**[Cite as *State v. Cain*, 2011-Ohio-3759.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2010-06-012 |
| | : | O P I N I O N |
| - vs - | | 8/1/2011 |
| | : | |
| JONATHAN CAIN, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2009-2028

Jessica D. Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Robert E. Rickey, Brown County Public Defender, Julie D. Steddom, 134 North Front Street, Ripley, Ohio 45167, for defendant-appellant

**PIPER, J.**

**{¶1}** Defendant-appellant, Jonathan Cain, appeals his conviction in the Brown County Court of Common Pleas on one count of gross sexual imposition. We affirm the conviction.

**{¶2}** For a few days in late December 2007 and early January 2008, Cain stayed at the home of Tim and Jessica, who had a one-year-old son and a four-year-old daughter.

According to Jessica's testimony, when Tim left to drive Cain home, her daughter said "it hurt" and that Cain "had kissed her." Jessica asked her daughter if Cain had touched her or if she had touched Cain, and the child stated that Cain told her to "suck the sugar off of his wiener."

**{¶3}** Once Tim returned home from dropping Cain off, he found Jessica and their daughter crying. When he asked why they were crying, the child responded that Cain "asked her to suck the sugar off of his wiener." Tim testified that prior to her statement, the child had not used the word "wiener" to refer to male genitals, and instead, would normally use the word "pee-pee" to refer to private parts.

**{¶4}** Tim and Jessica contacted police to report their daughter's statement, and the police interviewed Cain. In his first written statement to police, Cain stated that he had stayed at Tim and Jessica's house for a few days, and that on the night before he left, Tim and Jessica asked him to stay with the sleeping children while they went to the grocery store. While they were gone, Cain played video games, but stopped when he heard a child crying upstairs. Cain stated that he went upstairs and found the child asking for her mom and dad, and that after he told her they went to the store, she went back into her bedroom and fell asleep.

**{¶5}** After a second interview, Cain relayed through a written statement that during his stay with Tim and Jessica, he went to the upstairs bathroom and engaged in "phone sex" with a girl he met on the internet named Aerial. Cain stated that he began masturbating and that Aerial asked him what his ejaculation tasted like, and he replied "sugar." Cain stated that Tim and Jessica's daughter walked into the bathroom right as Aerial stated that if she and Cain ever met in person, she would put sugar on Cain's penis and "suck [him] till all the sugar came off." Cain stated that he pushed the child out of the bathroom, but that he believed that she had not seen anything inappropriate.

**{¶6}** In his third written statement to police, given after a failed polygraph examination, Cain stated that he was in Tim and Jessica's bathroom having phone sex with Aerial and masturbating. Cain stated that as Aerial was saying that she wanted to put sugar on Cain's "weiner [sic] and lick it off," Tim and Jessica's daughter walked into the bathroom. According to Cain's statement, "she saw my weiner [sic] and asked what it was and asked if she could touch it. I wasn't thinking right at the time and I said yes to her so she touched it but I pushed her away when I noticed what I was doing. It wasn't intended to happen I was not thinking I'm sorry it won't happen again I just don't want to go to jail."

**{¶7}** Cain was indicted on one count of gross sexual imposition. Cain moved the trial court to suppress the statements he made to police officers, and also filed a motion in limine to exclude the child's statements she made to a child advocate employed by a facility that treats children who are victims of sexual abuse. The trial court denied Cain's motion to suppress the statements he made to police, but agreed to exclude the testimony of the child advocate.

**{¶8}** The state filed a notice of its intent to use at trial the child's statements she made to her mother and father. The trial court held a hearing according to Evid.R. 807, during which the trial court tried to question the child about her experience with Cain. Present at the hearing were the child, her parents, counsel for the state and Cain, and Cain via a closed circuit television. The trial court held part of the hearing in chambers, and tried to question the child, but the child would not answer even when Jessica tried to assist the judge in asking questions. After reconvening in the court room, the trial court heard arguments regarding the admissibility of Tim and Jessica's statements concerning what their daughter told them.

**{¶9}** After the hearing, the trial court found that the child refused to testify and therefore her testimony regarding the incident in question was not reasonably obtainable.

