[Cite as *State v. Gray*, 2012-Ohio-4769.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-09-176
	:	O P I N I O N
- vs -		10/15/2012
	:	
PHILLIP GRAY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2011-03-0357

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HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, Phillip Gray, appeals his conviction in the Butler County Court of Common Pleas for two counts of rape and one count of gross sexual imposition.

{¶ 2} In 2011, the victim, A.H., a seven-year-old girl, was living with her father and two brothers in a trailer park in Butler County. During the month of February, A.H.'s father had to go to the hospital and appellant, a neighbor of A.H.'s father, agreed to watch the

children. A.H. and her brothers stayed with appellant in his trailer for two nights.

{¶ 3} After A.H.'s father returned from the hospital, one of A.H.'s brothers told his father that something inappropriate had happened between A.H. and appellant during one of the nights the children stayed with appellant. Subsequently, Butler County Children's Services was contacted and A.H. was referred to Andrea Richey, a social worker for the Mayerson Center, a child advocacy center, at Cincinnati Children's Hospital. Richey explained that her role as a social worker at the Mayerson Center is to perform "neutral fact finding" interviews where she asks open-ended questions, explores alternative hypothesis, and explores medical diagnoses and treatment on children who may suffer from neglect or abuse. During Richey's interview with A.H., A.H. revealed that appellant had touched her on top of her clothing, had touched her skin, and had touched her "thing." A.H. identified her "thing" as her vagina through the use of an anatomically correct picture.

{¶ 4} Based upon A.H.'s conversation with Richey, on the morning of March 1, 2011, Detectives Duane Monroe and Robert Whitlock from the Butler County Sheriff's Office went to appellant's residence and asked if he would be willing to speak with them at the sheriff's office. Appellant voluntarily went with Monroe and Whitlock to the sheriff's office and was placed in an interview room. Appellant was advised of his *Miranda* rights, waived those rights, and was interviewed by Monroe and Whitlock for approximately 30 minutes. During the interview, the detectives sat on either side of appellant, raised their voices at appellant, sometimes positioned themselves very close to appellant, and made implications that they already knew what appellant had done to A.H. Monroe and Whitlock even stated that they had physical evidence showing what appellant had done to A.H. and a polygraph test proving that A.H. was not lying about the incident. Soon after the interview began, appellant admitted that A.H. had slept in his bed with him, that he had only worn his underwear to bed that night, and that he had inserted his finger into A.H.'s vagina "probably twice."

{¶ 5} On April 20, 2011, appellant was indicted on two counts of rape, felonies of the first degree, in violation of R.C. 2907.02(A)(1)(b), and one count of gross sexual imposition, a felony of the third degree, in violation of R.C. 2907.05(A)(4). Appellant pled not guilty to each charge and filed a motion to determine his competency to stand trial and a motion to suppress. At separate hearings, the trial court determined that appellant was competent to stand trial and that appellant's statements to Monroe and Whitlock would not be suppressed.

{¶ 6} On July 13, 2011, the trial court held another hearing on the issues of appellant's prior bad acts and the admissibility of appellant's IQ. The trial court granted appellant's request to exclude his prior bad acts but rejected appellant's request to admit evidence relating to his IQ. The case then proceeded to a trial by jury on July 18, 2011.

{¶ 7} At trial, A.H. was the first to testify. A.H. stated that she had just recently turned eight, that appellant and A.H.'s father were neighbors in the same trailer park, and that she was not married to appellant. A.H. testified that she and her brothers had stayed with appellant at his trailer and identified pictures of appellant's trailer, including his bedroom. A.H. also testified as to what side of the bed appellant slept on. However, A.H. refused to testify about any events that occurred during the overnight visit, stating that she "[didn't] want to talk about it" and that she "[didn't] know" what happened. After repeated attempts by the state to get A.H. to testify about the incident, the state ceased examining A.H. The defense chose not to cross-examine A.H.

{¶ 8} Richey, the social worker, then took the stand to testify. Richey testified about her experience as a social worker, her purpose in interviewing A.H., and her interviewing techniques. The video and audio recording of the interview between A.H. and Richey was then played. The jury heard A.H. describe to Richey that appellant touched her on top of her clothing with his hand, touched her skin, and touched her on top of her "thing." After the video, Richey explained the portion of the video where she asked A.H. to identify different

body parts on anatomically correct pictures of a male and a female. Richey testified that A.H. called the vagina on the female picture a "thing."

