[Cite as *In re C.S.*, 2012-Ohio-2988.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
		No. 11AP-667
C.S.,	:	(C.P.C. No. 08JU-04-5937)
(Appellant).	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 29, 2012

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*, for appellee.

APPEAL from Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

SADLER, J.

{¶ 1} C.S., appellant, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, adjudicating him a delinquent minor for committing one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a third-degree felony if committed by an adult. For the reasons that follow, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} The juvenile-delinquency complaint filed on April 25, 2008, alleged appellant committed gross sexual imposition ("GSI") by engaging in sexual activity with

ten-year-old Z.J. According to the complaint, appellant was 17 years old at the time of the alleged offense.

{¶ 3} At an adjudicatory hearing that commenced before a magistrate on September 16, 2009, Z.J. testified that while spending the night at her grandmother's house on March 14, 2008, appellant touched her vaginal area. According to Z.J., when she fell asleep, she and two other female relatives were in her grandmother's bed, her grandmother was sleeping in a recliner next to the bed, and appellant was using the computer that was also in the bedroom. Z.J. was wearing a t-shirt and underwear and was laying on the left side of the bed next to her sister who was sleeping in the middle. Z.J. testified that at some point she woke up and appellant was lying next to her on the bed. Z.J. testified, "I felt his hand – [appellant's] hand go in my underwear and try to stick his finger in my private part." (Tr. 96.) Z.J. testified that after feeling appellant's hand, she "jumped up and stared at him for about five minutes and then got off the bed and went to go put [her] pants on." (Tr. 98.) When Z.J. returned to the room, she laid down in between the two other girls and went to sleep. Z.J. testified that she did not tell her grandmother what had happened, but she did tell her aunt and uncle a few hours after the alleged incident at approximately 7:00 a.m.

{¶ 4} Also presented was the testimony of Kerri Wilkinson, f.k.a. Kerri Marshall, a social worker at Nationwide Children's Hospital. Wilkinson testified she is employed as a forensic interviewer at the hospital's Center for Child and Family Advocacy ("CCFA"). According to Wilkinson, her role is to gather information from child victims for purposes of medical diagnosis and treatment, and to relay that information to the doctor or nurse practitioner that will be conducting a medical examination of the child. Wilkinson interviewed Z.J. on March 21, 2008. At that time, Z.J. told Wilkinson of the events that occurred on March 14, 2008. At the conclusion of the interview, Wilkinson met with Kristen Upton, the nurse practitioner who would be conducting the medical examination of Z.J. Wilkinson testified she informed Upton of the contents of Z.J.'s interview.

{¶ 5} Because Gloria Garmany, grandmother to both Z.J. and appellant, was too ill to travel, the parties stipulated to the admission of a transcription of a telephone conversation between Garmany and Columbus Police Detective Jeffrey Cromwell. During that conversation, Garmany stated she was in the room with the children the entire night

and that at no time did Z.J. inform her about what had happened. Garmany also expressed her belief that the incident did not actually occur.

{¶ 6} By decision rendered December 2, 2009, the magistrate found appellant a delinquent minor for having committed the offense of GSI. Appellant timely filed objections to the magistrate's decision challenging the sufficiency of the evidence and arguing testimony from Wilkinson was improperly admitted. The trial court overruled appellant's objections and adopted the findings of the magistrate. After a dispositional hearing, the magistrate found appellant to be a juvenile sex offender registrant and recommended that he be placed on probation until attaining the age of 21. The trial court adopted the magistrate's decision via judgment entry filed April 13, 2011.

II. ASSIGNMENTS OF ERROR

{¶ 7} This appeal followed, and appellant brings the following three assignments of error for our review:

> [1.] The trial court erred in permitting the state to introduce prior consistent statements to bolster the testimony of its critical witness in violation of the Rules of Evidence and due process protections under the state and federal Constitutions.
>
> [2.] There was insufficient competent, credible evidence to support the court's verdict, thereby, denying Appellant due process under the state and federal Constitutions.
>
> [3.] The verdict of the court was against the manifest weight of the evidence.

