

[Cite as *State v. Arnold*, 2010-Ohio-5622.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 07AP-789 (C.P.C. No. 05CR12-8462)
Michael S. Arnold,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 18, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

ON REMAND FROM THE SUPREME COURT OF OHIO

KLATT, J.

{¶1} This matter is before us on remand from the Supreme Court of Ohio to consider whether the erroneous admission of certain evidence constitutes harmless error. See *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, ¶44. Because the admission of such evidence was harmless error, we affirm appellant's conviction.

{¶2} In 2005, a Franklin County Grand Jury indicted appellant with two counts of rape in violation of R.C. 2907.02. The indictment alleged that the victim was his wife's four-year-old daughter. At trial, in lieu of the victim's live testimony, the trial court allowed

the state to present a recorded interview of the victim. The jury found appellant guilty of one count of rape and not guilty of the second count of rape.

{¶3} On appeal, this court affirmed appellant's conviction. *State v. Arnold*, 10th Dist. No. 07AP-789, 2008-Ohio-3471. We determined, in part, that the admission of the victim's recorded interview did not violate appellant's constitutional right to confront witnesses. *Id.* at ¶8-34.

{¶4} On appeal, the Supreme Court of Ohio determined that some statements the victim made in her interview were made for purposes of medical diagnosis and treatment and were, therefore, nontestimonial and properly admitted by the trial court. *Arnold*, 126 Ohio St.3d 290, at ¶37-41. Specifically, the court identified the victim's statements "that described the acts that Arnold performed, including that Arnold touched her 'pee-pee,' that Arnold's 'pee-pee' went inside her 'pee-pee,' that Arnold's 'pee-pee' touched her 'butt,' that Arnold's hand touched her 'pee-pee,' and that Arnold's mouth touched her 'pee-pee,' " as statements the trial court properly admitted. *Id.* at ¶38.

{¶5} However, the court also determined that other statements the victim made in her interview were made for forensic purposes, and therefore, were testimonial in nature. These statements were erroneously admitted by the trial court. *Id.* at ¶34-36. These statements included: (1) the victim's assertion that appellant shut and locked the bedroom door before raping her, (2) her descriptions of where her mother and brother were while she was in the bedroom with appellant, of appellant's boxer shorts, of him removing them, and of what appellant's "pee-pee" looked like, and (3) her statement

that appellant removed her underwear. *Id.* at ¶34.¹ Because the trial court erroneously admitted these statements, the Supreme Court of Ohio remanded the matter to this court to consider whether the admission of these statements constitutes harmless error. *Id.* at ¶44.

{¶6} As this court has recently noted, we need not disturb a conviction if a trial court's error constitutes harmless error. *State v. Ramos-Aquino*, 10th Dist. No. 09AP-975, 2010-Ohio-2732, ¶15 (citing *Crim.R. 52(A)*; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶15). Under this review, "[e]rror in the admission or exclusion of evidence in a criminal trial must be considered prejudicial unless the court can declare, beyond a reasonable doubt, that the error was harmless, and unless there is no reasonable possibility that the evidence, or the exclusion of evidence, may have contributed to the accused's conviction." *State v. Jones*, 10th Dist. No. 07AP-771, 2008-Ohio-3565, ¶13 (citing *State v. Bayless* (1976), 48 Ohio St.2d 73, 106, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3135. " 'Whether [the] error was harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " *Id.* (quoting *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶78. See also *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, ¶62-64. The prosecution bears the burden of demonstrating harmless error. *Perry* at ¶15.

¹ Appellant contends that other statements the victim made indicating that her mother and appellant were fighting and the presence of police at the house were also improperly admitted. Although the Supreme Court of Ohio did not identify those statements as improperly admitted testimonial statements, for purposes of this decision, we will assume that they were.

{¶7} Here, the state advances two reasons why the trial court's error in improperly admitting the victim's testimonial statements was harmless. The state argues that the victim's statements were merely cumulative of other evidence and that overwhelming evidence supports the guilty verdict. We agree with both of the state's arguments.

{¶8} Error in the admission of testimony may be considered harmless where such testimony is cumulative of other, properly admitted testimony. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶59 (any error in admitting statements was harmless where testimony was cumulative of other testimony); *State v. Holloman*, 10th Dist. No. 06AP-01, 2007-Ohio-840, ¶33 (same). Here, a number of the victim's improperly admitted statements were cumulative of other properly admitted testimony.

{¶9} The victim's statement that the bedroom door was locked was repeated by her mother, who testified that she tried to open the bedroom door but that it was locked. (Tr. 76.) Her mother also testified that she and her son were asleep downstairs when she awoke and found appellant upstairs with her daughter. (Tr. 74-75.) The victim's mother also testified to the appearance of appellant's boxers after he opened the bedroom door. (Tr. 77.) Columbus firefighter Charles Fritz testified that when he arrived at the victim's house that night, there were a number of police officers also at the scene and a helicopter overhead. (Tr. 50.)

{¶10} To the extent that any of the victim's improperly admitted statements were not cumulative of other testimony, overwhelming evidence other than those statements support the guilty verdict. "An error in the admission of evidence is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming

proof of defendant's guilt." See *State v. Simpson*, 10th Dist. No. 01AP-757, 2002-Ohio-3717, ¶38 (citing *State v. Williams* (1983), 6 Ohio St.3d 281, 290).

{¶11} The victim's mother testified that she was asleep on the first floor of her house when noises coming from her upstairs bedroom woke her up. She attempted to open the door but it was locked. When appellant unlocked and opened the door of the bedroom, the victim's mother saw appellant and her daughter inside the room. Mother saw that appellant's boxers were not on correctly. Mother then pulled a blanket off of her daughter and saw that her daughter's underwear was down around her ankles. The victim's properly admitted statements describe appellant's conduct inside the room, including conduct that clearly constitutes rape. A first responder to the house also testified that the victim told him that someone had touched her private parts. Lastly, a nurse who examined the victim the next day observed recent abrasions on her hymen. The nurse testified that the abrasions were indicative of something penetrating the child's labia. This evidence is overwhelming evidence of appellant's guilt in this matter.

{¶12} For all these reasons, the trial court's improper admission of the victim's testimonial statements was harmless error. Accordingly, we affirm appellant's conviction.

Judgment affirmed.

BRYANT and SADLER, JJ., concur.
