[Cite as *State v. McNew*, 2009-Ohio-5531.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 22902**
vs.	**:**	**T.C. CASE NO. 07-CR-3503**
MICHAEL A. MCNEW	**:**	**(Criminal Appeal from Common Pleas Court)**
Defendant-Appellant	**:**	

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O P I N I O N

Rendered on the 16th day of October, 2009.

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GRADY, J.:

{¶ 1} Defendant, Michael McNew, appeals from his conviction and sentence for rape and gross sexual abuse of a child less than thirteen years of age. R.C. 2907.02(A)(1)(b), 2907.05(A)(4).

{¶ 2} In the early morning hours of August 25, 2007,

Defendant's eleven year old step-daughter, A.C., called 911 to report that Defendant had sexually abused A.C. in their home. When police officers responded to the scene, they found A.C. alone on the front porch, wearing a pink nightgown and no underwear. A.C. was upset, spoke quietly, and several times looked over her shoulder.

{¶ 3} When officers informed A.C.'s mother of A.C.'s 911 call, her mother became upset and went back inside the house, slamming and locking the door. When she later came out, A.C.'s mother yelled at A.C. and assumed an aggressive attitude toward her. Officers placed A.C. in a police cruiser for her safety.

{¶ 4} While they were outside the home, several officers observed Defendant McNew come down the stairs inside, wrapped in what appeared to be a blanket or comforter. He went back upstairs, and later came down again, wearing an orange t-shirt and tan pants. Defendant was arrested when he went out the back door with his dog.

{¶ 5} A.C.'s mother consented to a search of A.C.'s bedroom by officers. From her bed, officers recovered the comforter they had earlier seen Defendant wrapped in. They also recovered a pair of A.C.'s panties from under the bed covers.

{¶ 6} A.C. was taken to Dayton Children's Hospital, where she was examined by a nurse, Evelyn Williams. A.C. told

Williams that Defendant had come into her bedroom while he was naked, then removed her underwear and kissed her breasts, licked between her buttocks, and put his fingers into her vagina. A.C. told Williams that Defendant finally stopped when A.C. begged him to, and that Defendant then fell asleep on A.C.'s bed. A.C. told the same story to the attending physician, Dr. Lynn Peters. A physical examination of A.C. revealed no evidence of the alleged assault.

{¶ 7} After Defendant was arrested, Detective William Swisher administered *Miranda* warnings prior to interrogating him. Defendant said he did not remember going into A.C.'s room or touching her in any way. Defendant said he had been out drinking with his wife and their friends, and that when they came home he and his wife went to bed. He did not remember what had happened that night, and did not recall being wrapped in a comforter.

{¶ 8} Based upon A.C.'s accusations, Detective Swisher took swabs from Defendant's right index and middle finger and submitted those to the crime lab for testing. Analysis revealed A.C.'s DNA on Defendant's fingers. A serology expert opined that the DNA likely came from A.C.'s body fluids, as opposed to skin-on-skin contact.

{¶ 9} Detective Phil Olinger also spoke with Defendant,

who repeated the story he had told Detective Swisher, denying that he had been in A.C.'s room. When Olinger began talking about DNA evidence, Defendant changed his story. He said that after he got home he and his wife argued, and that he then went out to two strip clubs. Defendant said he didn't remember coming home or anything else until after police arrived there. When asked why he had lied earlier about his whereabouts, Defendant said: "there's no excuse for what I did." Defendant refused to explain what he meant by that.

{¶ 10} Defendant was indicted on two counts of rape involving a child under age thirteen, R.C. 2907.02(A)(1)(b), one count of attempted rape involving a child under thirteen, R.C. 2923.02(A), 2907.02(A)(1)(b), and one count of gross sexual imposition involving a child under thirteen, R.C. 2907.05(A)(4).

{¶ 11} Defendant was found guilty following a jury trial of one count of rape and one count of gross sexual imposition. The trial court sentenced Defendant to consecutive prison terms of ten years to life for rape and five years for gross sexual imposition, for a total sentence of fifteen years to life. The court also classified Defendant as a Tier III sex offender. Defendant timely appealed to this court.

