[Cite as *State v. Britta*, 2010-Ohio-971.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-017**
- vs -	:	
ALDO J. BRITTA, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000261.

Judgment: Affirmed

Charles E. Coulson, Lake County Prosecutor, and *Joshua s. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Aldo J. Britta, Jr., appeals his convictions on four counts of Gross Sexual Imposition following a jury trial in the Lake County Court of Common Pleas. Britta was sentenced to serve an aggregate prison term of eight years. For the following reasons, we affirm the decision of the court below.

{¶2} On July 18, 2008, Britta was indicted by the Lake County Grand Jury on four counts of Gross Sexual Imposition, felonies of the third degree, in violation of R.C. 2907.05(A)(4).

{¶3} Britta filed the following pre-trial motions: a Motion in Limine Regarding Defendant's Criminal History, a Motion in Limine to Address the Complaining Witness and Defendant by their Names and not by Character Label, and a Motion in Limine regarding the Testimony and Report of Lauren McAliley, a pediatric nurse practitioner with Child Advocacy and Protection at Rainbow Babies and Children's Hospital.

{¶4} On October 8, 2008, the trial court ruled on Britta's Motions. With respect to Britta's criminal history, the court prohibited "the introduction of evidence relating to a 1993 felony aggravated assault conviction, a misdemeanor of the fourth degree public indecency conviction and 1993 newspaper articles regarding stalking allegations. With respect to addressing the complaining witness and defendant, the court ordered that "the complaining witness shall not be referred to as the 'victim', but may be referred to as the 'alleged victim'. The defendant shall not be referred to as the 'accused' but may be referred to as the 'defendant'." With respect to the testimony and report of Nurse McAliley, the court ordered that "McAliley shall not testify as to the truthfulness and veracity of statements made by the alleged child victim. *** McAliley may express an opinion regarding sexual abuse if a proper foundation is first established that [sic] she has relied upon 'other facts' or 'something other' than unsupported allegations in the alleged child victim's statements in forming her opinion."

{¶5} A jury trial was held on November 18 and 19, 2008. The following testimony was presented at trial.

{¶6} The victim, N.M., was eleven years old at the time of the incidents charged in the indictments. Britta, forty-two years old at the time of the incidents, is N.M.'s uncle by marriage to N.M.'s aunt, Brenda Mandato. At the time of the incidents, Britta and Brenda were divorced, although they maintained a relationship and have a child together.

{¶7} N.M. testified that on a Saturday in January 2008, she was alone at her aunt's house in Eastlake, Ohio, watching G.M., Britta and Brenda's two year old daughter. N.M. was preparing lunch when Britta arrived and told her that he "had something for [her]." Britta had N.M. go into the bedroom, sit on the bed, and close her eyes. N.M. testified that Britta pushed her back on the bed and climbed on top of her and started rubbing his pelvis against her vagina. He also put his hand under her shirt and over her bra to feel her breasts. N.M. "screamed help" and G.M. entered the bedroom. At this point, Britta got off N.M. and left Brenda's house. N.M. testified that she did not tell her aunt what had happened because she was frightened about what might happen between her aunt and Britta.

{¶8} On Sunday, March 23, 2008, N.M. was spending the night at Brenda's home. The following day, N.M. and other members of her family were going to Kalahari water park in Sandusky, Ohio. Early Sunday morning, N.M.'s father called and announced that her grandmother (the father and aunt's mother) had died. N.M.'s father came by the house and picked Brenda up, leaving Britta, N.M., and G.M. at the house.

{¶9} N.M. was sleeping in the bed with G.M. when Britta came in and laid down on the other side of G.M. N.M. testified that Britta reached over G.M. and put his hand "under my shirt and started like hitting on my back and unstrapped my bra." N.M. went

into the bathroom and fixed her bra, and then went to sit on a couch in the living room. Britta followed and sat on the couch with her. N.M. went to another couch and, when Britta again followed, moved to the floor, laying on her stomach in front of the television. Britta climbed on top of N.M. and turned her over and began "moving his penis on [her] vagina and he was holding [her] arms up." Britta put one of his hands under her shirt and bra and began rubbing on her breasts. Britta also touched N.M.'s "lower thigh" and "below [her] vagina," underneath her shorts but on top of her underwear. When Britta let go of her hands, N.M. was able to get up from the floor and returned to the bedroom until her father and aunt returned. She did not tell them what happened because she thought her father would fight with Britta.

{¶10} N.M. next encountered Britta at the funeral home for her grandmother's funeral. N.M. testified that when she walked past him, Britta "touched [her] one thigh, like below my butt," which made her feel "uncomfortable." At this point, N.M. told her cousin, J.W., then ten years old, that Britta was touching her inappropriately.

{¶11} The following day, N.M. was approached by her adult sister, Erica Mandato, and her aunt, Stacy Wilson, regarding what she had told J.W. N.M. told them what happened with Britta, although she was "nervous" and "worried" and not "real comfortable" talking about the incidents.

{¶12} On cross-examination, N.M. admitted that she had initially described Britta as "tickling" her when he unsnapped her bra. However, N.M. explained that "he wasn't playing around when he unsnapped my bra," and that she did not think there was a "big difference" between tickling and the way in which he was feeling her back. N.M. also

testified on cross-examination that Britta would have her walk on his back because it was hurting, although this occurred prior to the incidents reported to the police.

{¶13} Eric Wilson, N.M.'s cousin, testified that she was "angry but teary," "about to cry," when she told him that she hated Britta because he was a "rapist." J.W. also testified that N.M. told him that Britta touched her in "weird places," indicating the breasts and genitals. Although N.M. did not want J.W. to tell anyone, he told his parents and N.M.'s older sister.