III. DISCUSSION

A. First Assignment of Error

{¶ 8} In his first assignment of error, appellant contends the trial court erred in admitting Z.J.'s prior consistent statements made to Wilkinson at the CCFA. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, citing *State v. Issa*, 93 Ohio St.3d 49 (2001). Thus, our inquiry is limited to determining whether the trial court acted unreasonably, arbitrarily or unconscionably in deciding the evidentiary issues. *Conway*, citing *State v. Barnes*, 94 Ohio St.3d 21 (2002).

{¶ 9} In the case sub judice, appellant contends Z.J.'s statements, as contained in a video of Z.J.'s interview at CCFA and written summary of the same, constitute hearsay and are not admissible under Evid.R. 801(D)(1)(b) or 803(4), and that their admission violates Evid.R. 403(A) and (B). Appellant asserts he was unduly prejudiced by these statements that had the effect of improperly bolstering Z.J.'s testimony.

{¶ 10} Because it is dispositive, we first address appellant's arguments regarding Evid.R. 803(4). Hearsay, defined as statements other than ones the declarant made at trial offered into evidence to prove the truth of the matter asserted, is generally inadmissible. Evid.R. 801; Evid.R. 802. However, numerous exceptions to the hearsay rule exist. Evid.R. 803(4) provides an exception to the hearsay rule as follows:

> Statements 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.

{¶ 11} Appellant argues that because the CCFA interview was primarily forensic in nature rather than for medical diagnosis and treatment, Z.J.'s statements from that interview are testimonial and, therefore, inadmissible under Evid.R. 803(4). In support, appellant relies on *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, in which the Supreme Court of Ohio held Evid.R. 803(4) was limited to information necessary for the diagnosis and treatment of injuries.

{¶ 12} The defendant in *Arnold* was accused of raping his four-year-old daughter in charges that arose after the child reported she had been touched in her private area. The day following the child's report, the child was taken to the hospital and interviewed at the CCFA. At trial, it was ruled that the victim was unavailable to testify, and the trial court allowed the state to present the child's recorded interview from the CCFA in lieu of her live testimony. The admission of the child's interview at trial was upheld on appeal. *State v. Arnold*, 10th Dist. No. 07AP-789, 2008-Ohio-3471 ("*Arnold I*"). On review, the Supreme Court of Ohio framed the issue before it as whether, in a criminal prosecution, the out-of-court statements made by a child to an interviewer employed by a child advocacy center violates the right to confront witnesses provided by the Sixth Amendment's Confrontation Clause and corresponding provisions of the Ohio

Constitution. *Arnold* at ¶ 11. The court analyzed this issue in light of *Crawford v. Washington*, 541 U.S. 36 (2004), wherein the United States Supreme Court held that out-of-court statements violated the Sixth Amendment when they are testimonial and the defendant has had no opportunity to cross-examine the declarant. *Arnold* at ¶ 13, citing *Crawford* at 68.

{¶ 13} The Supreme Court of Ohio found "[t]he objective of a child-advocacy center * * * is neither exclusively medical diagnosis and treatment nor solely forensic investigation." *Arnold* at ¶ 29. The court held that statements made to interviewers at child-advocacy centers that are made for the purpose of medical diagnosis and treatment are nontestimonial and, therefore, admissible without offending the Confrontation Clause. *Id*. at ¶ 2. The court further held that statements made to interviewers at child-advocacy centers that serve primarily a forensic or investigative purpose are testimonial and, therefore, inadmissible pursuant to the Confrontation Clause. *Id*.

{¶ 14} In accordance with its holding, the *Arnold* court went on to analyze particular statements and to determine whether the statements at issue primarily served a forensic or investigative purpose or whether the statements provided information necessary to diagnose and provide medical treatment. *Id*. at ¶ 34-37. The court classified information regarding the identity of the perpetrator, the type of abuse alleged, the identification of the areas where the child had been touched and the body parts of the perpetrator that had touched her, as well as the time frame of the abuse, as statements for diagnosis and treatment because that information allowed the doctor or nurse to determine whether to test the child for sexually transmitted diseases, and to identify any trauma or injury sustained during the alleged abuse. *Id*. at ¶ 32, 38. On the other hand, the court determined statements such as the child's assertion that the offender shut and locked the door before raping her, the child's description of where others were in the house at the time of the rape, the child's statement that the offender removed her underwear, and the child's description of the offender's boxer shorts were statements related primarily to the investigation and, therefore, such statements were prohibited by the Confrontation Clause. Thus, the court affirmed in part and reversed in part the judgment of the court of appeals and remanded the matter to that court for a determination of whether the erroneous admission of forensic statements was harmless