FIRST ASSIGNMENT OF ERROR

{¶ 12} "THE TRIAL COURT ERRED AND DENIED APPELLANT A FAIR TRIAL UNDER THE STATE AND FEDERAL CONSTITUTIONS WHEN IT REFUSED TO ALLOW A.C.'S SCHOOL PSYCHOLOGIST TO TESTIFY THAT THE CHILD HAD RECANTED HER ALLEGATIONS."

{¶ 13} The State did not call A.C. to testify as a witness at Defendant's trial. Instead, the State relied on the testimony of other witnesses who testified concerning A.C.'s out-of-court statements accusing Defendant of sexual abuse, which were offered to prove the truth of what A.C. said. That evidence was hearsay. Evid.R. 801. That evidence was admitted pursuant to several exceptions to the rule against hearsay. Evid.R. 802. The testimony of the physician and nurse who interviewed A.C. at Dayton Children's Hospital was admitted pursuant to Evid.R. 803, which states:

{¶ 14} "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

{¶ 15} "(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

{¶ 16} Defendant likewise relied on Evid.R. 803(4) when he sought to introduce the testimony of a school psychologist, Carla Spriestersbach, who had counseled A.C. concerning her behavioral problems. Defendant proposed to elicit testimony from Spriesterbach that, during their counseling sessions, A.C. recanted her allegations against Defendant. The trial court excluded Spriestersbach's testimony, finding that the purpose of her counseling sessions with A.C. was not medical diagnosis or treatment. Defendant argues that the trial court erred in so holding.

{¶ 17} Statements made for purposes of medical diagnosis or treatment are admissible under Evid.R. 803(4) as exceptions to the rule against hearsay. *State v. Dever* (1992), 64 Ohio St.3d 401; *State v. Chappell* (1994), 97 Ohio App.3d 515. The exception allows the admission of statements made not only to licensed physicians, but also to psychologists and social workers, *State v. Sheppard*, 164 Ohio App.3d 372, 2005-Ohio-6065, *State v. Edinger*, Franklin App. No. 05AP-31, 2006-Ohio-1527, so long as the function of the person to whom the statement is made was diagnosis or treatment. *Chappell* at 531.

{¶ 18} Carla Spriestersbach testified that she is a licensed school psychologist at Emerson Academy. She has a masters' degree in school psychology with an emphasis on family therapy

and counseling. Spriestersbach counsels children for emotional issues and behavioral problems, and did so with A.C. on the first day of school on a range of issues including swearing, not getting along with the other children, and lying.

{¶ 19} Following A.C.'s allegations that Defendant had sexually abused her, the school principal asked Spriestersbach to counsel A.C. in that connection. Spriestersbach met with A.C. seven or eight times over the next two weeks. Initially, A.C. told Spriestersbach that Defendant had raped her. Later, A.C. said Defendant had not raped her, and that she believed the incident was only a dream. Finally, A.C. said that the incident was not a dream, that she had not told the truth about it, and that she felt badly about getting Defendant in trouble.

{¶ 20} Spriestersbach testified that she provides counseling and treatment, which are synonymous terms. She explained that "treatment" is technically a medical term that is used only by doctors and psychiatrists. If a child has emotional problems, Spriestersbach works with the child in order to foster behavioral changes that will allow the child to be more successful. Spriestersbach counsels and treats emotionally disturbed students, and while she does not make any formal diagnoses, she makes informal ones for purposes of

treatment. Spriestersbach met with A.C. to help treat her psychological problems. On cross-examination, Spriestersbach testified

{¶ 21} "Q. Would you medically diagnose her?

{¶ 22} "A. No.

{¶ 23} "Q So you didn't medically diagnose her?

{¶ 24} "A. No.

{¶ 25} "Q. And do you medically treat her?

{¶ 26} "A. Do I counsel her? Yes.

{¶ 27} "Q. But do you treat her medically and give her a diagnosis?

{¶ 28} "A. No. I just said I did not. I'm not qualified to do that. Am I qualified to counsel a human being? Yes, I am. Am I qualified to work with the mental well-being? Yes, I am.

{¶ 29} "Q. But you are not qualified to diagnose her?

{¶ 30} "A. No, ma'am, I am not."

{¶ 31} In response to questioning by the court, Spriestersbach testified:

{¶ 32} "THE COURT: Okay. Do you have cases where you have children there and you refer them for – to a psychiatrist or to a medical doctor.