{¶14} Erica Mandato, N.M.'s adult half-sister, testified that when she confronted N.M. with the information provided by J.W., she "went white, she looked down, she was shaking, she didn't want to talk about it at all." Erica testified that N.M. told her that she and Britta had had sex, meaning "like in the movies when they move up and down on each other." When Erica explained what intercourse was, N.M. conceded that it had not occurred, since their "clothes were on." On cross-examination, Erica testified that N.M.'s initial account of the events described tickling or touching on the breast and inner thigh.

{¶15} Erica observed N.M.'s interactions with Britta at the water park and a few days later at a family dinner following the grandmother's funeral. At the water park, N.M. was less talkative than usual and stayed closer to the adults rather than playing with the other children. At the dinner, Erica noted that Britta did not acknowledge N.M.'s presence or give her a hug and a kiss when they parted, as he usually did.

{¶16} Stacy Wilson, N.M.'s aunt, testified that when she confronted N.M. about Britta, "her head dropped, her eyes filled up *** with tears, and *** she said, 'I don't want

to talk about it.'" Stacy also noted that N.M. behaved differently at the water park by staying with the adults for a few hours before playing with her cousins.

{¶17} On cross-examination, Stacy testified that, in her initial impression of the incidents, Britta "was playing around with [N.M.]" and "tickling" her. With respect to the second incident, Stacy's initial account described N.M. crying because her grandmother had died and Britta "put his hand on her shoulder and told her that everything was going to be okay."

{¶18} Nurse Lauren McAliley conducted the sexual abuse examination of N.M. In preparing her report, Nurse McAliley relied, in part, upon the behavioral and medical inventories prepared by Licensed Social Worker, Darlynn Constant, in consultation with N.M.'s mother, Tammy Breeden-Mandato. Tammy reported that N.M. had known Britta all her life and referred to him as "Uncle Aldo." Tammy also reported recent changes in N.M.'s behavior, such as "lashing out" at people, pulling her hood over her head to conceal her face, refusing to take her clothes off when she goes swimming, and, when asked to watch G.M., wanting her grandfather to be with her. Nurse McAliley testified that these behavioral concerns "could certainly be reflective of these incidents," but, "they could also be reflective of any kind of stress." It was significant that the changes occurred within a couple of months of N.M.'s evaluation.

{¶19} Nurse McAliley testified to the account of the two incidents as described by N.M., over the objection of defense counsel. This account was substantively similar to the account provided by N.M. while testifying. Nurse McAliley testified that the "key elements" of N.M.'s accounts of the incidents were consistent with each other over time

and N.M. tended to be more detailed than the average child in her description of the incidents.

{¶20} After interviewing N.M., Nurse McAliley performed a general screening physical and an anal/genital examination of N.M. There were no physical findings: "she was a normal appearing pubescent female, and there were no signs of any tissue trauma or nothing suggestive of infection."

{¶21} Over the objection of defense counsel, Nurse McAliley testified that, to a reasonable degree of medical certainty, it was probable that N.M. was sexually abused.

{¶22} Detective Christopher Bowersock of the Eastlake Police Department spoke with N.M. on April 14, 2008. The same day, he went to Britta's place of employment and advised him of the allegations. Britta agreed to return to the police station to be interviewed. En route, Detective Bowersock read Britta his Miranda rights. Britta admitted doing something of which he was ashamed. Britta explained that "it was just tickling in the beginning, and then *** he did end up undoing her bra and touching her, touching her breast, and on another occasion he did touch her breast and her vaginal area over the clothing." Detective Bowersock asked whether he was rubbing against her genital area and "he said, yeah, he did do that and didn't know why he did it."

{¶23} At the police station, Detective Bowersock again mirandized Britta and continued the interview. Detective Bowersock testified that Britta was more nervous at the police station and began minimalizing the incidents. A video recording of the second interview was played before the jury.

{¶24} Regarding the January 2008 incident, Britta said he and N.M. were "fooling around" in the bedroom, although he did not remember calling her into the bedroom; that he was tickling her, pinched her, snapped her bra, and threw little pieces of paper at her.

{¶25} Detective Bowersock: You're tickling her and you end up touching her breasts, which makes her very uncomfortable. Okay? And she said, at that point, that's when she said, she actually screamed out a little bit and that's when [G.M.] came towards her, or came towards the room.

{¶26} Britta: And it stopped, I believe it stopped.

{¶27} A few minutes later, Britta denied touching her breasts, saying "truly it was a bump," rather than groping.

{¶28} Detective Bowersock: Okay, what about rubbing on her? Because that happened the first time, too. You got on top of her face to face, you were rubbing on her. Were you tickling her stomach, was that what was going on?

{¶29} Britta: I tickled her stomach? Yes, I did tickle it and she said, no, I've got a bad stomach, and *** that's all I did. I *** was tickling. I was just playing.

{¶30} Detective Bowersock: Okay. Is it possible that while you were tickling her you touched her vagina area?

{¶31} Britta: Absolutely not.

{¶32} Regarding the March 2008 incident, Britta admitted that N.M.'s bra became undone, but denied undoing it. Britta also denied rubbing against N.M. face to face. When Detective Bowersock confronted Britta with making such admissions prior to arriving at the police station, Britta did not deny doing so.

{¶33} Detective Bowersock: *** At this point she is emphatic that you rubbed up against her face to face. *** You're rubbing your genitals against her genitals. *** Explain to me why you would do that?

{¶34} Britta: I didn't do that. *** I know the bra got undone, that she went in the bathroom, she hooked her bra back on, and that was the end of that. That was it.

{¶35} Detective Bowersock: Okay. You're undoing her bra, you're tickling her, and at this point she is emphatic that you touched her breasts, which you admitted that you did on the second occasion, okay? Right or wrong? Isn't that what you said to me?

{¶36} Britta: Yeah.

{¶37} Detective Bowersock: Okay?

{¶38} Britta: Yeah.

{¶39} ***

{¶40} Detective Bowersock: Why try to take her bra off, then?

{¶41} Britta: It was a stupid thing. *** I was just playing around and it was stupid.