error. On remand, the court of appeals concluded the admission of the challenged evidence was harmless for two reasons: (1) the statements were cumulative of other evidence properly admitted, and (2) overwhelming evidence other than the challenged statements supported the guilty verdicts. *State v. Arnold*, 10th Dist. No. 07AP-789, 2010-Ohio-5622 ("*Arnold II*"), appeal denied, 128 Ohio St.3d 1426, 2011-Ohio-1049.

{¶ 15} In this case, because Z.J. testified at trial and was subject to cross-examination, we are not presented with a Confrontation Clause issue. Nonetheless, appellant contends *Arnold* compels a conclusion that Z.J.'s statements made at the CCFA were not admissible because they were made for forensic purposes rather than for purposes of medical diagnosis and treatment.

{¶ 16} A similar argument was recently presented to this court in *State v. Simms*, 10th Dist. No. 10AP-1063, 2012-Ohio-2321, wherein the defendant sought review of his convictions for rape, sexual battery, and GSI arising out of numerous sexual acts involving his nine-year-old daughter. During the defendant's trial, the testimony of Diane Lampkins, forensic interviewer of the victim at the child advocacy center, was introduced. Over objection, the trial court allowed Lampkins' testimony under Evid.R. 803(4). Like appellant, the defendant in *Simms* argued on appeal that the interviewer's testimony constituted hearsay that had the effect of bolstering the victim's testimony. Also like appellant, the *Simms*' defendant additionally argued that because the victim's statements were not made for purposes of medical diagnosis and treatment, said statements should have been excluded pursuant to *Arnold*. In *Simms*, we rejected the defendant's arguments.

{¶ 17} Initially, this court recognized *Arnold*'s "limited application" given that no Confrontation Clause issues were present because the victim testified at trial and was subject to cross-examination. *Simms* at ¶ 42, citing *State v. Rucker*, 1st Dist. No. C-110082, 2012-Ohio-185, ¶ 37; *see also State v. Gutierrez*, 3d Dist. No. 5-10-14, 2011-Ohio-3126, ¶ 58 (post-*Arnold* case concluding no Confrontation Clause violation in admission of child victim's prior testimonial statements where victim testified at trial and was subject to cross-examination).

{¶ 18} Secondly, we stated, "[w]e disagree with appellant's conclusory assertion that [the victim's] statements were made simply as part of the criminal investigation."

Simms at ¶ 41. Relying on other courts' classifications of similar statements, we found that with one possible exception of the victim's statement regarding the location where the events occurred, the substance of the statements to which Lampkins testified indicated the statements were made primarily for purposes of medical diagnosis and treatment. *Id.* at ¶ 40, citing *In re J.M.M.*, 4th Dist. No. 08CA782, 2011-Ohio-3377, ¶ 39 (child's statement that the offender "rubbed his pee-pee all over my face and then put his pee-pee in my butt," as well as her statements that "her butt hurt" and that the incident had occurred that day were statements made for medical diagnosis and treatment and, therefore, they were nontestimonial and admissible); *State v. Dorsey*, 5th Dist. No. 11 CA 39, 2012-Ohio-611, ¶ 24-28 (victim's statements describing forms of sexual activity, such as statements explaining that the offender "grabbed me[,] hugged me and grabbed my boob and my [vagina]. He got on top of me and put his [penis] in my [vagina] and I fought him. He's been doing it to me for a while. If I'm not at home he does it to Pam[,]" would cause a medical professional to be concerned about possible injuries and sexually transmitted diseases; such statements were not testimonial and were for medical diagnosis and treatment); and *In re T.L.*, 9th Dist. No. 09CA0018-M, 2011-Ohio-4709, ¶ 14-22 (statements that the perpetrator touched the child's "pee-pee with his fingers" under her underwear and also inside her "pee-pee" were for purposes of medical diagnosis and treatment and therefore admissible; however, statements that she and the offender were playing hide-and-seek and that the offender told her to sit on the bed immediately prior to the abuse were investigative in nature and should not have been admitted; nevertheless, their admission was harmless beyond a reasonable doubt). In conclusion, this court in *Simms* held that with respect to statements regarding the location where the events took place, any error which may have occurred by their admission was "clearly harmless beyond a reasonable doubt." *Id.* at ¶ 41.