{¶ 33} "THE WITNESS: No. That has got to be the parent

that does that. I have no right to do that. I have no right to do that - so you can suggest it to a parent-

{¶ 34} "THE COURT: So you're really not part of the treatment?

{¶ 35} "THE WITNESS: No, no. Part of the education team."

{¶ 36} The trial court found that Spriestersbach was very straight-forward in acknowledging that she is not part of the medical team, and that treatment is performed by the medical team while counseling is the work of the education team of which she is a part. The court then concluded that Spriestersbach's counseling of A.C. did not rise to the level of medical diagnosis or treatment, and therefore A.C.'s statements to her are not admissible under Evid.R. 803(4).

{¶ 37} The admission or exclusion of evidence is a matter within the trial court's sound discretion, and its decision will not be disturbed on appeal absent an abuse of that discretion. *State v. Robb*, 88 Ohio St.3d 59, 2000-Ohio-275. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 38} In our view, the trial court construed the term "treatment" too narrowly when it found that Spriestersbach's

counseling of A.C. did not constitute treatment for purposes of Evid.R. 803(4). Medical diagnosis or treatment as used in Evid.R. 803(4) is not a "white coat" test, limited to those things that only licensed physicians and psychiatrists do. Counseling, particularly as it relates to mental health issues, comfortably fits within the meaning of treatment as used in Evid.R. 803(4), when that function is performed by psychologists and social workers. See: *State v. Edinger,* Franklin App No. 05AP-31, 2006-Ohio-157; *State v. Durham*, Cuyahoga App. No. 84183, 2005-Ohio-202; *State v. Chappell* (1994), 97 Ohio App.3d 515. Restricting the meaning of diagnosis or treatment in Evid.R. 803(4) in too narrow a way undercuts the function of nurses, psychologists, therapists, social workers and numerous other individuals who routinely treat victims of sexual abuse for physical, mental and emotional problems, often by counseling them. *Id.*

{¶ 39} **Spriestersbach testified that counseling and treatment are synonymous terms, and that is what she provided A.C. to help treat her emotional and psychological problems. The fact that Spriestersbach met with A.C. to counsel/treat her emotional and psychological problems with the goal of fostering behavioral changes to help A.C. qualifies as "treatment" within the meaning of Evid.R. 803(4). A.C.'s**

statements to Spriestersbach were made for the purpose of and were reasonably pertinent to the purpose of the treatment rendered by Spriestersbach. Therefore, the trial court abused its discretion by refusing to allow Spriestersbach to testify pursuant to Evid.R. 803(4) about the statements A.C. made, recanting A.C.'s allegations that Defendant had raped her. In our view, the jury was entitled to hear that evidence.

{¶ 40} The question then becomes whether the trial court's error in excluding Spriestersbach's testimony is harmless beyond a reasonable doubt because of the other, overwhelming evidence of Defendant's guilt. *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. We think not. The State's evidence of Defendant's guilt simply does not rise to the level of being overwhelming.

{¶ 41} The State's case primarily consisted of hearsay testimony admitted under various exceptions to the hearsay rule, relating what A.C. allegedly told other people about the sexual assault by Defendant. Those persons were police officers and health care providers, whose credibility is generally well-regarded. A.C.'s credibility clearly was the pivotal issue in this case, and yet she did not testify and was not subjected to cross-examination.

{¶ 42} Officers Knedler and Hammann both testified that they

observed Defendant inside the home, wrapped in a comforter that was later found on A.C.'s bed. The implication is that Defendant had been in A.C.'s bed, as she said, to commit the acts of sexual abuse she related. However, no physical evidence of a sexual assault was found on that bedding or the comforter.

{¶ 43} The State claims that Defendant made several statements that implicated him in this crime. For example, after police began discussing the possibility of DNA evidence, Defendant changed his story regarding his whereabouts that night. When asked why he initially lied about where he had been, Defendant replied: "there's no excuse for what I did." Defendant refused, however, to explain what he meant by that statement, and whether it related to his lying to the police or to the crime with which he was subsequently charged. When discussing A.C.'s allegations with police, Defendant said that he could think of no reason why A.C. would make up something like that. Defendant did not, however, admit to sexually assaulting A.C.