{¶ 9} Finally, the state called Detective Monroe to testify and played the video and audio recording of appellant's interrogation by Monroe and Whitlock. During the interrogation, appellant stated that he inserted his left index finger approximately one knuckle deep into A.H.'s vagina "probably twice." The interrogation also revealed appellant stating that he kissed A.H.'s cheeks, kissed her on the chest once, and that he had an erection at the time of these events. Appellant also indicated that he may have rubbed his penis against A.H.'s right leg.

{¶ 10} On July 19, 2011, the jury returned a verdict of guilty on all counts in the indictment. Appellant made a motion for a new trial, which was denied by the trial court. Subsequently, appellant was sentenced to a prison term of 15 years to life on each rape count, to run concurrent with each other. The gross sexual imposition conviction merged with both rape counts.

{¶ 11} From his conviction, appellant appeals, raising nine assignments of error. For ease of discussion, the assignments of error shall be addressed out of turn.

{¶ 12} Assignment of Error No. 7:

{¶ 13} THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS.

{¶ 14} In his seventh assignment of error, appellant argues that the trial court erred in denying his motion to suppress the statements he made to Detectives Monroe and Whitlock because the statements were coerced.

{¶ 15} An appellate court's review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. When considering a motion to suppress, the trial court assumes the role of trier of fact and is,

therefore, in the best position to resolve factual questions and evaluate the credibility of witnesses. *Id.*; *State v. Bird*, 12th Dist. No. CA2002-05-106, 2003-Ohio-2541, ¶ 9; *State v. Mills,* 62 Ohio St.3d 357, 366 (1992). Consequently, an appellate court may not disturb a trial court's ruling on a motion to suppress where it is supported by substantial, credible evidence. *Bird* at ¶ 9; *State v. McNamara*, 124 Ohio App.3d 706, 710 (4th Dist.1997). Accepting these facts as true, the appellate court must independently determine, without deference to the trial court, whether the trial court's conclusions of law are correct. *Bird* at ¶ 9.

{¶ 16} Upon arriving at the police station, appellant was taken into an interview room and advised of his *Miranda* rights. It took Detective Monroe approximately six seconds to read appellant his rights. Appellant indicated that he understood the rights and waived them. Appellant now contends that his statements to Monroe and Whitlock were not voluntarily made because: (1) his IQ places him in the mild-range of mental retardation; (2) he did not have the mental capabilities to understand what was happening in the interrogation; (3) Monroe and Whitlock positioned appellant in the corner of the room and sat on either side of him; (4) Monroe and Whitlock sat in a manner which prevented appellant from leaving the room or getting up from the table; (5) Monroe and Whitlock continually stated false information regarding evidence; and (6) Monroe and Whitlock continually pressed appellant for the answers they wanted to hear.

{¶ 17} "In determining whether a confession is voluntary or involuntary, a court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *Bird* at ¶ 39; *State v. Bays*, 87 Ohio St.3d 15, 23, 1999-Ohio-216.

{¶ 18} As an initial matter, we note that although appellant's *Miranda* rights were read through quickly and without explanation, appellant waived those rights and does not

challenge the validity of that waiver here. Thus, our review of the record focuses solely on the voluntariness of appellant's confession.

{¶ 19} We have reviewed the recording of appellant's interrogation, including the statements, gestures, and demeanor of both appellant and the detectives. We are aware that appellant, although in his 50s, has limited cognitive ability. Yet, several circumstances weigh heavily in favor of finding that appellant's confession was voluntary.

{¶ 20} Appellant went to the station voluntarily and was interrogated for only 30 minutes. There was no evidence of physical abuse or deprivation. Appellant was provided water upon request. Monroe and Whitlock did raise their voices at appellant and, occasionally, Detective Whitlock slammed his fingers or palm down on the table, but there was no evidence of any direct threats. Although appellant was positioned in a corner of the room with a detective sitting on each side of him, he still had some freedom of movement, as he was able to swivel his chair back and forth and lean backward and forward. Moreover, appellant had been questioned by police officers in the past for a similar situation. Finally, although Monroe and Whitlock misled appellant as to the strength of the evidence they had against him, "'[a] defendant's will is not overborne simply because he is led to believe that the government's knowledge of his guilt is greater than it actually is.'" *State v. Bays*, 87 Ohio St.3d at 23, quoting *Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (C.A.6, 1994); *In re N.J.M.*, 12th Dist. No. CA2010-03-026, 2010-Ohio-5526, ¶ 26.

{¶ 21} Based upon the foregoing, we find that there was no showing of police coercion or other facts involving appellant that affected the voluntariness of his statement. Appellant did not appear to be overborne by Monroe and Whitlock or affected by his cognitive abilities. Therefore, appellant's confession was voluntarily made and the trial court did not err in denying appellant's motion to suppress. Accordingly, appellant's seventh assignment of error is overruled.