{¶42} Britta continues to deny touching N.M.'s breasts, but concedes that he "grazed" them while tickling her.

{¶43} Detective Bowersock: *** I asked you in the car, why you would rub on her, and you said, you didn't know why you'd do that. You weren't thinking. You thought it was stupid, correct?

{¶44} Britta: [Nods affirmatively.]

{¶45} ***

{¶46} Detective Bowersock: Should you not have been tickling and touching her breasts, and rubbing up on an eleven year old girl?

{¶47} Britta: Without a doubt.

{¶48} At the conclusion of the interview, Detective Bowersock summarized what Britta had admitted to doing, both in the car and at the police station:

{¶49} Detective Bowersock: You told me that it started off tickling on the first one. You did touch her breasts. There was some rubbing, but you stopped and that was it. On the second one, there was some tickling. You undid her bra. You touched her breasts, physically, *** flesh to flesh. [You] rubbed up against her. She said, stop. You stopped. She went into the bathroom and redid her bra and then went back to the bedroom. Correct?

{¶50} Britta: [Nods head affirmatively.]

{¶51} Detective Bowersock: Okay, so we're clear on that, yes?

{¶52} Britta: Yeah.

{¶53} Thereupon, Britta was asked to make a written statement. This statement was submitted into evidence during the cross-examination of Detective Bowersock. In this statement, Britta admitted to playing with and tickling N.M. He further stated that he pulled on her bra strap and it came undone. N.M. said to stop and went into the bathroom to fix it. Britta denied rubbing on her.

{¶54} The jury returned a verdict finding Britta guilty of four counts of Gross Sexual Imposition.

{¶55} On January 9, 2009, a sentencing hearing was held. At the conclusion of the hearing, the trial court sentenced Britta to four years of imprisonment for each count of Gross Sexual Imposition. The sentences on the first and second counts, and on the third and fourth counts, were ordered to be served concurrently with each other but consecutively to the other pair of concurrent sentences, for an aggregate sentence of eight years. The court further advised Britta that he was classified as a Tier II sexual offender and would be subject to post release controls upon the completion of his prison sentence. On January 14, 2009, the trial court's Judgment Entry of Sentence was journalized.

{¶56} On February 5, 2009, Britta filed his Notice of Appeal.

{¶57} On appeal, Britta raises the following assignments of error:

{¶58} "[1.] The trial court erred to the prejudice of the defendant-appellant in permitting the expert testimony of a nurse practitioner, a direct violation of the Sixth Amendment to the United States Constitution, Section 10 and 16, Article I of the Ohio

Constitution, and the authority of the Ohio Supreme Court as set forth in *State v. Boston*."

{¶59} "[2.] The defendant-appellant's due process rights and rights to fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution were violated by ineffective assistance of counsel."

{¶60} "[3.] The trial court violated the defendant-appellant's constitutional right to fair trial and due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 5 and 10, Article I of the Ohio Constitution when it admitted inadmissible hearsay testimony."

{¶61} "[4.] The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶62} In his first assignment of error, Britta maintains the trial court committed reversible error by allowing Nurse McAliley to testify that, with respect to N.M., "that sexual abuse was probable." According to Britta, the State failed to lay a proper foundation for this testimony which served merely to bolster the veracity of the alleged child-victim.

{¶63} Determinations regarding the admissibility of expert testimony are generally within the discretion of the trial court and, absent an abuse of that discretion, will not be overturned. *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 616, 1998-Ohio-178; *Rigby v. Lake Cty*. (1991), 58 Ohio St.3d 269, 271 ("a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence").

{¶64} The Ohio Supreme Court discussed the issue of expert testimony in child sexual abuse cases in *State v. Boston* (1989), 46 Ohio St.3d 108, overruled, in part, on other grounds by *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267.

{¶65} The Supreme Court held that "the use of expert testimony is perfectly proper [in cases involving alleged child abuse] and such experts are not limited to just persons with scientific or technical knowledge but also include other persons with 'specialized knowledge' gained through experience, training or education." Id. at 126. "[A]n expert's opinion testimony on whether there was sexual abuse would aid jurors in making their decision and is, therefore, admissible pursuant to Evid.R. 702 and 704." Id. at 128. However, "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." Id. at syllabus.

{¶66} As an example of expert testimony impermissibly bolstering a witness' credibility, the expert in *Boston* testified "that [the victim] had not fantasized her abuse and that [the victim] had not been programmed to make accusations against her father." Id. at 128. The Supreme Court found this testimony "egregious" and "prejudicial," since it, "in effect, declared that [the victim] was truthful in her statements." Id.

{¶67} In a latter decision, the Ohio Supreme Court affirmed its position that "[i]t *is* permissible *** for an expert to convey this belief[, i.e., that the child was actually abused,] to the jury." *State v. Stowers*, 81 Ohio St.3d 260, 261, 1998-Ohio-632 (emphasis sic). In *Stowers*, the Court recognized a distinction "between expert testimony that a child witness is telling the truth and evidence which bolsters a child's credibility insofar as it supports the prosecution's efforts to prove that a child *has* been abused." Id. at 262 (emphasis sic). While the former is the sort of testimony prohibited

by *Boston*, the other sort, "which is additional support for the truth of the *facts testified to* by the child, or which assists the fact finder in assessing the child's veracity," does not violate this prohibition. Id. at 262-263 (emphasis sic).

{¶68} As an example of expert testimony supporting the truth of the facts testified to the victim, the expert in *Stowers* testified that the behavior of the victims, specifically their delayed disclosure of the abuse and subsequent recantation of the allegations, was "consistent with behavior observed in sexually abused children." Id. at 261. "She testified that even though the children changed their stories, her assessment that they had been abused did not change." Id. at 263. The Supreme Court concluded the expert's testimony provided information to the jury which would allow it to make an "educated determination" regarding the ultimate issues in the case. Id. (citation omitted).