{¶ 44} The evidence most prejudicial to Defendant, other then A.C.'s hearsay statements to other people about the sexual assault by Defendant, was the DNA evidence. Based upon A.C.'s accusation that Defendant put his fingers inside her vagina,

police took swabs of Defendant's right index and middle finger. Laboratory analysis revealed the presence of A.C.'s DNA in sufficient quantity that the forensic serologist testified that the DNA was likely the result of Defendant's hand coming in contact with A.C.'s bodily fluid, although she could not exclude the possibility that the DNA came from skin- to-skin contact.

{¶ 45} That alternative possibility remains plausible in a setting such as this, in which the victim and the offender reside in the same house. Furthermore, the expert could not say that the body fluid Defendant's hand came in contact with was vaginal secretion as opposed to saliva, sweat or tears. Therefore, contrary to the State's claim, the jury could not have concluded, beyond a reasonable doubt, and from the DNA evidence alone, that the only way Defendant could have A.C.'s DNA on his fingers is because he digitally penetrated her vagina.

{¶ 46} Because the victim, A.C., did not testify in this case, her credibility, which was the critical issue, could not be challenged on cross-examination, and the jury did not hear any such evidence. On this record, we cannot say that, had the jury heard Spriestersbach's testimony that A.C. recanted her allegations that Defendant sexually had abused her, there is no reasonable possibility that such evidence would not have

affected the outcome of the trial. In other words, we cannot say that the trial court's error in excluding Spriestersbach's testimony is harmless beyond a reasonable doubt.

{¶ 47} Defendant's first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

{¶ 48} "WITH REFERENCE TO THE PREVIOUS ARGUMENT, THE TRIAL COURT ALSO ERRED BY NOT ALLOWING THE WITNESS TO TESTIFY BECAUSE HER TESTIMONY WAS ADMISSIBLE FOR IMPEACHMENT UNDER EVIDENCE RULE 806."

{¶ 49} Following the court's determination that Spriestersbach's hearsay testimony concerning A.C.'s statements to her would not satisfy the Evid.R. 803(4) exception to the rule against hearsay, Defendant asked to call Spriestersbach to testify concerning A.C.'s reputation for untruthfulness. Defendant also asked to call A.C.'s father to testify for the same purpose, as well as to statements that A.C. made, admitting that her accusations against Defendant were false.

{¶ 50} The court refused to permit the testimony of the two witnesses Defendant proposed to offer. The court found that their testimony concerning A.C.'s reputation would be evidence of the character of a witness, and therefore admissible only

pursuant to Evid.R. 404(A)(3). The court reasoned that because A.C. had not testified as a witness, evidence concerning her character or reputation for untruthfulness was therefore not admissible through those two witnesses. (T. 616). The court also found that, her father's extrinsic evidence concerning A.C.'s admissions was inadmissible because, not being called as a witness, A.C. could not be given an opportunity to first explain or deny her statements. Evid.R. 613.

{¶ 51} Evid.R. 404(A) prohibits evidence of a person's character or trait of character when offered to prove conforming conduct on a particular occasion. Defendant proposed to offer evidence of A.C.'s character and reputation for untruthfulness in order to argue that she was likewise untruthful in her accusations against Defendant. Such evidence is admissible per Evid.R. 404(A)(2), which states:

{¶ 52} "Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly

are applicable."

{¶ 53} Evidence of A.C.'s character or her reputation for untruthfulness that Defendant proposed to offer through the testimony of the two witnesses was pertinent to A.C.'s credibility regarding the truth of the accusations against Defendant that A.C. had made to the other witnesses who testified concerning those accusations. Therefore, the reputation evidence Defendant proposed to offer through the testimony of the two witnesses, if they were qualified to so testify, was admissible per Evid.R. 404(A)(2).

{¶ 54} That rule does not impose a requirement that the victim of the crime must testify at trial. Furthermore, Evid.R. 806 states:

{¶ 55} "(A) When a hearsay statement, or a statement defined in Evid.R. 801(D)(2), (c), (d), or (e), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence that would be admissible for those purposes if declarant had testified as a witness.

{¶ 56} "(B) Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or

explain."