{¶ 22} Assignment of Error No. 1:

{¶ 23} THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND [A] FAIR TRIAL BY ADMITTING APPELLANT'S STATEMENT WITHOUT INDEPENDENT PROOF OF THE CORPUS DELECTI [SIC] OF THE CRIME.

{¶ 24} In his first assignment of error, appellant contends that the trial court violated his constitutional rights by not requiring the state to produce some evidence outside of his confession that tends to prove some material element of the crime. Here, appellant alleges that the state failed to produce any physical evidence that a sexual assault occurred and failed to provide any witness testimony that appellant had sexually assaulted A.H. As such, appellant argues that the admission of his confession at trial was improper.

{¶ 25} "It is well-established that the admission or exclusion of evidence rests within the sound discretion of the trial court." *In re Bays*, 12th Dist. No. CA2003-02-026, 2004-Ohio-915, ¶ 7, citing *State v. Robb*, 88 Ohio St.3d 59, 68 (2000). Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *State v. Issa*, 93 Ohio St.3d 49, 64 (2001). An abuse of discretion connotes more than an error in law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Barnes*, 94 Ohio St.3d 21, 23, 2002-Ohio-68.

{¶ 26} "The corpus delicti of a crime consists of two elements: the act and the criminal agency of the act." *State v. Van Hook*, 39 Ohio St.3d 256, 261 (1988), certiorari denied, 489 U.S. 1100, 109 S.Ct. 1578 (1989), citing *State v. Maranda*, 94 Ohio St. 364 (1916). "It has long been established as a general rule in Ohio that there must be some evidence outside of a confession, tending to establish the corpus delicti, before such confession is admissible." *Maranda* at paragraph two of the syllabus.

{¶ 27} "Although the corpus delicti rule has ancient origins, the practicality of the rule

has come into serious question in light of modern procedural safeguards." *State v. Ledford*, 12th Dist. No. CA99-05-014, 2000 WL 127095, *7 (Jan. 24, 2000). "The courts refuse to apply the rule with 'dogmatic vengeance.'" *Id*., quoting *State v. Edwards*, 49 Ohio St.2d 31, 36 (1976), death penalty vacated, 438 U.S. 911, 98 S.Ct. 3147 (1978). As such, "the burden upon the state to prove some evidence of the corpus delicti is minimal." *State v. Sturgill*, 12th Dist. No. CA2004-02-008, 2004-Ohio-6481, ¶ 10, citing *Van Hook* at 261-262. Indeed, "while independent evidence of the corpus delicti is required, 'the quantum or weight of such outside or extraneous evidence is not of itself to be equal to proof beyond a reasonable doubt, nor even enough to make it a prima facie case.'" *State v. Chambers*, 12th Dist. No. CA2006-07-178, 2007-Ohio-4732, ¶ 27, quoting *State v. Black*, 54 Ohio St.2d 304, 307 (1978). "Instead, '[i]t is sufficient if there is *some* evidence outside of the confession that tends to prove *some* material element of the crime charged.'" (Emphasis sic.) *Id*., quoting *Black* at 307.

{¶ 28} Appellant was charged with rape as the result of allegedly engaging in sexual conduct with A.H., who was not his spouse, and less than 13 years of age, in violation of R.C. 2907.02(A)(1)(b). During the trial, A.H. testified that she was not the spouse of appellant and that she was eight years old at the time of the trial. A.H. was also able to identify pictures of appellant's home, including his bedroom and bed. In addition, Richey's interview with A.H. was played where A.H. stated that appellant had touched her "thing" with his hand, that appellant had touched her on top of her clothes and on her skin, and that appellant's hand had been moving. It was only after this evidence had been presented to the jury that appellant's confession was played.

{¶ 29} We find that the foregoing constitutes *some* evidence of the corpus delicti of rape and, therefore, the trial court did not violate appellant's constitutional rights by permitting the state to present the confession to the jury. Consequently, appellant's first assignment of error is overruled.

{¶ 30} Assignment of Error No. 6:

{¶ 31} THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND COMPULSORY PROCESS WHEN IT REFUSED TO ALLOW APPELLANT TO PRESENT EVIDENCE.

{¶ 32} In his sixth assignment of error, appellant contends that his constitutional rights were violated when the trial court refused to allow appellant to produce evidence regarding his low IQ of 69 and his difficulty in understanding complex situations.