{¶69} In practice, the decision of whether to allow an expert to offer an opinion on the issue of whether abuse has occurred often turns on the foundation of the expert's opinion. While there must not always be "physical evidence present before an expert can render a valid opinion on whether a child has been sexually abused ***, there simply has to be something other than the child's unsupported allegations that assisted the expert in arriving at his or her opinion." *State v. Schewirey*, 7th Dist. No. 05 MA 155, 2006-Ohio-7054, at ¶48 (citation omitted); accord *State v. Johnson*, 8th Dist. No. 90961, 2008-Ohio-6657, at ¶13 (citation omitted); *State v. Winterich*, 8th Dist. No. 89581, 2008-Ohio-1813, at ¶24 (citation omitted). "This would obviously include physical evidence, but could also involve the expert's observations of the child's

demeanor or other indicators tending to show the presence of sexual abuse." *Schewirey*, 2006-Ohio-7054, at ¶48 (citation omitted).

{¶70} Thus, where the expert's opinion is based solely on the testimony of the alleged victim, courts of appeals have deemed such opinions as "tantamount to permitting the expert to testify as to the child's veracity." *Johnson*, 2008-Ohio-6657, at ¶32; *State v. Burrell* (1993), 89 Ohio App.3d 737, 746 (an expert's opinion that the victim had suffered sexual abuse is inadmissible "when he conceded that the sole foundation for that belief was his assessment of her veracity"). Where the expert's opinion is "based upon all of the data he had in front of him, [and] not just the victim's statements," it does not "constitute his personal opinion as to the veracity of the victim's complaints" and is, therefore, admissible. *State v. Muhleka*, 2nd Dist. No. 19827, 2004-Ohio-1822, at ¶40.

{¶71} Nurse McAliley's testimony in the present case was based upon all the data before her and did not, as claimed by Britta, "consist[] of nothing more than a resuscitation of the alleged child-victim's own statements." With respect to her experience in evaluating sexual abuse cases, Nurse McAliley reported that she has evaluated approximately 1,400 children over the past twelve years and has testified on behalf of both the prosecution and the defense. She described the process of diagnosis as follows:

{¶72} [M]aking a diagnosis most often relies, as in some other medical circumstances, on the history, not on the physical exam. A good comparison would be headaches, someone who comes in with headaches. I can't see that they have a headache, I can't prove that they have a headache. For most types of headaches there's not a test I can do, but there's some signs to the history that I take. *** [S]exual abuse is much like that. You need to be able to evaluat[e] the history that the child provided since we rely so heavily on it. *** I look for a lot of things. Like the language, does it sound coached? Does it sound like the child's own language? Is it richly

detailed? It is consistent over time? Are there elements that a child isn't likely to be able to recount if she or he hadn't experienced it? *** Just like the person [with] a headache, there are questions that I'm going to ask to assess whether they're a malingerer ***.

{¶73} Nurse McAliley noted that N.M. provided a high degree of detail in recounting her abuse. She compared the account given by N.M. during the assessment interview with prior accounts and noted the differences of detail and language. She concluded that the accounts were substantively consistent, although certain details described as occurring during the second incident with Britta had previously been reported as occurring during the first incident. Nurse McAliley noted N.M.'s mental and emotional condition, that she was a little subdued but spoke freely. She discussed N.M.'s reluctance to confide in her father for fear that he would do something to Britta that would get him in trouble, a common attitude among victims, and the fact that N.M. has never recanted her allegations. Nurse McAliley also considered the possibility of N.M.'s exposure to sexually explicit materials as influencing her allegations.

{¶74} With respect to the absence of physical indications of abuse, Nurse McAliley testified that she would not expect to find such indications, given the nature of the abuse reported and the amount of time that had elapsed since the incidents. Nurse McAliley noted that a physical examination is important, nevertheless, to explore the possibility of victim's minimizing the extent of the abuse.

{¶75} Finally, Nurse McAliley relied upon the behavioral history provided by N.M.'s mother to her assistant, Constant. Nurse McAliley found N.M.'s recent changes in behavior to be consistent with N.M.'s account of the abuse and potentially indicative of actual abuse. Notably, N.M. was not the source of her behavioral history.

{¶76} This testimony provides an adequate foundation to admit Nurse McAliley's opinion "that sexual abuse was probable." Such opinion testimony was expressly sanctioned by the Ohio Supreme Court in *Stowers*. 81 Ohio St.3d at 261. The opinion is duly based upon Nurse McAliley's training and experience, her interview and physical examination of N.M., and the behavioral history provided by N.M.'s mother. The opinion expresses Nurse McAliley's professional opinion that N.M. was actually abused without directly commenting on N.M.'s veracity. The fact that the opinion supports the veracity of N.M.'s testimony and may have assisted the jury in concluding that N.M.'s testimony was true does not render the opinion inadmissible. Id. at 262-263; *Muhleka*, 2004-Ohio-1822, at ¶40; *State v. Eben* (1992), 81 Ohio App.3d 341, 344 (doctor's testimony that the victim was sexually abused "is precisely the sort of expert testimony sanctioned by the Supreme Court in *Boston*").

{¶77} Britta relies upon a series of cases decided by the Eighth Appellate District, concluding that similar testimony provided by Nurse McAliley was improper under *Boston*, and constituted reversible error. See *State v. Johnson*, 8th Dist. No. 90961, 2008-Ohio-6657; *State v. Knight*, 8th Dist No. 87737, 2006-Ohio-6437; *Winterich*, 2008-Ohio-1813; *State v. West*, 8th Dist. No. 90198, 2008-Ohio-5249.