{¶ 57} Evid.R. 607 permits a party to impeach the credibility of a witness through evidence of a prior inconsistent statement; that is, through proof of a self-contradiction. Evid.R. 806(A) would permit Defendant to attack A.C.'s credibility in connection with the prior hearsay testimony of other witnesses that the State had offered with evidence concerning A.C.'s declarations contradicting what she allegedly told those other witnesses. *State v. Klein* (1983), 11 Ohio App.3d 208, 211-212; *State v. Crossen* (Oct. 18, 1988), Ashland App. No. 902. Evid.R. 806(B) suspends the requirement in Evid.R. 613 that the subject of the attack must first be offered an opportunity to explain or deny the inconsistency.

{¶ 58} The admissions that A.C. allegedly made to Spriestersbach, while hearsay, are not barred by Evid.R. 802, per the exception in Evid.R. 803(4). The admissions that A.C. allegedly made to her father are also hearsay and inadmissible per Evid.R. 802, unless one of the exceptions in Evid.R. 803 or 804 would apply. The court did not rule on that question, however.

{¶ 59} The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

{¶ 60} "THE TRIAL COURT ERRED AND DENIED APPELLANT HIS RIGHT

TO CONFRONT WITNESSES UNDER THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION WHEN IT ALLOWED THE PROSECUTION TO PRESENT HEARSAY EVIDENCE BY THE ABSENT COMPLAINING WITNESS."

{¶ 61} Defendant argues that admission through the testimony of three police officers, Knedler, Phillips and Hammann, of hearsay evidence relating what A.C. told those officers or others violated his Sixth Amendment right to confront the witnesses against him pursuant to *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, and *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct, 2266, 165 L.Ed.2d 224. We agree.

{¶ 62} The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. Under former law, *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, the right of confrontation did not bar admission of an unavailable witness's hearsay statements against a criminal defendant if the statement bore "adequate indicia of reliability," a test that was satisfied when the evidence either fell within a "firmly rooted hearsay exception," or bore "particularized guarantees of trustworthiness." *Id.*

{¶ 63} In *Crawford v. Washington, supra*, the Supreme Court changed its view concerning application of the right of

confrontation, and held that out-of-court statements by a witness that are testimonial in nature are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether the statements are deemed reliable by the court.

{¶ 64} Statements are not testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police to meet an ongoing emergency. Statements are testimonial when the circumstances objectively indicate that there is no ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. ***Davis v. Washington, supra*****.**

{¶ 65} Officer Chad Knedler was asked and testified:

{¶ 66} "Q. If you could explain to us, what do you mean you received a dispatch?

{¶ 67} "A. When people call into the police or fire department, it goes through our dispatch center and they, in return, send the police or fire to each location.

{¶ 68} "Q. Okay. Is that what happened on this particular night?

{¶ 69} "A. Yes, Ma'am.

{¶ 70} "Q. Are you, as the police officer, provided any information about the reason you're going to that particular address?

{¶ 71} "A. Yes.

{¶ 72} "Q. And in this case, what information were you provided?

{¶ 73} "A. Told that there was a 11-year-old female by the name of [A.C.] who was saying that she was molested by her stepfather." (T. 223).

{¶ 74} Defendant failed to object to Officer Knedler's testimony, thereby waiving all but plain error. *State v. Wickline* (1990), 50 Ohio St.3d 114. Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been different. *State v. Long* (1978), 53 Ohio St.2d 91.

{¶ 75} Officer Knedler's statement indicates that A.C. said that Defendant had molested her. The State claims that admission of this evidence did not violate Defendant's confrontation rights because the statement was not hearsay and was not offered to prove the truth of the matter asserted. Rather, the statement was offered to merely explain the subsequent conduct of the police officers and why Officer

Knedler and other officers were dispatched to A.C.'s residence. We are not persuaded by this argument.

{¶ 76} Why police proceeded as they did has very little, if any, relevance or real importance in this case. Officer Knedler's statement has real meaning and impact only if it is offered to prove the truth of what it asserts, which is that Defendant molested A.C. In that regard, the evidence is highly accusatory in nature and directly implicates Defendant in the criminal conduct alleged in the indictment. We conclude that this out of court statement by A.C. was offered for the truth of what it asserts, and that it therefore constitutes hearsay, Evid.R. 801(C), and a *Crawford* challenge therefore may apply.