{¶ 33} Prior to trial, appellant was evaluated by a licensed psychologist and sought to have the psychologist's findings admitted at trial. Specifically, appellant sought to explain why he made certain statements and responded in a certain manner during his interrogation with Monroe and Whitlock. The trial court determined that appellant was essentially requesting that the jury be permitted to consider his IQ in order to determine the voluntariness of appellant's confession. Consequently, the trial court ruled, in limine, that the testimony of the psychologist relating to appellant's IQ was prohibited from trial.

{¶ 34} As provided above, the admission or exclusion of evidence rests within the sound discretion of the trial court and shall not be reversed unless the trial court's ruling was arbitrary, unreasonable, or unconscionable. *State v. Robb*, 88 Ohio St.3d 59, 68 (2000).

{¶ 35} We find this case similar to this court's previous ruling in *State v. Loza*, 12th Dist. No. CA91-11-198, 1993 WL 120028 (Apr. 19, 1993), affirmed, 71 Ohio St.3d 61 (1994). In *Loza*, the defendant sought to introduce the testimony of a clinical psychologist who would have testified that the defendant confessed due to his background, difficult childhood, psychological makeup, and his personal code of conduct. *Id*. at *5. We ruled that the introduction of evidence of the "physical and psychological environment that yielded the confession" is admissible to assist the jury in making a "factual determination of whether the manner in which the confession was obtained casts doubt on its credibility." *Id*. at *5-6, citing

Crane v. Kentucky, 476 U.S. 683, 688-690, 106 S.Ct. 2142 (1986). However, expert testimony on the issues of a defendant's "credibility and veracity" was ruled inadmissible in order to prevent the proceeding from "degenerating into a collateral trial on the issue of [a defendant's] veracity and credibility." *Id*. at *6.

{¶ 36} In this case, appellant sought to introduce the testimony of a psychologist that appellant's low IQ and cognitive ability caused him to answer interrogation questions in a certain manner and not fully understand the questions asked. Essentially, appellant sought to introduce evidence that his individual psychological makeup impacted the credibility of his confession. The admission of this evidence would go against our holding in *Loza* and allow the jury to determine the voluntariness of appellant's confession. Having viewed the tape of appellant's interrogation, the jury had the evidence necessary to assess appellant's credibility and to give the confession its appropriate probative weight. As such, the trial court did not abuse its discretion in excluding the testimony of the psychologist relating to appellant's IQ. Accordingly, appellant's sixth assignment of error is overruled.

{¶ 37} Assignment of Error No. 2:

{¶ 38} THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND [A] FAIR TRIAL WHEN IT ADMITTED INADMISSIBLE HEARSAY.

{¶ 39} In his second assignment of error, appellant argues that the trial court erred in admitting the interview between A.H. and Richey, the social worker, because the statements made by A.H. were inadmissible hearsay. The admission or exclusion of evidence by the trial court is reviewed under an abuse of discretion standard. *State v. Robb*, 88 Ohio St.3d 59, 68 (2000).

{¶ 40} Appellant contends that the out-of-court statements in the interview between A.H. and Richey do not qualify under Evid.R. 803(4) as an exception to the hearsay rule for

the purposes of medical diagnosis or treatment and, therefore, were improperly admitted at trial. Specifically, appellant asserts that Butler County Children's Services referred A.H. to Richey for investigatory and forensic purposes and not for medical diagnosis and treatment. In support of this contention, appellant points out that A.H. met with Richey weeks after the alleged incident occurred, was not examined by a physician regarding the abuse until 13 days after the interview between Richey and A.H., and Detective Monroe was present during Richey's interview with A.H. Appellant further argues that the admission of these hearsay statements violated his right to confrontation, as he did not receive the opportunity to cross-examine A.H. regarding her interview with Richey.

{¶ 41} Hearsay is a statement made outside of a trial or hearing and offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Generally, hearsay is not admissible unless the statement comes under some exception to the hearsay rule. Evid.R. 802. Evid.R. 803(4) provides that "[s]tatements 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" are admissible in court as exceptions to the hearsay rule. *See State v. Wagers*, 12th Dist. No. CA2009-06-018, 2010-Ohio-2311, ¶ 51. "A fundamental assumption underlying the medical-treatment exception is that this particular hearsay is reliable." *Id*., citing *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, ¶ 39.

{¶ 42} Pursuant to the Ohio Supreme Court in *State v. Muttart*, a child's statements made to a social worker regarding sexual abuse she experienced are admissible under Evid.R. 803(4) when made for the purposes of medical diagnosis or treatment. *Muttart* at paragraph one of the syllabus. *See also Wagers* at ¶ 52; *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, ¶ 18. In *Muttart*, the Ohio Supreme Court considered various factors when determining the purpose of the child's statements in this context. These factors

include:

> (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 or "bitter custody battle;" (3) whether the child understood the need to tell the physician the truth; (4) whether the age of the particular child making the statements suggests the absence or presence of an ability to fabricate; and (5) whether the child was consistent in her declarations.