{¶78} These cases are factually distinguishable. They rest on the conclusion that Nurse "McAliley based her diagnosis solely on her assessment of the victim's veracity." *Johnson*, 2008-Ohio-6657, at ¶31; *Knight*, 2006-Ohio-6437, at ¶31; *Winterich*, 2008-Ohio-1813, at ¶26; *West*, 2008-Ohio-5249, at ¶7. "Permitting the introduction of an expert's opinion, which relies solely on the child's statements, is tantamount to permitting the expert to testify as to the child's veracity." *Johnson*, 2008-Ohio-6657, at

¶32 (citation omitted). Based on the testimonial record before us in the present case, Nurse McAliley's testimony was not solely based on statements by N.M., but also relied on information provided by N.M.'s mother that was not ultimately derived from N.M. In this important respect, the present case is distinguishable from the cases decided by the Eighth District. Accordingly, those decisions do not compel the conclusion that the admission of Nurse McAliley's opinion was erroneous.

{¶79} The first assignment of error is without merit.

{¶80} The second and third assignments of error are interrelated. In the second assignment of error, Britta argues trial counsel was ineffective for failing to object to the hearsay statements of J.W., Erica, and Stacy, who recounted their conversations with N.M. regarding the allegations against him. In the third assignment of error, Britta argues these statements, as well as Nurse McAliley's testimony regarding the history provided by N.M., constituted inadmissible and prejudicial hearsay. For the sake of clarity, we will first consider whether the testimony in question was properly admissible (third assignment of error), before considering whether the failure to object to its admission constituted ineffective assistance of counsel.

{¶81} As is the case with expert testimony, the determination of what constitutes hearsay and whether such testimony is admissible is within the trial court's discretion. See *State v. Dever*, 64 Ohio St.3d 401, 410, 1992-Ohio-41.

{¶82} If the testimony admitted constitutes an abuse of the lower court's discretion, we apply the two-part test adopted by the Ohio Supreme Court to determine whether an attorney's performance has fallen below the constitutional standard for effective assistance. To reverse a conviction for ineffective assistance of counsel, the

defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688. "To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Stojetz*, 84 Ohio St.3d 452, 457, 1999-Ohio-464, citing *Strickland*, 466 U.S. at 694; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶83} We will first consider the allegedly hearsay statements of J.W., Erica, and Stacy. J.W. is N.M.'s cousin and the first person to whom she confided the allegations against Britta. J.W., then ten years old, repeated the allegations to N.M.'s older sister, Erica, and to N.M.'s aunt, Stacy. Erica and Stacy each confronted N.M. regarding the incidents with Britta.

{¶84} Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). "A statement is not hearsay if: (1) The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is *** consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive." Evid.R. 801(D)(1)(c).

{¶85} J.W., Erica, and Stacy's testimony regarding statements made by N.M. are not hearsay under Evid.R. 801(D)(1)(c). N.M. testified at trial and was subject to

cross-examination concerning the statements. The prior statements were consistent with N.M.'s testimony and served to rebut Britta's contentions that the allegations were fabricated under the improper influence of N.M.'s family.

{¶86} In his opening statement to the jury, Britta's trial counsel outlined the defense theory of the case as follows:

{¶87} We've got Bobby, the father of [N.M.], Stacy, who's the sister, and Brenda, who's another Mandato who was married to Aldo. They can't stand Britta and they can't stand his family. This is important because the story that was told to [J.W.] or to Stacy Wilson, who was a Mandato, *** [t]hat's how it kicked off this investigation. It's important. She says something to the effect of Uncle Aldo is a pervert, or something. From that statement, once the State became involved, social services, the police department, and Stacy Wilson, [J.W.]'s mother and Brenda's sister and Nicole's aunt--I know it gets confusing--this story took on a life of its own. I mean it is a story.

{¶88} ***

{¶89} There's actually the concocted story of this young girl, I think prompted by her sister, or Aunt Stacy Wilson. I don't know what her mother may have told her. *** No physical evidence. It's a story.

{¶90} ***

{¶91} This is a case that is solely based on the testimony and credibility of one 11 year old. And I believe that when she told [J.W.] what occurred, the Mandatos jumped to the conclusion and from there the story got better and better. The incidents became more and more detailed. And I think what you'll see during the course of cross-examination [is] that usually when people tell a story there are gaps in it.

{¶92} Consistent with this theory of the case, defense counsel sought, in his cross-examination of N.M., to elicit admissions that she fabricated or altered her testimony during the course of the investigation.

{¶93} It is well-established that allegations of fabrication and/or improper influence raised during opening arguments satisfy the foundational requirement of Evid.R. 801(D)(1)(c) for the admission of prior consistent statements as an exception to the definition of hearsay. *State v. Abdussatar*, 8th Dist. No. 86406, 2006-Ohio-803, at

¶15 ("[a]ttacking a victim's credibility during opening statement has been found to constitute sufficient grounds for permitting a prior consistent statement into evidence pursuant to Evid.R. 801(D)(1)(b)") (citations omitted); *State v. Wolff*, 7th Dist. No. 07 MA 166, 2009-Ohio-2897, at ¶78; *State v. Crawford*, 5th Dist. No. 07 CA 116, 2008-Ohio-6260, at ¶64 (citations omitted); *State v. Alvarado*, 3rd Dist. No. 12-07-14, 2008-Ohio-4411, at ¶17 (citations omitted); *State v. Potts*, 11th Dist. No. 96-T-5576, 1997 Ohio App. LEXIS 5743, at *7-*8.

{¶94} Since J.W., Erica, and Stacy's testimony regarding statements made by N.M. are not hearsay under Evid.R. 801(D)(1)(c), Britta's trial counsel was not ineffective for failing to object to this testimony.

{¶95} Britta also objects to a portion of Erica's testimony which recounts J.W.'s account of what N.M. told him, which constitutes double hearsay. According to Erica, J.W. told her that N.M. doesn't like Britta because he is a "rapist" and "touched her in places he shouldn't have." While N.M.'s statements to J.W. were not hearsay for the reasons given above, J.W.'s repetition of those statements to Erica did constitute hearsay. Nonetheless, the effect of these statements was harmless beyond a reasonable doubt. Erica's repetition of J.W.'s statements was brief and abbreviated. Their import was also inconsequential in light of Erica's far more extensive and prejudicial testimony recounting what N.M. told her when confronted about the abuse.