{¶ 77} Officer Knedler's statement repeats what the police dispatcher told him, which is what A.C. told the police dispatcher during her 911 call to police. Evidence of that 911 call was properly admitted during trial as an excited utterance under Evid.R. 803(2), which Defendant conceded at oral argument in this appeal. Furthermore, the statements A.C. made during that 911 call did not constitute testimonial evidence that violated Defendant's confrontation rights, because her primary purpose was to seek police assistance or aid during an ongoing emergency. *Davis v. Washington, supra; State v. Bailey*, Hamilton App. Nos. C-060089, C-060091,

2007-Ohio-2014.

{¶ 78} Though Officer Knedler's evidence is cumulative relative to other evidence of A.C.'s statement during her properly admitted 911 call, admission of that evidence did not violate Defendant's confrontation rights because A.C.'s statements during that 911 call were not testimonial. Furthermore, admission of this cumulative evidence does not rise to the level of plain error. ***State v. Crosky*****, Franklin App. No. 06AP-816, 2007-Ohio-6533, at ¶25.**

{¶ 79} Officer Terry Phillips testified:

{¶ 80} "Q. And officer, at some point, did you ask [A.C.] what was going on or what had happened?

{¶ 81} "A. Yes, I did.

{¶ 82} "Q. And not to go into specific what she told you about, did, in fact, [A.C.] tell you what happened that night?

{¶ 83} "A. Yes, she did.

{¶ 84} "Q. And based upon that information, what did you next?

{¶ 85} "A. At that time, we called Sergeant Hammann out to the scene.

{¶ 86} "Q. Let me ask you that, at that point, why did you request that Sergeant Hammann come out to the scene?

{¶ 87} "A. It's policy of the Dayton Police Department,

when we have any type of rape call, especially when it's involving children, to call a supervisor out to the scene." (T. 252).

{¶ 88} Once again, Defendant failed to object to this testimony, and therefore the plain error standard of review applies. We reject the State's claim that this evidence is not hearsay because it was not offered to prove the truth of the matter asserted, that A.C. told Officer Phillips that she had been raped, but rather was offered merely for background purposes, to explain why Officer Phillips acted as he did and called a supervisor to the scene. For the reasons we previously discussed in relation to Officer Knedler's testimony, we conclude that this out-of-court statement by A.C. to Officer Phillips was offered to prove the truth of what it asserted, and, accordingly, it is hearsay and a *Crawford* challenge may apply.

{¶ 89} The jury could infer from Officer Phillips' testimony that when he talked to A.C. she told him that she had been raped by Defendant. The State argues that the admission of this hearsay did not rise to the level of plain error because it was merely cumulative to other properly admitted statements by A.C. indicating that Defendant had raped her, such as her 911 call to police and the statements she made to health care

professionals at Children's Medical Center. While we agree that Phillips' statement is cumulative to other similar statements made by A.C. that were properly admitted, a significant difference exists. Unlike A.C.'s 911 call to police, the out of court statement to Officer Phillips was testimonial in nature.

{¶ 90} At the time Officer Phillips questioned A.C., there was no ongoing emergency. Police were on the scene and A.C. was in no immediate danger. Moreover, the primary purpose of Officer Phillips' questions was to establish or prove past events that could be potentially relevant to a later criminal prosecution. Under those circumstances, A.C.'s out of court statement to Officer Phillips was testimonial, *Davis, supra*, and was barred by the Confrontation Clause unless A.C. was unavailable to testify and Defendant had a prior opportunity to cross-examine A.C. *Crawford v. Washington, supra*. The State failed to demonstrate either of those matters. Accordingly, admission of A.C.'s hearsay statement to Officer Phillips violated Defendant's confrontational right.

{¶ 91} The further question is whether, no objection having been made to it, admission of Officer Phillips' testimony was plain error. On the relevant test, whether but for the error, the outcome of the trial would have been different, *State v.*

Long, we find that plain error is not demonstrated. The inferences the jury could draw from Officer Phillips' testimony concerning what A.C. told him were cumulative to the testimony of several other witnesses that was admissible, and the outcome of the trial would not have been different had Officer Phillips' testimony not been admitted.