Wagers at ¶ 54, citing *Muttart* at ¶ 49.

{¶ 43} However, in *State v. Arnold*, the Ohio Supreme Court acknowledged the dual role of the social worker in interviewing a child who may be a victim of sexual abuse from both an investigatory and medical perspective. *Arnold*, 2010-Ohio-2742 at ¶ 33. The social worker's interview must "gather forensic information to investigate and potentially prosecute a defendant for the offense" as well as "elicit information necessary for medical diagnosis and treatment of the victim." *Id*. The Court determined that those statements made to the social worker for the primary purpose of investigation or forensics, unrelated to an ongoing emergency, are testimonial in nature and are prohibited by the Confrontation Clause without a prior opportunity for cross-examination. *Id*. at ¶ 44. However, the Court went on to state that those statements made during the social worker's interview which are necessary to diagnose and medically treat a victim are nontestimonial in nature and admissible without violating the Confrontation Clause. *Id*.

{¶ 44} Based upon our review of the interview between A.H. and Richey, certainly several statements were made for the purpose of medical diagnosis or treatment. These statements include that (1) appellant touched A.H.'s "thing" indicating her vagina; (2) he did so with his hand; (3) his hand was moving when he touched her "thing"; (4) this occurred while A.H. was laying down; and (5) appellant touched A.H. on top of her clothing as well as on her skin. Just as in *Arnold*, these statements were elicited from A.H. for the purposes of diagnosing and treating her. *See id*. at ¶ 40. Thus, Richey was acting as an agent of the

physician who later examined A.H., not as an agent of the investigators.

{¶ 45} Furthermore, we can find nothing in the record to cast doubt on A.H.'s motivation in her discussion with Richey. *See Muttart* at ¶ 49; *Wagers* at ¶ 54. Although A.H. was directed to Richey by Butler County Children's Services, this does not mean that A.H.'s statements were necessarily untrustworthy. *Muttart* at ¶ 53; *State v. Dever*, 64 Ohio St.3d 401, 409-410, 1992-Ohio-41. Moreover, the questions asked by Richey were open-ended and in no way leading or suggestive. As such, the portions of A.H.'s interview with Richey described above satisfy the factors provided in *Muttart* and were made for the purposes of medical diagnosis and treatment as detailed in *Arnold*. Consequently, these statements were properly admitted at trial.

{¶ 46} However, other statements made during the course of the interview served a primarily forensic or investigative purpose. Those statements include that (1) the touching occurred while the bedroom door was open; (2) A.H.'s brothers were sleeping in the other room; (3) appellant was wearing only his underwear at the time; and (4) A.H. left the room when appellant went to attend to his dog. These statements were likely not for the purpose of medical diagnosis and treatment but, rather, relate primarily to the investigation into appellant. Thus, pursuant to *Arnold*, these statements were testimonial in nature, unrelated to a medical emergency, and should not have been admitted without the opportunity for appellant to cross-examine A.H. *See Muttart* at ¶ 36. However, we find appellant's argument that he did not receive the opportunity to cross-examine A.H. regarding these statements unpersuasive.

{¶ 47} A.H. testified as the first witness at trial. It is true that her testimony occurred prior to the playing of the interview between A.H. and Richey and was extremely limited, as A.H. continually stated that she "didn't know" or did not want to talk about what happened between herself and appellant. However, appellant was aware of the state's desire to admit

the interview between A.H. and Richey, and the state referred to A.H.'s interview with Richey during its direct examination of A.H. A.H. acknowledged speaking with Richey but did not want to discuss what was said. Yet, instead of cross-examining A.H. about the interview with Richey, appellant chose not to cross-examine A.H. at all. Furthermore, during oral argument before this court, appellant's counsel acknowledged that appellant had the opportunity to recall A.H. after the recording of the interview was published to the jury and cross-examine A.H. at that time. However, again, appellant chose not to cross-examine A.H.

{¶ 48} A defendant's failure to cross-examine a witness does not mean that the witness was not available for such cross-examination or that the Confrontation Clause has not been satisfied. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *State v. Rucker*, 1st Dist. No. C-110082, 2012-Ohio-185; ¶ 37, citing *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 113; *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354 (2004). "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Rucker* at ¶ 37. Thus, any testimonial statements made by A.H. in her interview with Richey did not violate appellant's Confrontational Clause rights because A.H. was available to testify, and did testify, at trial.