The trial court made other findings according to Evid.R. 807, and specifically found that the child's statements to her parents had particularized guarantees of trustworthiness. The trial court issued a judgment entry permitting the state to use the statements at trial made by the child to Tim and Jessica.

**{¶10}** The trial court also discussed the way in which the state could offer evidence collected before and after the failed polygraph. Although the trial court found Cain's statements before and after the polygraph admissible, the parties understood that the jury could not hear that Cain failed the polygraph, or even that he had taken one. However, during Cain's January 2010 trial, a state's witnesses inadvertently mentioned that he helped Cain schedule the polygraph exam. Cain moved for, and the trial court granted, a mistrial.

**{¶11}** On May 11, 2010, a second trial began during which time the state offered the child's statements through her parents' testimony. Cain did not object to the statements, or request that the child be reexamined by the trial court to determine if her testimony was still unobtainable. A jury found Cain guilty, and the trial court sentenced him to a mandatory three-year prison term. Cain now appeals the decision of the trial court, raising the following assignment of error.

**{¶12}** "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ADMITTED INTO EVIDENCE THE HEARSAY STATEMENTS OF A FOUR-YEAR-OLD ALLEGED VICTIM, THEREBY VIOLATING THE RULES OF EVIDENCE AND THE CONFRONTATION CLAUSE PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS."

**{¶13}** Cain argues in his assignment of error that the trial court should not have permitted Tim and Jessica to testify about their daughter's statements regarding the incident in question. This argument lacks merit.

**{¶14}** Cain's assignment of error is broken into two sections, the first of which

challenges the trial court's pre-trial decision based on Evid.R. 807 to permit Tim and Jessica to testify regarding their daughter's statements. "As an initial matter we note that decisions regarding the admissibility of evidence are within the sound discretion of the trial court and will not be reversed absent a showing of an abuse of discretion. * * * An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Brock*, Hancock App. No. 05-07-42, 2008-Ohio-3220, ¶36. The trial court's determination regarding the child's statement and whether the disputed evidence fits within a hearsay exception is therefore left to the trial court's broad discretion. *In re Bright* (July 31, 1995), Clinton App. No. CA94-10-027.

**{¶15}** According to Evid.R. 807(A), "an out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply: (1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. * * * (2) The child's testimony is not reasonably obtainable by the proponent of the statement. (3) There is independent proof of the sexual act or act of physical violence. (4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness."

**{¶16}** Under Evid.R. 807(C), "the court shall make the findings required by this rule on

the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling."

**{¶17}** According to Cain's argument, "the trial court does not support its finding that 'under the totality of the circumstances surrounding the statements that the child made to her parents, that there are particularized guarantees of trustworthiness.'" Cain goes on to state that the circumstances surrounding the child's statements "were not discussed on the record." We disagree, and moreover, find that the trial court correctly determined that each element within Evid.R. 807 was met.

**{¶18}** Although the trial court's judgment entry does not contain an extensive listing of facts, Cain's Evid.R. 807 hearing was recorded and this court has a full transcript of that proceeding. Therefore, we are able to adequately review the application of Evid.R. 807 to the particular facts of this case, and have a clear indication as to the bases for the trial court's ruling.

**{¶19}** Cain did not object to the trial court's written decision, and was apparently satisfied with the trial court's judgment entry at the time it was issued. While we note that it is better practice for a trial court to fully and comprehensively incorporate findings of facts into its discussion of Evid.R. 807's elements, we are confident that the record is complete and affords ample review of the trial court's findings as required by the rule.

**{¶20}** Regarding Evid.R. 807(A), the trial court found, and the record supports the fact, that at the time of the hearing the child was five years old and that the state wanted to use her out-of-court statements. The trial court also determined that based on the totality of the circumstances surrounding the making of the child's statement, there were particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. While Cain argues that the trial court's decision regarding this element was not supported by or discussed on the record, the hearing

testimony is clear that the circumstances surrounding the child's statements had the particularized guarantees of trustworthiness to make the statements as reliable as those permitted under Evid.R. 803 and 804.