{¶ 92} Sergeant George Hammann testified, over Defendant's objection, as follows:

{¶ 93} "Q. And sergeant, when you arrived at the scene, what was the first thing you did, please?

{¶ 94} "A. Well, the thing I did was confer with Officer Knedler to see if we actually had a child rape. If there was elements of a crime here. He confirmed that there were elements of a crime in a child rape and then I approached the victim." (T. 266).

{¶ 95} "Q. After you spoke with the officer, you then spoke with [A.C.]?

{¶ 96} "A. Yes, I talked to her directly.

{¶ 97} "Q. Okay. And after speaking with [A.C.] what did you do next?

{¶ 98} "A. Well, I determined that there were elements of a child rape in talking to her." (T. 267).

{¶ 99} Sergeant Hammann's statement indicates that police

believed A.C.'s statement to them that Defendant had raped her. The State appears to concede in its brief that this evidence constitutes inadmissible hearsay. We agree. This evidence was clearly offered to prove the truth of what it asserted, that A.C. had been raped by Defendant. It was therefore hearsay. Evid.R. 801(C). Moreover, A.C.'s out of court statement to Sergeant Hammann was clearly testimonial in nature.

{¶ 100} **At the time A.C.'s statement to Sergeant Hammann was made, there were multiple police officers on the scene. A.C. was not in any immediate danger, and there was no ongoing emergency. The purpose of Sergeant Hammann's interrogation was obviously to establish or prove a past event that was potentially relevant to a later criminal prosecution. *Davis v. Washington, supra*. Therefore, evidence of A.C.'s out of court statement to Sergeant Hammann was barred by the Confrontation Clause, unless A.C. was unavailable to testify and Defendant had a prior opportunity to cross-examine A.C. *Crawford v. Washington, supra*. The State did not prove either of those propositions. Accordingly, the admission of A.C.'s hearsay statement to Sergeant Hammann, over Defendant's objection, violated Defendant's Sixth Amendment confrontation right, and the trial court abused its discretion in admitting**

this evidence.

{¶ 101} **The State argues that the admission of this evidence constituted harmless error because of the strength of the State's other evidence against Defendant. For the reasons we discussed in sustaining Defendant's first assignment of error, we again reject the State's harmless error claim.**

{¶ 102} **Defendant's third assignment of error is sustained in part and overruled in part.**

FOURTH ASSIGNMENT OF ERROR

{¶ 103} **"THE PROSECUTION COMMITTED PREJUDICIAL MISCONDUCT WHEN IT SUGGESTED BY INNUENDO, DURING VOIR DIRE, THAT THE COMPLAINING WITNESS HAD BEEN MURDERED."**

{¶ 104} **Defendant argues that the prosecutor's remarks during voir dire were improper and constituted misconduct, and that the trial court abused its discretion in permitting, over Defendant's objection, remarks that analogized this case to a murder case in which the victim is deceased and therefore unable to come into court to testify.**

{¶ 105} **In *State v. Williams*, Montgomery App. No. 22126, 2008-Ohio-2069, at ¶45, this court observed:**

{¶ 106} **"In analyzing claims of prosecutorial misconduct, the test is 'whether remarks were improper and, if so, whether they prejudicially affected substantial rights**

of the accused.' *State v. Jones,* 90 Ohio St.3d 403, 420, 2000-Ohio-187, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14. 'The touchstone of analysis "is the fairness of the trial, not the culpability of the prosecutor."' *Id.,* quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced and his conviction will not be reversed. See *State v. Loza* (1994), 71 Ohio St.3d 61, 78, 1994-Ohio-409. In reviewing allegations of prosecutorial misconduct, we review the alleged wrongful conduct in the context of the entire trial. *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144."

{¶ 107} **Prior to the commencement of trial, defense counsel argued that because the victim, A.C., would not be called to testify, the State should be precluded from suggesting to the jury that the victim was not present at trial because of something Defendant had said or did. The trial court agreed, and indicated that counsel could merely tell the jury that the child was not present and they were not to speculate as to why.**

{¶ 108} **During voir dire, the prosecutor made the following remarks:**

{¶ 109} **"Ms. Montgomery: In a case, and I'm not saying**

this is a murder case, but let's say there was a murder case, would, in a murder case, would the victim of that case be dead or alive? Maybe a trick question there, but in that particular case would you expect that person who was dead to be able to come in and be able to testify in court? And why not? So, would you think then, that the State of Ohio could prosecute the person who murdered them * * *" (T. 60-61).