{¶ 49} Nonetheless, even if we determined that A.H., due to her limited testimony at trial, was not fully available for cross-examination, we find that the testimonial statements made primarily for investigatory purposes do not warrant a reversal of appellant's conviction, as any error was harmless.

{¶ 50} When evidence has been improperly admitted at trial "in derogation of a criminal defendant's constitutional rights, the admission is harmless 'beyond a reasonable doubt' if the remaining evidence alone comprises 'overwhelming' proof of [a] defendant's guilt." *State v. Wynn*, 12th Dist. No. CA2009-04-120, 2009-Ohio-6744, ¶ 20, citing *State v.*

Harris, 12th Dist. No. CA2007-11-280, 2008-Ohio-4504, ¶ 29.

{¶ 51} Here, A.H. testified that she was eight years old during the trial and was not the spouse of appellant. In addition, appellant admitted during interrogation that A.H. came into his room and lay down in his bed, that he kissed her cheeks and her chest, and that he inserted his finger, approximately to the knuckle, into A.H.'s vagina "probably twice." In reviewing this remaining evidence, we find that the statements made by A.H. during her interview with Richey which served a primarily forensic or investigative purpose did not violate appellant's constitutional rights as A.H. was available for cross-examination and the admission of the statements otherwise constituted harmless error.[1]

{¶ 52} Based upon the foregoing, we find that appellant's constitutional rights were not violated by the admission of any statements made during Richey's interview with A.H. Consequently, appellant's second assignment of error is overruled.

{¶ 53} Assignment of Error No. 3:

{¶ 54} APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND [A] FAIR TRIAL WERE VIOLATED BY PROSECUTORIAL MISCONDUCT.

{¶ 55} Appellant's third assignment of error addresses the issue of prosecutorial misconduct. Appellant argues that the prosecutor engaged in prejudicial misconduct during closing arguments when he (1) referenced appellant's cognitive ability in relation to his confession; (2) repeatedly referred to A.H. as "tiny," "little," and a "pipsqueak"; and (3) misquoted one of appellant's statements during his interrogation. Due to these instances of misconduct, appellant contends that his due process rights were violated and his conviction

1. We additionally note that the entire interview of Richey and A.H. was played for the jury. Therefore, the jury heard some statements not relating to the purposes of medical diagnosis and treatment or forensics and investigation. However, we find that the admission of those statements was also harmless error, as they were so unrelated to the charges at hand that there is "no reasonable probability that the testimony contributed to" appellant's convictions. *State v. Kehoe*, 133 Ohio App.3d 591, 608 (12th Dist.1999).

must be reversed.

{¶ 56} "The prosecution is normally entitled to a certain degree of latitude in its concluding remarks." *State v. Vanloan*, 12th Dist. No. CA2008-10-259, 2009-Ohio-4461, ¶ 31, citing *State v. Smith*, 14 Ohio St.3d 13, 13-14 (1984). Indeed, a prosecutor "is at liberty to prosecute with earnestness and vigor, striking hard blows." *Id*., citing *Smith* at 14. Yet, he may not strike with foul ones. *Id*.

{¶ 57} The test for prosecutorial misconduct during closing argument is "whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *Id*. at ¶ 32; *State v. Lamb*, 12th Dist. Nos. CA2002-07-171, CA2002-08-192, 2003-Ohio-3870, ¶ 12. "The focus of an inquiry into allegations of prosecutorial misconduct is upon the fairness of the trial, not upon the culpability of the prosecutor." *Vanloan* at ¶ 32; *State v. Murphy*, 12th Dist. No. CA2007-03-073, 2008-Ohio-3382, ¶ 9; *State v. Hill*, 75 Ohio St.3d 195, 203, 1996-Ohio-222. The finding of prosecutorial misconduct does not warrant a reversal of the conviction "unless the defendant has been denied a fair trial." *Murphy* at ¶ 9, citing *State v. Maurer*, 15 Ohio St.3d 239, 266 (1984).

{¶ 58} At trial, appellant's counsel failed to object to the prosecutor's comments which appellant now argues were made improperly. "A failure to object to alleged prosecutorial misconduct waives all but plain error." *Lamb* at ¶ 13. "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *Vanloan* at ¶ 33, citing *State v. Moreland*, 50 Ohio St.3d 58, 62 (1990). A finding of plain error must be made with "utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Lamb* at ¶ 13, citing *State v. D'Ambrosio*, 73 Ohio St.3d 141, 144 (1995). Therefore, in order to reverse appellant's conviction for prosecutorial misconduct, we must find that appellant would not have been convicted but for the alleged misconduct of the prosecutor. *Id*.