{¶96} The hearsay exception set forth in Evid.R. 801(D)(1)(c) does not, however, apply to Nurse McAliley's testimony regarding her interview with N.M., since that interview occurred after the alleged fabrication and/or improper influence. *State v. Totarella*, 11th Dist. No. 2002-L-147, 2004-Ohio-1175, at ¶46, quoting *Tome v. United*

States (1995), 513 U.S. 150, 167 ("Evid.R. 801(D)(1)(b) only applies 'when those statements were made before the charged recent fabrication or improper influence or motive'").

{¶97} Nurse McAliley's testimony regarding her interview with N.M., which was given over the objection of defense counsel, is admissible as statements made for purposes of medical diagnosis or treatment.

{¶98} Pursuant to Evid.R. 803(4), "[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."

{¶99} The "cornerstone of admissibility under Evid.R. 803(4)" is "whether the statements are reasonably pertinent to diagnosis or treatment." *State v. Cline*, 11th Dist. No. 2007-T-0052, 2008-Ohio-1500, at ¶69 (citation omitted); cf. *Dever*, 64 Ohio St.3d at 414 ("statements made by a child during a medical examination identifying the perpetrator of sexual abuse, if made for purpose of diagnosis or treatment, are admissible pursuant to Evid.R. 803(4)"). "In making this determination, a trial court must consider the circumstances surrounding the child's out-of-court statements to determine if it was made to a medical professional for the purposes of diagnosis or treatment." *State v. Brazzon*, 11th Dist. No. 2001-T-0050, 2003-Ohio-6088, at ¶22 (citations omitted). "This inquiry will vary, depending on the facts of each case. For example, the trial court may consider whether the child's statement was in response to a suggestive or leading question (as was the case in *Idaho v. Wright*), and any other factor which

would affect the reliability of the statements (such as the bitter custody battle in *State v. Boston*)." *Dever*, 64 Ohio St.3d at 410.

{¶100} In the present case, Nurse McAliley testified at length about the circumstances of N.M.'s evaluation. As a Nurse Practitioner with the Child Advocacy and Protection program at Rainbow Babies and Children's Hospital, her "primary responsibility is medical evaluations of children thought to have been sexually abused." She testified that cases are typically referred by "county social workers, sometimes law enforcement, occasionally physicians, occasionally prosecutors *** and very, very rarely from families themselves." N.M. was referred by Lake County Children Services. The Child Advocacy and Protection program has a social work coordinator on staff who gathers information prior to the actual evaluation, including the medical and behavioral inventories completed by the parents.

{¶101} Nurse McAliley interviews the child apart from the parents, conducts a physical examination looking for signs of physical and/or sexual abuse, and performs a more focused anal/genital sex abuse examination. As noted above, Nurse McAliley testified that N.M. spoke freely regarding the incidents: "She provided a lot of information without me having to ask specific questions." The information gained from the child is used for the purpose of "formulating a diagnosis as to whether the child has been sexually abused, whether the child is likely to have any sexually transmitted disease that ought to be tested for and/or treated, [and] whether there could be risk of pregnancy." At the conclusion of the evaluation, she reports her findings to both the child and the parents.

{¶102} N.M. testified only briefly, on cross-examination, to the fact that she was interviewed by Nurse McAliley at a hospital.

{¶103} The evidence before this court indicates that the information provided to Nurse McAliley by N.M. was primarily for medical diagnosis or treatment and, thus, admissible pursuant to Evid.R. 803(4). Moreover, any error in the admission of statements made by N.M. in the course of the interview with Nurse McAliley would have been harmless, in light of the fact that both N.M. and Nurse McAliley testified and were available for cross-examination, and the fact that the history provided by Nurse McAliley was cumulative to N.M.'s own testimony, as well as that of J.W., Erica, and Stacy. *Cline*, 2008-Ohio-1500, at ¶86 and ¶87 (citations omitted).

{¶104} The second and third assignments of error are without merit.

{¶105} In the fourth assignment of error, Britta claims that his convictions are not supported by the manifest weight of the evidence.

{¶106} A challenge to the manifest weight of the evidence involves factual issues. The "weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25 (citation omitted); *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52 ("[w]eight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial'") (emphasis sic) (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Wilson*, 2007-Ohio-2202, at ¶25.

{¶107} "The [appellate] court, reviewing the entire record, 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." *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "[T]he weight to be given to the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, at syllabus; *State v. Thomas* (1982), 70 Ohio St.2d 79, at the syllabus. However, when considering a weight of the evidence argument, a reviewing court "sits as a 'thirteenth juror'" and may "disagree[] with the factfinder's resolution of the conflicting testimony." *Thompkins*, 78 Ohio St.3d at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42. "The only special deference given in a manifest-weight review attaches to the conclusion reached by the trier of fact." Id. at 390 (Cook, J., concurring opinion).

{¶108} In order to convict Britta of Gross Sexual Imposition, the State had to prove, beyond a reasonable doubt, that Britta had "sexual contact with another" and "[t]he other person *** [was] less than thirteen years of age." R.C. 2907.05(A)(4). "Sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶109} Britta argues generally that his convictions should be reversed since the testimony of J.W., Erica, Stacy, and Nurse McAliley constituted inadmissible hearsay and he denied the allegations against him during the recorded interview at the Eastlake Police Station. We disagree.

{¶110} N.M. testified competently and credibly that Britta had committed four distinct acts of sexual contact with her on two occasions.[1] N.M.'s testimony was consistent with prior statements made to her family members and Nurse McAliley, which, contrary to Britta's argument, were admissible as evidence. Recent changes in N.M.'s behavior were indicative of potential sexual abuse. Detective Bowersock testified that Britta admitted to committing the acts N.M. claimed he had committed. Britta's denial of these allegations during the recorded interview were equivocal. Britta denied touching her breasts, but admitted that he bumped or grazed them. Britta admitted that N.M.'s bra had unfastened, explaining that it was just a "stupid thing." Britta denied rubbing against N.M.'s vaginal area, but did not deny admitting that he had done so when questioned by Detective Bowersock. The State's evidence was persuasive and no manifest miscarriage of justice occurred by the jury's return of guilty verdicts.