{¶ 19} Like *Simms*, issues pertaining to the Confrontation Clause are not before us because Z.J. testified at trial and was subject to cross-examination. *Simms* at ¶ 42; *Gutierrez* at ¶ 58; *State v. Knauff*, 4th Dist. No. 10CA900, 2011-Ohio-2725 (even if some of the child advocacy center's interview contained statements testimonial in nature, no constitutional error in statements' admission because child victim testified and was

subject to cross-examination). Like *Simms*, "we believe *Arnold* has limited application to the instant case." *Id*. at ¶ 37.

{¶ 20} Further, appellant does not challenge specific statements but rather challenges the interview and report in their entirety. Regardless, we have reviewed the statements challenged here, and conclude the majority of Z.J.'s statements made to Wilkinson were for purposes of medical diagnosis or treatment. *Simms*; *State v. Hill*, 2d Dist. No. 24410, 2011-Ohio-5810 (statements made at child advocacy center regarding physical abuse were for purposes of medical diagnosis and treatment).

{¶ 21} As to those statements that are potentially not "reasonably pertinent to diagnosis or treatment," such as what appellant was doing on the computer, what appellant was wearing, whether grandmother was in the room, and the direction the girls were lying in the bed, we conclude any error which may have occurred by their admission is harmless as such testimony is cumulative of other, properly admitted testimony. *Arnold II* (error in admission of testimony can be considered harmless where such testimony is cumulative of other properly admitted testimony); *Conway* at ¶ 59; *State v. Holloman*, 10th Dist. No. 06AP-01, 2007-Ohio-840, ¶ 33 (any error in admitting statements was harmless where testimony was cumulative of other testimony). Z.J. testified at trial about the events alleged to have occurred on March 14, 2008, including how the girls were lying in the bed, what appellant was doing prior to the alleged incident, and who was present in the bedroom. Consequently, to the extent they can be held to have been improperly admitted, we conclude such admission constitutes harmless error.

{¶ 22} Because admission of the challenged statements was either proper under Evid.R. 803(4) or constituted harmless error, we overrule appellant's first assignment of error.

B. Second and Third Assignments of Error

{¶ 23} Since they are interrelated, we address appellant's second and third assignments of error together. Together these assigned errors challenge both the sufficiency and weight of the evidence supporting the trial court's delinquency finding. Our review of the sufficiency and the manifest weight of the evidence in a juvenile delinquency adjudication is the same as for criminal defendants. *In re D.R.*, 10th Dist.

No. 05AP-492, 2006-Ohio-5205; *see also In re Watson*, 47 Ohio St.3d 86 (1989); *In re Fortney*, 162 Ohio App.3d 170, 2005-Ohio-3618, ¶ 19 (4th Dist.).

{¶ 24} When reviewing the sufficiency of the evidence supporting a criminal conviction, an appellate court must examine the evidence submitted at trial to determine whether such evidence, if believed, would convince an average person of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. *See also Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

{¶ 25} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin*, 20 Ohio App.3d 172 (1st Dist.1983). Rather, the sufficiency of the evidence test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319. Accordingly, the reviewing court does not substitute its judgment for that of the factfinder. *Jenks* at 279.

{¶ 26} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror." Under this standard of review, the appellate court weighs the evidence in order to determine whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). However, in engaging in this weighing, the appellate court must bear in mind the factfinder's superior, first-hand perspective in judging the demeanor and credibility of witnesses. *See State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The power to reverse on manifest-weight grounds should only be used in exceptional circumstances, when "the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶ 27} A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was offered at trial. *State v. Campbell*, 10th Dist. No. 07AP-1001, 2008-Ohio-4831. The trier of fact is free to believe or disbelieve any or all of the testimony presented. *State v. Jackson*, 10th Dist. No. 01AP-973 (2002). The trier of

fact is in the best position to take into account the inconsistencies in the evidence, as well as the demeanor and manner of the witnesses, and to determine which witnesses are more credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503. Consequently, although appellate courts must sit as a "thirteenth juror" when considering a manifest-weight argument, it must also give great deference to the trier of fact's determination on the credibility of the witnesses. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037.