{¶ 110} **Defense counsel objected, but the objection was overruled. The prosecutor continued:**

{¶ 111} **"Ms. Montgomery: Do you think that the State of Ohio has the ability then to prosecute someone for murdering someone else when the victim is dead and the victim can't say who did it?" (T. 61).**

{¶ 112} **"Ms. Montgomery: Do any of you think that the State of Ohio shouldn't prosecute people if, say, a victim is dead in a murder case? And I'm asking you this because you're not going to hear from the victim in this case. You're not going to hear from the child. So I'm going to ask [a juror], if you want to hear from the victim in this case, do you think that the State can still go forward? If we were to present sufficient evidence to you otherwise and you never saw the victim take that witness stand, would you be able to convict somebody?" (T. 61-62).**

{¶ 113} **"Ms. Montgomery: What I'm asking though is if a child doesn't come into this courtroom and testify but the State presents other evidence to you, and we prove all of the elements of those crimes and rape and gross sexual imposition to you beyond a reasonable doubt, you never see the victim take the stand and tell you anything, would you still be able to convict? * * * I'm not saying that - the State is obviously here because we want to present sufficient evidence to you but that's a decision that you would have to make. What I'm asking if that victim didn't testify - what about you [a juror], does anyone else here feel differently? Please let us know, there are no right or wrong answers we're trying to figure out how you feel on this topic * * *." (T. 62-64).**

{¶ 114} **Defendant argues that the prosecutor's remarks analogizing the fact that the child victim in this case would be absent from the trial and not testifying to a "murder" case where the victim is deceased and therefore unable to testify, were improper because those remarks were inflammatory and created a false implication that Defendant was responsible for the child not appearing at trial. We do not agree. The core test of whether prosecutorial misconduct denies a defendant a fair trial is whether the misconduct created a danger that the jury might convict defendant on extraneous considerations**

rather than on the evidence introduced at trial. *Taylor v. Kentucky* (1978), 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468. The prosecutor disclaimed any contention that "this is a murder case." We see no real danger that the jury would conclude that the alleged victim had been murdered – no homicide was charged – or was at risk should she testify.

{¶ 115} **The prosecutor was making a valid point concerning the child's absence and its effect on the State's burden of proof. However, her analogy to a murder case was both potentially confusing and inconsistent with the court's prior determination regarding implications that might arise from the child's absence at trial. The better course would have been to correct the prosecutor. However, we cannot say that the court's failure to do that implies an attitude that was unreasonable, arbitrary, or unconscionable, *State v. Adams* (1980), 62 Ohio St.2d 151, so as to portray an abuse of discretion.**

{¶ 116} **Defendant's fourth assignment of error is overruled.**

FIFTH ASSIGNMENT OF ERROR

{¶ 117} **"EVEN IF THE FOUR PREVIOUS ASSIGNMENTS OF ERROR WHEN CONSIDERED INDIVIDUALLY DO NOT MANDATE REVERSAL, THE CUMULATIVE EFFECT OF THOSE ERRORS SHOULD CAUSE THIS COURT TO**

REVERSE THE CONVICTIONS."

SIXTH ASSIGNMENT OF ERROR

{¶ 118} **"THE CONVICTIONS SHOULD BE REVERSED AND APPELLANT SHOULD ONLY BE CONVICTED OF RAPE AND GSI, WITHOUT THE UNDER THE AGE OF THIRTEEN SPECIFICATION, BECAUSE THE PROSECUTION FAILED TO PROVE THAT THE VICTIM WAS LESS THAN THIRTEEN YEARS OLD."**

{¶ 119} **Our disposition of the previous assignments of error, which will require a new trial, have rendered these assignments of error moot, and therefore we need not address them. App.R. 12(A)(1)(c).**

{¶ 120} **Having sustained Defendant's first and second, and his third assignment of error, in part, we will reverse Defendant's conviction and sentence and remand this matter to the trial court for further proceedings consistent with this opinion.**

DONOVAN, P.J., And BROGAN, J., concur.

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Hon. Barbara P. Gorman