{¶111} The fourth assignment of error is without merit.

{¶112} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, finding Britta guilty of four counts of Gross Sexual Imposition, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J., concurs,

TIMOTHY P. CANNON, J., dissents with Dissenting Opinion.

---

1. Prior to sentencing, Britta filed a motion to merge the first and second counts and the third and fourth counts of the Indictment. The trial court denied the motion at the sentencing hearing on the authority of *State v. While*, 11th Dist. No. 2001-T-0051, 2003-Ohio-4594, at ¶19 (holding that, where the "appellant maneuvered his hand over two separate erogenous zones (the victim's breast and genital area) ***, the nature of appellant's conduct requires an inference of a separate and distinct animus for each act" sufficient to support separate counts of Gross Sexual Imposition).

_____

TIMOTHY P. CANNON, J., dissenting.

{¶113} I respectfully dissent with the majority's conclusion of appellant's first assignment of error and, consequently, to the disposition of the instant case.

{¶114} The Eighth Appellate District has reviewed a litany of cases wherein McAliley testified as an expert witness and rendered an opinion as to whether a child had been sexually abused. Each of the cases had similar fact patterns, with no physical findings, and an opinion based on hearsay-laden reports. In *State v. West*, *State v. Winterich*, *State v. Knight*, and *State v. Johnson*, the Eighth Appellate District reversed the appellants' convictions finding McAliley's testimony in violation of the Supreme Court of Ohio's holding in *State v. Boston* (1989), 46 Ohio St.3d 108, 128-129. *State v. West*, 8th Dist. No. 90198, 2008-Ohio-5249; *State v. Winterich*, 8th Dist. No. 89581, 2008-Ohio-1813; *State v. Knight*, 8th Dist. No. 87737, 2006-Ohio-6437; and *State v. Johnson*, 8th Dist. No. 90961, 2008-Ohio-6657. In *Boston*, the Court held that "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." Id. at syllabus. The *Boston* Court noted, "the admission of [such] testimony was not only improper – it was egregious, prejudicial and constitutes reversible error." Id. at 128.

{¶115} In *State v. West*, 2008-Ohio-5249, at ¶5, the following was noted by the Eighth Appellate District:

{¶116} "[There is] a difference between an expert who says the victim has been 'probably' or 'possibly' raped and testimony by the expert that her findings 'indicate'

rape. Stating that the expert's findings are indicative of rape is not the same as commenting on the victim's veracity. We have historically held that an expert may state her findings and opine that these findings are indicative of rape so as not to cross the bright line of *Boston*."

{¶117} In *State v. Winterich*, 2008-Ohio-1813, at ¶26, the Eighth Appellate District reversed the appellant's convictions based upon the state failing to lay a proper foundation with respect to McAliley's expert testimony. In *Winterich*, McAliley "diagnosed the alleged sexual abuse as 'very possible' based upon her medical examination and her interview with the victim." Id.

{¶118} In *State v. Knight*, 2006-Ohio-6437, at ¶20, McAliley "testified to a reasonable degree of medical certainty that [the minor victim] was sexually abused ***." McAliley's opinion was based upon a medical examination of the minor victim, laboratory results, information provided to McAliley from the victim's family and referring agent, and information provided by the victim. Id. The Eighth Appellate District observed that McAliley's opinion was based upon the victim's statements, as the information from the victim's family and referring agent "relied solely upon the [victim's] statements." Id. at ¶31.

{¶119} In a concurring opinion, Judge Corrigan observed that McAliley "only relied on the victim's statements and her emotional state in making those statements, and whether they were consistent with statements made by similarly situated victims of abuse. These are not objectively verifiable and ultimately rest on whether the expert believed the victim." Id. at ¶37. Judge Corrigan commented that an expert witness should not state an opinion that merely agrees "with the consistency of the victim's

story"; rather, the expert witness should utilize "objectively verifiable, scientifically supported data as a foundation for expressing an opinion." Id. at ¶38.

{¶120} Judge Corrigan's point is well-taken. It is interesting to note that McAlIiley testified at trial that she has evaluated approximately 1,400 children in the last 12 years. Yet, there is no indication that verifiable data exists concerning the accuracy of her assessments. If McAliley is wrong in her assessments, it would not matter if she had evaluated 14,000 children if there is no verifiable data to support her conclusions. As a result, McAliley's testimony is rendered completely subjective. It is disconcerting that McAliley's testimony is given greater weight than a polygraph test, as even that has some objective verifiability.

{¶121} In *State v. Johnson*, 2008-Ohio-6657, at ¶31, although McAliley testified to the absence of medical findings, she opined that the victim had been sexually abused. McAliley based her opinion on the victim's story and "[w]hat her mother and Detective Schmid told [her.]" Id. at ¶14-24. The *Johnson* Court held that McAliley's testimony "'served to bolster the victim's credibility in the eyes of the jurors.'" Id. at ¶31, quoting *State v. West*, 2008-Ohio-5249, at ¶7. The *Johnson* Court found McAliley's testimony to be in violation of *State v. Boston*, 46 Ohio St.3d 108, and reversed and remanded the judgment of the lower court. Id. at ¶33-34.

{¶122} In all, eight different appellate judges in the Eighth Appellate District have considered the testimony of McAliley in circumstances similar to this case. All eight have rejected it.