{¶ 59} During his closing argument, the prosecutor made statements that appellant is not seven or eight years old, like A.H., but "50 some odd years old." The prosecutor further stated that appellant made statements in his interrogation while aware "of the importance of what" he told the detectives. The prosecutor also continually referred to A.H. as "that little seven year old," and that "little pipsqueak of an eight year old." Finally, the prosecutor stated that if the jury listened closely to the statements appellant made after his interrogation, they would hear him say "why did you do those things to her" while appellant argues that the tape reveals him saying "I didn't do those things to her."

{¶ 60} Appellant contends that the prosecutor's statements in closing argument went beyond the wide latitude afforded to prosecutors because the remarks prejudiced appellant, inflamed the passions and prejudice of the jury, and misstated evidence. Appellant maintains that these statements were not harmless, as the state presented essentially no evidence other than the statements of A.H. and appellant and that the jury would not have found appellant guilty beyond a reasonable doubt but for the misconduct of the prosecutor.

{¶ 61} In reviewing the evidence presented at trial, including the statements of A.H. to Richey, as well as appellant's statements during his interrogation, we do not believe that, but for the prosecutor's statements, appellant would have been acquitted. The prosecutor never mentioned appellant's cognitive ability but, rather, pointed out that appellant is an adult who was aware of the situation he was in while being interrogated. Without the prosecutor's statements, the jury would still have been able to determine, from listening to the statements appellant made to Monroe and Whitlock, that appellant was aware of the situation. In addition, A.H. testified at trial and, therefore, the jury could see whether her stature aligned with the prosecutor's interpretation of her as "little," "tiny," and a "pipsqueak." Finally, the prosecutor's quoting of appellant's statement is the prosecutor's interpretation of the evidence. The statement was made quietly by appellant after Monroe and Whitlock had left

the room. Indeed, during defense counsel's closing, he gave his interpretation of what appellant said after the detectives left the interview room. Furthermore, the jury was able to listen to the recording and make their own determinations as to what appellant stated.

{¶ 62} Additionally, though not dispositive, we note that the trial court instructed the jury that the closing arguments of counsel were not evidence. We must presume that the jury followed the trial court's instructions and did not rely on the closing arguments in their deliberations. *Vanloan*, 2009-Ohio-4461 at ¶38; *State v. Woodard*, 68 Ohio St.3d 70, 76 (1993).

{¶ 63} Therefore, based upon the foregoing, we cannot say that the statements of the prosecutor were improper or so affected the jury that they would have acquitted appellant but for the prosecutor's remarks. Accordingly, the prosecutor's remarks did not constitute prejudicial misconduct and did not constitute plain error. As such, appellant's third assignment of error is overruled.

{¶ 64} Assignment of Error No. 4:

{¶ 65} THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR A NEW TRIAL BASED ON PROSECUTORIAL MISCONDUCT.

{¶ 66} In his fourth assignment of error, appellant argues that the trial court erred in denying his motion for a new trial. "The decision to grant or deny a motion for a new trial under Crim.R. 33 rests within the sound discretion of the trial court." *State v. Blankenship*, 102 Ohio App.3d 534, 556 (12th Dist.1995); *State v. Schiebel*, 55 Ohio St.3d 71, 76 (1990). "An appellate court may not disturb a trial court's decision denying a motion for a new trial absent an abuse of discretion." *Id*.

{¶ 67} Appellant argues that the conduct of the prosecuting attorney described in his third assignment of error deprived him of his right to a fair trial and that the trial court erred in not granting appellant a new trial. However, as we have determined that no prosecutorial

misconduct occurred in this case, we cannot say that the trial court abused its discretion in denying appellant's motion. Therefore, appellant's fourth assignment of error is overruled.

{¶ 68} Assignment of Error No. 5:

{¶ 69} APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND [A] FAIR TRIAL WERE VIOLATED WHEN HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 70} In his fifth assignment of error, appellant alleges that he was denied the effective assistance of counsel in violation of his constitutional rights. "To establish a claim of ineffective assistance of counsel, a defendant must show that his or her counsel's actions were outside the wide range of professionally competent assistance, and that prejudice resulted by reason of counsel's actions." *State v. Ullman*, 12th Dist. No. CA2002-10-110, 2003-Ohio-4003, ¶ 43, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). A counsel's performance will not be deemed ineffective unless the appellant demonstrates that "counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different." *Id*.; *Strickland* at 688; *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989). "A reasonable probability is 'a probability sufficient to undermine confidence in the outcome of the proceeding.'" *State v. Fields*, 102 Ohio App.3d 284 (12th Dist.1995), quoting *Strickland* at 694.

