23} Lastly, Appellant contends the jury was influenced by A.B.'s disabilities. Appellant argues that the state, with only the testimony of lay witnesses, put the issue of A.B.'s mental and physical disabilities before the jury and that this created prejudice by

"arous[ing] the passions of the jury in favor of the victim and against the accused." (Appellant's Brf., p. 12.) According to Appellant, the state created a "hybrid" charge when it presented layperson testimony about A.B.'s mental and physical disabilities as Appellant was charged under R.C. 2907.05(A)(1), rather than R.C. 2907.05(A)(5), which applies to a victim who is impaired.

{¶24} R.C. 2907.05(A)(5) specifically applies where the ability of the victim "to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age." This provision also requires the offender to know or have "reasonable cause to believe" that the victim is "substantially impaired." R.C. 2907.05(A)(5).

{¶25} As an initial matter, we note that the trial court has broad discretion in the admission or exclusion of relevant evidence. *State v. Paige,* 7th Dist. Mahoning No. 17 MA 0033, 2019-Ohio-1088, ¶ 23 citing *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. Appellant specifically now complains about testimony given by Officer Perry and Detective Talbert. As defense counsel did not object to the testimony, Appellant waives all but plain error. Civ.R. 52. An appellate court generally reviews the decisions of the trial court concerning lay witness testimony for an abuse of discretion. *State v. Kehoe,* 133 Ohio App.3d 591, 603, 729 N.E.2d 431 (12th Dist.1999). However, an alleged error is "plain error" only if error is obvious. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Moreover, a matter will be reversed in a plain error review only if, "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. Because it was not first raised to the trial court, plain error

should be noticed only "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id*. at 97.

{¶26} Evid.R. 701 governs the admission of opinion testimony by a lay witness. It provides: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." "Evid.R. 701 grants the trial court wide latitude in allowing or controlling lay witness opinion testimony." *Kehoe* at 603. Further, Evid.R. 704 states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." In other words, even if opinion testimony is offered on an ultimate issue to be decided by a trier of fact, it is not automatically excluded. There are two limitations in Evid.R. 701 placed on a lay witness providing opinion testimony. Testimony based on the perception of the witness must be the result of an intelligent and reasonable conclusion based upon facts observed. *American Louisiana Pipe Line Co. v. Kennerk,* 103 Ohio App. 133, 141, 144 N.E.2d 660 (6th Dist.1957). Opinion testimony need only be helpful in assisting the trier of fact in understanding the witness' testimony or in determining a fact at issue. *Hugh v. Wills*, 7th Dist. Monroe No. 05 MO 8, 2006-Ohio-1282, ¶ 75, citing *Lee v. Baldwin*, 35 Ohio App.3d 47, 49, 579 N.E.2d 662 (1st Dist.1987).

{¶27} Appellant specifically complains of the trial testimony of Officer Perry and Detective Talbert when discussing their opinion of A.B.'s behavior as each conducted their separate interviews of her. The state inquired of Officer Perry "what was your first

impression of [A.B.]?" Officer Perry responded that A.B. "did not appear to be functioning as a normal 50-year-old would." (4/16/18 Tr., p. 167.)

{¶28} Appellant also takes issue with the state asking Detective Talbert, "what was your first impression of [A.B.], upon meeting her?" Detective Talbert responded, "[s]he did appear to function well below average." (4/16/18 Tr., p. 184.) Appellant argues that these statements were not made by experts, no foundation was laid, and that they only served to "confuse the jury and improperly sway the jury's sentiments." (Appellant's Brf., pp. 12-13.)

{¶29} The questions asked by the state to Officer Perry and Detective Talbert were intended only to indicate their perceptions of A.B. and her ability to engage during their separate interviews. It was defense counsel who elicited additional testimony from each witness on cross-examination as to their opinion of A.B.'s mental and physical disabilities. During cross-examination of Officer Perry defense counsel inquired:

> Q. [Y]ou stated that you believed [A.B.] to have some sort of disability, or some sort of a deficiency; correct?
>
> A. Yes.
>
> Q. So that was very apparent to you?
>
> A. Yes.

(4/16/18 Tr., pp. 174-175.)

{¶30} During cross-examination of Detective Talbert defense counsel inquired:

Q. Okay. Now, sir, you had indicated that it was clear to you, in speaking with [A.B.], that she functioned below average?

A. Correct.

Q. Can you explain that a little bit, what you mean by that?

A. Well, 47 years on this planet, I've come into contact with a lot of people.

Q. Right.

A. And most adults, is how I gauge that. And she appeared to function, the more I talked to her, was somebody with less than average functionability.

(4/16/18 Tr., p. 194.)

{¶31} Evid.R. 701 and 704 permit the use of lay witness opinion testimony when it is based on the witness' perceptions and is helpful to an understanding of a factual issue. Neither the testimony by Officer Perry nor Detective Talbert violates these rules. Each demonstrated that their opinion of A.B.'s disabilities was based on their personal observations while interacting with her. Their opinion was helpful to the jury to understand the context of the interviews conducted by Officer Perry and Detective Talbert.

{¶32} In addition to the failure of defense counsel to object to the direct testimony, on cross-examination the defense elicited additional testimony regarding the officers' perceptions of A.B. when interviewing her. Again, the statements were simply the perceptions of A.B. by Officer Perry and Detective Talbert on meeting her. Whether A.B. was in some way disabled was not the ultimate issue to be decided by the jury as the trier

of fact and was not an element of these crimes as charged. Therefore, the testimony did not violate Evid.R. 701 and 704 regarding lay witness opinion testimony. It was not plain error for the trial court to permit the testimony. We also note that A.B. testified at trial regarding the incidents and her disabilities. Thus, the jury did not need to solely rely on the observation testimony of police personnel. The jury was able to view A.B. directly and make a determination as to the extent of her physical and mental abilities and the extent that these may have played a role in the offenses for which Appellant was charged.