**{¶21}** According to Evid.R. 807(A)(1), factors to take into consideration when deciding the reliability of a statement include: "spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement."

**{¶22}** Regarding the spontaneity of the child's statement and the way in which it was elicited, Jessica's hearing testimony reveals that the child made the statement spontaneously and that it was not the result of prodding or repeated questioning from anyone. During the hearing, the following exchange occurred.

**{¶23}** "[Q] And can you tell us first of all how this conversation began? Where were you? Where was [the child] and what – tell us what happened?

**{¶24}** "[A] We were sitting in the living room, and she said it hurt, that [Cain] had kissed her. And so I asked her, 'Well, has he touched you, or have you touched him?' And she said that he told her to, 'suck the sugar off of his wiener.' And that's what she told me."

**{¶25}** "[Q] Off of his wiener?

**{¶26}** "[A] Yes.

**{¶27}** "[Q] That –those were her words?

**{¶28}** "[A] Yes.

**{¶29}** "* * *

**{¶30}** "[Q] Immediately prior to [the child] making the statement where she said about the kiss, and then from there, were you discussing [Cain] at all?

**{¶31}** "[A] No.

**{¶32}** "[Q] This was basically a spontaneous remark she made?

**{¶33}** "[A] Yes."

**{¶34}** The record therefore demonstrates that the child's comment was made spontaneously and that the manner in which it was elicited supports the trustworthiness of the statement.

**{¶35}** The record also establishes that the child made consistent statements. After Jessica testified that her daughter said that Cain "told her to 'suck the sugar off of his wiener,'" Tim testified that after he walked in and saw his wife and daughter crying, the child said that Cain "asked her to suck the sugar off of his wiener. I mean, that's exactly what she said." Therefore, the child's statements were consistent, and did not change.

**{¶36}** The Evid.R. 807 hearing testimony regarding the child's mental state demonstrated that while she was upset, she was also rational when she spoke to her parents about the events that occurred between herself and Cain. Jessica testified that the child referenced Cain specifically, and that the child understood who Cain was when she spoke about him. Although the child was upset and crying, the record does not contain any reference to a mental state which would undermine the veracity of the statement.

**{¶37}** The record also demonstrates that the child did not have a motive to fabricate her statements. Both Tim and Jessica testified that they had a positive relationship with Cain prior to the incident in question, and that Cain was one of Tim's best friends. Jessica specifically testified that they had not argued with Cain and did not have "any difficulties of any type" the day he left their home. The record is void of any reason that the child would fabricate her statements.

**{¶38}** The hearing testimony also establishes that the child was using terminology unexpected of a child of similar age. First, we find it abnormal that the child used the word "wiener" to refer to Cain's penis when her parents testified that she had never used that word

before, and that she referred to a boy's private parts as "pee-pee." Second, it is reasonable to assume that a three-year-old child would not discuss sucking sugar off of genitals if there had not been a *specific* statement regarding that *specific* sexual act or terminology.

**{¶39}** Lastly, the lapse of time between the act and the statement was short. Jessica and Tim testified that their daughter told them of the incident within 24 hours after it happened. We also note that the child talked to Jessica about the event at the first possible moment that Cain left the house, and told her father about the event the moment he returned from dropping Cain off at his home. The temporal proximity between the act and the child's statement is therefore short and lends credibility to her statement.

**{¶40}** The record clearly demonstrates that based on the totality of the circumstances surrounding the making of the statement, there were particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted under other hearsay exceptions. The circumstances discussed on the record plainly establish that the child was particularly likely to be telling the truth when her statements were made and that the test of cross-examination would add little to the reliability of the statement.

**{¶41}** Regarding Evid.R. 807(A)(2), the trial court found that the child's testimony was not reasonably obtainable by the proponent of the statement. As applicable to this appeal, Evid.R. 807(B) provides that, "the child's testimony is 'not reasonably obtainable by the proponent of the statement' under division (A)(2) of this rule only if one or more of the following apply: (1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify."

**{¶42}** The trial court expressly found that the "child refused to testify concerning the subject matter of the previous statements to her parents in reference to the allegations set

forth in the indictment notwithstanding the fact that a person trusted by the child, to wit: her mother was in the presence of the Court urging the child to describe the acts and previous statements made." This finding is supported by the record.