{¶ 71} Appellant contends that his defense counsel was ineffective in failing to object to the alleged prosecutorial misconduct discussed in the third assignment of error. As discussed above, however, none of the statements of the prosecutor constituted prosecutorial misconduct or prejudicially affected appellant's substantial rights. Therefore, we find that defense counsel was not ineffective for failing to object to the alleged instances of prosecutorial misconduct. Accordingly, appellant's fifth assignment of error is overruled.

{¶ 72} Assignment of Error No. 8:

{¶ 73} THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF RAPE IN VIOLATION OF R.C. 2709.02(A)(1)(b).

{¶ 74} Assignment of Error No. 9:

{¶ 75} APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.[2]

{¶ 76} In his eighth and ninth assignments of error, appellant contends that the evidence presented at trial was insufficient and that his conviction was not supported by the greater weight of the evidence. Specifically, appellant argues that A.H. never identified appellant as the perpetrator of the sexual assault and that no physical evidence of a sexual assault was produced at trial. Further, appellant asserts that A.H. never made the allegation, whether at trial or when talking to Richey, that appellant touched her inappropriately. Rather, A.H. only stated that appellant touched her on top of her clothes. Thus, appellant reasons that his convictions must be reversed.

{¶ 77} When reviewing the sufficiency of the evidence underlying a criminal conviction, the function of an appellate court 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." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶ 78} "While the test for sufficiency requires a determination of whether the state has

2. Although appellant does not specify which conviction he asserts is against the manifest weight of the evidence, it is clear that appellant refers solely to his rape convictions. Appellant's argument makes no mention of his conviction for gross sexual imposition and focuses only on sexual conduct rather than sexual contact. Therefore, our analysis shall focus on appellant's rape convictions.

met its burden of production at trial, a manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *State v. Wilson*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298, ¶ 34. In determining whether the conviction is against the manifest weight of the evidence, an appellate court "must weigh the evidence and all reasonable inferences from it, consider the credibility of the witnesses and determine whether in resolving conflicts, 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. Coldiron,* 12th Dist. Nos. CA2003-09-078, CA2003-09-079, 2004-Ohio-5651, ¶ 24; *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. "This discretionary power should be exercised only in the exceptional case where the evidence weighs heavily against conviction." *Id*.

{¶ 79} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *Wilson* at ¶ 35. "Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id*.

{¶ 80} Appellant was found guilty of two counts of rape against A.H. in violation of R.C. 2907.02(A)(1)(b), which provides, in pertinent part, that "no person shall engage in sexual conduct with another who is not the spouse of the offender * * * when * * * the other person is less than thirteen years of age[.]" The definition of sexual conduct includes "the insertion, however slight, of any part of the body or an instrument, apparatus, or other object into the vaginal or anal opening of another" without privilege to do so. R.C. 2907.01(A).

{¶ 81} At trial, A.H. testified that she had just turned eight years old and that she was not the spouse of appellant. She further testified regarding appellant's home, his bedroom, and which side of the bed he sleeps on. A.H.'s interview with Richey was then played at trial, where A.H. states that she lay on appellant's bed with him, that appellant was lying on his

side and that appellant touched her on her "thing" with his hand. The interview with Richey also revealed A.H. stating that appellant moved his hand while he was touching her, touched her on top of her clothes, and touched her skin.

{¶ 82} Finally, the tape of appellant's interrogation was played at trial. During the interrogation, appellant stated that A.H. came and slept with him in his bed, that he lay on his side in his underwear, and that he inserted his finger into A.H.'s vagina "probably twice." The interrogation also revealed that appellant had an erection and rubbed his penis against A.H.'s right leg. In addition, appellant stated to Monroe and Whitlock that A.H. told him she did not like it when he inserted his finger into her vagina the first time, but that he did it again later that night.

{¶ 83} In reviewing the record, we are mindful that the jury was in the best position to judge the credibility of the witnesses and the weight to be given the evidence. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Based upon the facts of this case, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice to warrant a reversal of appellant's conviction. As such, appellant's convictions for rape were not against the manifest weight of the evidence and were, consequently, supported by sufficient evidence. *See Wilson*, 2007-Ohio-2298 at ¶ 35. Therefore, appellant's eighth and ninth assignments of error are overruled.

{¶ 84} Judgment affirmed.

PIPER and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.