{¶123} In its brief, appellee cites to this court's dissent in *State v. Plymale*. In that case, the dissent recognized that expert testimony, when in the context of sexual abuse

of a minor, cannot be admitted when in violation of *State v. Boston*, supra. *State v. Plymale* (Nov. 2, 2001), 11th Dist. No. 99-P-0012, 2001 Ohio App. LEXIS 4981, at *17 (Christley, J., dissenting). In *Plymale*, the state presented testimony of Ms. Abbott, a pediatric nurse practitioner at Children's Hospital Medical Center of Akron. Id. at *2. Ms. Abbott interviewed a minor regarding alleged sexual abuse and conducted a physical examination, which revealed "no signs of sexual abuse or other trauma." Id. at *14. Although defense counsel did not object at trial and the appellant did not assign the admission of Ms. Abbott's testimony as error on appeal, the dissent found the testimony to be *plain error*, as it "was highly prejudicial and affected appellant's substantial rights." Id. at *17. "To allow an expert's opinion to be introduced when it is based solely on statements made by the child would, in essence, be the same as allowing the expert to testify about the child's veracity." Id. I agree with this analysis espoused by the dissent.

{¶124} In the case at issue, McAliley's "expert" opinion was based upon a review of the victim's behavioral and medical history, statements made by the victim to a social worker, a personal interview conducted with the victim, a physical examination of the victim, and her training and experience.

{¶125} McAliley testified that the physical examination was unremarkable, meaning there was no physical evidence upon which she could rely to base her opinion. Furthermore, McAliley stated the behavioral assessment, completed by the victim's mother, revealed a "good number of behavioral concerns that the mother mentioned, most of which [were] of the nonspecific nature[.]" Although McAliley noted the

behavioral concerns could be reflective of the incidents at issue, they "could be reflective of any kind of stress[.]"

{¶126} On cross-examination, McAliley testified to the following:

{¶127} "[Defense counsel]: Other than the statement and the behavioral assessment, you have nothing else from a nurse practitioner's standpoint to substantiate your opinion, do you?

{¶128} "[McAliley]: Other than what statement? What she told me?

{¶129} "[Defense counsel]: Yes.

{¶130} "[McAliley]: I also have the summary of what her mother said she told her and I have indications of what the county social worker says she told her. So, I have all of those statements."

{¶131} Based on the aforementioned evidence, McAliley testified:

{¶132} "[Prosecutor]: Now, what is your opinion, from a medical perspective to a reasonable degree of medical certainty, as to whether [the victim] was sexually abused?

{¶133} "***

{¶134} "[McAliley]: My impression was that sexual abuse was *probable*." (Emphasis added.)

{¶135} Here, McAliley, testifying as an expert witness, "'must confine [her] opinion to matters within [her] specialty or scientific field of inquiry and may not express an opinion upon matters as to which the jury is capable of forming a competent conclusion.'" *State v. Weaver*, 178 Ohio App.3d 504, 2008-Ohio-5022, at ¶121, citing *Burens v. Indus. Comm. of Ohio* (1955), 162 Ohio St. 549, at paragraph two of the syllabus. In the case sub judice, two issues are troublesome with respect to McAliley's

testimony. First, her opinion exceeded the boundaries of permissible expert testimony. While it would have been acceptable to allow McAliley to state her opinion that the evidence at issue is indicative or consistent with sexual abuse, her testimony determining that "sexual abuse was probable" was subjective, not based on any verifiable data or testing, and highly prejudicial. As the fact finder, the jury was capable of formulating this conclusion. This evidence was offered "solely to bolster the credibility of the victim," and consequently, its admission results in reversible error.

{¶136} Second, the testimony of McAliley has been mischaracterized. At trial, McAliley was asked to render an opinion "to a reasonable degree of medical certainty" as to whether the victim had been sexually abused. Initially, this raises the issue as to whether there was any testimony in the record to allow this witness to make a "medical" diagnosis or form a "medical" opinion. While she indicated that she is able to prescribe medication in her "area of specialization," it is not clear from the record if the medication is for pain, trauma, or anything whatsoever to do with the condition of the victim in this case. In asking McAliley's opinion "to a reasonable degree of medical certainty," the state went to great lengths to characterize this testimony as a medical diagnosis. Appellee even refers to it in its brief as "scientific." McAliley's testimony regarding her opinion that "sexual abuse probably" occurred in this case was neither medical nor scientific.

{¶137} Nearly 17 pages of the transcript are devoted to McAliley's normal course of conduct in cases such as this, including details of physical examinations. Yet, there is an absence of evidence that McAliley has done anything to verify or test whether her assessment of "probable" or "possible" abuse has been historically accurate. It is

simply her subjective review of whether someone is telling the truth. The sole issue in this case was the credibility of the victim, which did not require medical or scientific testimony from an "expert" witness.

{¶138} The fundamental flaw in appellee's position regarding this testimony is that appellee maintains it is admissible, in part, as a result of Evid.R. 803(4), an exception to the hearsay rule. Evid.R. 803(4) permits testimony "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations *** as reasonably pertinent to diagnosis or treatment." In support of this argument, appellee cites to the testimony of McAliley that she used the information gathered from the victim: "as part of formulating a diagnosis as to whether the child has been sexually abused, whether the child is likely to have any sexually transmitted disease that ought to be tested for and/or treated, whether there could be a risk of pregnancy, and I also look at all of that to help me determine, as I mentioned, how likely it is that the child was sexually abused."

{¶139} Diagnosis is defined as the "determination of a medical condition (such as disease) by physical examination or by study of its symptoms." Black's Law Dictionary (8 Ed.Rev.2004), 484. In this case, there was a significant amount of testimony regarding the physical examination normally performed by McAliley, as well as the physical examination she performed on the victim in this case. However, the victim never made a contention that anything occurred that would lead one to believe she had any "medical condition" that needed to be diagnosed. There was no testimony or prior statement of the victim that appellant did anything that would have reasonably resulted in any physical findings on the victim. If McAliley had merely testified that her physical

findings were consistent with the statements made by the victim, then perhaps that would be admissible. However, her testimony went impermissibly far beyond that.

{¶140} For the foregoing reasons, I respectfully dissent.