**{¶43}** During the hearing in the trial court's chambers, the trial court asked the child several questions, and the child refused to answer. The trial court directed Jessica to ask the child to answer the questions, and Jessica urged the child to do so on several occasions. After several failed attempts to have the child answer, the trial court stated, "let the record reflect that the child has shaken her head no, and refuses to have any discourse at this time." The record is therefore clear that the child's testimony was not reasonably obtainable, and that such determination was made after adherence to 807(A)(2)'s requirement that a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

**{¶44}** Regarding 807(A)(3), the trial court found that there was independent proof of the sexual act because Cain gave a statement in writing admitting to sexual contact with the child. This finding is also supported by the record. The trial court had before it, as does this court upon review, Cain's written statements in which he admitted to having the child touch his penis, and that he spoke of putting sugar on his penis. We also note that throughout his written statements, Cain refers to his penis as "weiner" [sic], a word that the child had never used before the incident with Cain.

**{¶45}** Regarding 807(A)(4), the trial court found that the state gave written notice to all parties at least ten days before the hearing of the content of the statement, the time and place at which the statement was made, the identity of the witnesses who were to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness. The record supports the trial court's finding. The state filed its "NOTICE TO USE CHILD STATEMENTS" according to Evid.R. 807 on April 20, 2009, and

the 807 hearing did not occur until November 25, 2009, and the first trial did not commence until January 14, 2010. The state's notice also identified the witnesses, the contents of the child's statements, the time and place they were made, and included a copy of the witnesses' statements which identified the circumstances surrounding the statements. The state's notice, therefore, fully comported with the last requirement of Evid.R. 807.

**{¶46}** After a thorough review of the record, the trial court did not abuse its discretion in admitting the child's statements through Evid.R. 807.

**{¶47}** Second, Cain argues that the trial court erred by not holding a second Evid.R. 807 hearing once his first trial ended in a mistrial. As stated above, once the state's witness mentioned that Cain took a polygraph examination, Cain moved for and was granted a mistrial. Before the second trial began, approximately four months later, the trial court did not reexamine the child to determine whether her testimony was unobtainable. However, Cain did not move the trial court to reexamine the child, nor did he object to the testimony once the state called Tim and Jessica as witnesses. Therefore, Cain has waived all but plain error.

**{¶48}** According to Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights, or influenced the outcome of the proceedings. *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68. The defendant must show a violation of his substantial rights and even then, notice of plain error is taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Landrum* (1990), 53 Ohio St.3d 107. 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. *State v. Biros,* 78 Ohio St.3d 426, 436, 1997-Ohio-204.

**{¶49}** After reviewing the record, we find that the trial court did not err by not holding

another Evid.R. 807 hearing before the second trial started. Cain essentially focuses on the fact that from the time of his Evid.R. 807 hearing to the time of his second trial, the child had aged approximately six months and may have been willing to offer her testimony. However, the record does not support such an assumption.

**{¶50}** The hearing transcript clearly demonstrates that the child was adamant about not answering questions and was wholly unwilling to testify to the incident involving Cain. When asked by the court and her mother to talk about Cain or to answer specific questions, the child would only shake her head no and refused to speak. At the time of the hearing, the child was five years old. There is nothing on the record to indicate that she would have matured enough from the time of the 807 hearing to Cain's second trial or that she would be willing to testify. Nor does the record indicate that any circumstances surrounding the event and aftermath had changed to the degree necessary to find the child's testimony anything but unobtainable. We also note that while Evid.R. 807 requires that notice be given at least ten days before the hearing, there are no other time constraints listed in the rule regarding the necessary proximity of the hearing to the trial.

**{¶51}** After reviewing the record, we cannot say that Cain has shown a violation of his substantial rights or that we must reverse in order to prevent a manifest miscarriage of justice. Nor can we say that the trial court abused its discretion in admitting the evidence. Cain's single assignment of error is overruled.

**{¶52}** Judgment affirmed.

HENDRICKSON, P.J., and HUTZEL, J., concur.