{¶33} Appellant correctly notes that he was not charged under R.C. 2907.05(A)(5), which involves a showing of the victim's substantial impairment. The photographs of A.B.'s front porch coupled with the testimony of A.B. and Detective Talbert that A.B.'s right-side paralysis played a role in her ability to physically leave the area once Appellant began touching her went towards the issue of force. As A.B.'s credibility was in question due to some of her actions or inaction immediately after the incident, her behavior became an issue of witness credibility. It was not plain error for the trial court to permit the testimony regarding other witnesses' personal observations of A.B. while interacting with her. Further, Appellant has not proven that, but for the testimony he now finds objectionable, the outcome of the trial would have clearly been otherwise. For all of the above reasons, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY.

{¶34} In his second assignment of error, Appellant contends the trial court violated his Sixth Amendment right to confrontation in permitting inadmissible hearsay testimony by Officer Perry and J.H. regarding A.B.'s out-of-court statements.

{¶35} Again, it is well established that the admission or exclusion of evidence is within the sound discretion of the trial court. *State v. Robb*, 88 Ohio St.3d 59, 68, 723 N.E.2d 1019 (2000). An abuse of discretion connotes more than an error of judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Smithberger,* 7th Dist. Belmont No. 16 BE 0033, 2017-Ohio-8015, ¶ 9 citing *State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶36} The Confrontation Clause in the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." The United States Supreme Court has held that the Confrontation Clause prohibits the introduction of "testimonial" statements by a non-testifying witness unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Generally, we must first determine whether the statements were testimonial in nature utilizing the "primary purpose" test set forth in *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). However, in the instant matter, the statements made at trial to which Appellant assigns error were allegedly made by A.B. as she explained the incident involving Appellant, first to J.H. and then to Officer Perry, both of whom repeated her statements at trial. A.B. was not an unavailable witness. She testified on both direct and cross-examination at trial regarding the incident. Her testimony included the statements she made to both J.H. and

to Officer Perry. As A.B. was subject to cross-examination by Appellant at trial, there can be no violation of his confrontation rights as he asserts.

{¶37} Regarding whether the testimony by J.H. and Officer Perry as to A.B.'s statements were hearsay, the trial court has broad discretion to determine whether a statement constitutes a hearsay exception. *State v. Everson,* 7th Dist. Mahoning No. 12 MA 128, 2016-Ohio-87, 57 N.E.3d 289, ¶ 27. Hearsay errors are subject to a harmless error review. Evid.R. 103(A); Crim.R. 52(A). Unless an error regarding an evidentiary ruling affects a substantial right, it will be deemed harmless and does not require a reversal of the judgment. *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 23. Although Appellant's right to confront a witness is a substantial right, based on the record before us any error in permitting this testimony should be deemed harmless beyond a reasonable doubt. "Harmless beyond a reasonable doubt" means that there is no reasonable possibility that the unlawful testimony contributed to the conviction. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d. 705 (1967).

{¶38} Appellant takes issue with Officer Perry and J.H. both testifying about A.B.'s statements recounting the incident. Appellant contends, "the trial court permitted Officer Perry and [J.H.] to testify that [A.B.] told them: Appellant pulled his pants down; exposed his penis; asked for oral sex; and, rubbed his penis on the victim's chest and face." (Appellant's Brf., p. 16.) Appellant claims that defense counsel objected and the trial court sustained the objection. However, the court then allowed the state to lay a foundation and allowed these witnesses to testify about what they were told by the victim. Both witnesses recounted their discussions with A.B. and recited what A.B. told them about the manner in which the incident occurred. Appellant is correct that there is no hearsay

exception permitting either Officer Perry or J.H. to testify as to the statements made to them by A.B. recounting the incident. However, in order to affect a substantial right and constitute reversible error, the statements must be so prejudicial as to have contributed to Appellant's conviction. Otherwise, the testimony is considered harmless beyond a reasonable doubt as there is no reasonable possibility that the impermissible testimony contributed to a conviction. As acknowledged by Appellant, A.B. herself testified at great length both on direct and cross-examination as to the manner in which the incident occurred and her conversations with Officer Perry and J.H.. The transcript reveals extensive cross-examination of Officer Perry, J.H. and A.B. by defense counsel regarding those same statements. Although the state may have initially impermissibly permitted the jury to hear A.B.'s statements through the testimony of Officer Perry and J.H., the jury also heard A.B.'s testimony on both direct and cross-examination regarding those same statements and the identical facts. As the declarant herself presented the same testimony at trial, the admission of the hearsay statements can only be regarded as harmless beyond a reasonable doubt. Appellant's second assignment of error is overruled.

Conclusion

{¶39} Appellant alleged two assignments of error on appeal. Appellant's first assignment that his convictions were against the manifest weight of the evidence is not borne out by the record. The jury, as trier of fact, found the state's witnesses credible and Appellant's testimony incredible. Thus, Appellant's first assignment of error is without merit and is overruled. Appellant's second assignment of error contending that the trial court erred in admitting hearsay testimony in violation of his constitutional rights under the Confrontation Clause is equally unsupported by the record. Although the testimony

of which he complains may have been hearsay, Appellant cross-examined A.B. at length regarding those statements and the information contained in them. As such, the admission of the hearsay is harmless. Appellant's second assignment of error is without merit and is overruled. Accordingly, Appellant's assignments of error are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.