{¶ 28} Governing here is R.C. 2907.05(A)(4), which provides, in relevant part, that "[n]o person shall have sexual contact with another, not the spouse of the offender * * * when * * * [t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person." The state introduced evidence through Z.J's testimony that when she was ten years old, appellant touched her vaginal area. Nonetheless, appellant argues this evidence is insufficient to sustain a delinquency finding of GSI because the state did not present any physical evidence or eyewitness testimony of inappropriate touching.

{¶ 29} As this court has stated, a "victim's testimony alone is sufficient to support the conviction for sexual assault." *State v. West*, 10th Dist. No. 06AP-111, 2006-Ohio-6259, ¶ 16 (victim's testimony alone sufficient to support conviction under R.C. 2907.05(A)(4)); *In re Fisher*, 10 Dist. No. 97APF10-1356 (June 25, 1998). "There is nothing in the law that requires that a sexual assault victim's testimony be corroborated as a condition precedent to conviction." *West* at ¶ 16, citing *State v. Nichols*, 85 Ohio App.3d 65, 76 (4th Dist.1993); *State v. Jackson*, 10th Dist. No. 06AP-1267, 2008-Ohio-1277. Z.J. testified that during an overnight stay at her grandmother's house, she woke to find appellant lying next to her in the bed and that she felt his hand go inside of her underwear and him try to stick his finger in her "private part." (Tr. 96.) If believed by the trier of fact, such evidence is sufficient to find appellant guilty of GSI beyond a reasonable doubt. Consequently, we reject appellant's assertion that this record contains insufficient evidence to support the delinquency finding.

{¶ 30} Appellant's manifest-weight-of-the-evidence challenge is also based upon the lack of both physical evidence and corroborating witness testimony. The state may use either direct or circumstantial evidence to prove the essential elements of an offense.

State v. Lundy, 8th Dist. No. 90229, 2008-Ohio-3359, ¶ 12, citing *Jenks*. As stated by this court in *West*, "physical evidence of sexual contact, as defined [in R.C. 2907.05(A)(4)] is not a required element of gross sexual imposition." *Id*. at ¶ 18, citing *State v. Owens*, 9th Dist. No. 19932 (Jan. 24, 2001) (the mere absence of corroborating physical evidence does not negate the testimony of a witness to a crime); *Lundy* (simply because the state provided no physical evidence that the defendant spat on police does not mean the record contains insufficient evidence to support the conviction or that a conviction is against the manifest weight of the evidence).

{¶ 31} " '[W]here a factual issue depends solely upon a determination of which witnesses to believe, that is the credibility of witnesses, a reviewing court will not, except upon extremely extraordinary circumstances, reverse a factual finding either as being against the manifest weight of the evidence or contrary to law.' " *In re L.J.*, 10th Dist. No. 11AP-495, 2012-Ohio-1414, ¶ 21, quoting *In re Johnson*, 10th Dist. No. 04AP-1136, 2005-Ohio-4389, ¶ 26. The trier of fact was free to believe or disbelieve any part of the witnesses' testimony, and a conviction is not against the manifest weight of the evidence merely because the trier of fact believed the victim's testimony. *In re L.J.* at ¶ 23, citing *State v. Smith*, 10th Dist. No. 04AP-726, 2005-Ohio-1765. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor and determine whether the witnesses' testimony is credible. *Williams* at ¶ 58; *State v. Clarke*, 10th Dist. No. 01AP-194 (Sept. 25, 2001).

{¶ 32} The trial court, as trier of fact, was in the best position to consider the discrepancies in the evidence offered, as well as the demeanor and manner of the witnesses, and to determine which of those witnesses were more credible. We cannot say that this was one of the rare cases in which the trier of fact clearly lost its way such that a miscarriage of justice requiring reversal of appellant's delinquency finding has occurred. Consequently, the trial court's finding appellant to be a delinquent minor for having committed the offense of GSI is not against the manifest weight of the evidence.

{¶ 33} Accordingly, we overrule appellant's second and third assignments of error.

IV. CONCLUSION

{¶ 34} Having overruled appellant's three assignments of error, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is hereby affirmed.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.
