[Cite as *In re J.M.*, 2009-Ohio-4574.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

IN THE MATTER OF:	:	
	:	
[J.M., an Adjudicated] Delinquent Child	:	Case No. 08CA782
	:	
	:	**DECISION AND**
	:	**JUDGEMENT ENTRY**
	:	
	:	File-stamped date: 8-14-09

APPEARANCES

Timothy Young, Ohio Public Defender, and Angela Miller, Assistant Ohio Public Defender, Columbus, Ohio, for appellant.

C. Robert Junk, Jr., Pike County Prosecutor, and Anthony A. Moraleja, Assistant Pike County Prosecutor, Waverly, Ohio for appellee.

Kline, P.J.:

{¶1} J.M. appeals his delinquency adjudication of the juvenile court in Fairfield County and his classification as a juvenile offender registrant by the juvenile court in Pike County. On appeal, J.M. contends that the trial court erred by permitting experts to impermissibly vouch for the testimony of the victim. Because J.M. failed to preserve this error, and because we find that any impermissible vouching did not constitute plain error, we disagree. J.M. next contends that the trial court erred in its admission of other acts evidence under Evid.R. 404(B). Because we find that the court did not abuse its discretion in finding this evidence probative of identity, we disagree. J.M. next contends that the victim's statements to mandatory reporters (i.e., people who are required to report certain information to the authorities) are testimonial, and therefore, their admission violated his rights under the Confrontation Clause. Because we find it

unlikely the victim gave these statements with any understanding that they would later be used in a prosecution, we disagree. J.M. next contends that the court's adjudication of delinquency was against the manifest weight of the evidence. We disagree, holding that substantial evidence exists to support the delinquency adjudication. J.M. next contends that the cumulative errors in this case require this Court to reverse and remand the matter to the trial court for another adjudicatory hearing. Because we find that any errors during the hearing were minor, we disagree. Finally, J.M. contends that he was afforded ineffective assistance of counsel, and this failure warrants reversal. We disagree as to the court's delinquency adjudication in Fairfield County but agree as to J.M.'s classification in Pike County. Accordingly, we affirm the trial court's delinquency adjudication in Fairfield County but vacate the trial court's classification of J.M. as a juvenile offender registrant and as a tier III offender in Pike County. We remand this matter to the juvenile court in Pike County for a re-classification hearing.

I.

{¶2} On August 23, 2007, a complaint was filed in the Juvenile Division of the Court of Common Pleas in Fairfield County. This complaint alleged that J.M. was a delinquent child on the basis of two separate rapes (acts of sodomy) in violation of R.C. 2907.02(A)(1)(b). The juvenile court granted several continuances, and both parties filed numerous evidentiary motions.

{¶3} The case came to trial on February 4-6, 2008. The state apparently chose to only present evidence of the second alleged rape. The trial court determined that J.M. was delinquent because he had committed the rape offense.

{¶4} The state's evidence showed that the rape occurred on July 3, 2007, during a family visit. J.M. spent much of the visit with his cousins in a room separate from where the adults were. J.M. tied two of his cousins to a chair with a bicycle chain. He then took the third to a closet and sexually assaulted her. She was four-years-old. The trial court credited this evidence, concluded that J.M. was a delinquent child based on the rape of the four-year-old, and transferred the matter for disposition and classification to the Court of Common Pleas, Juvenile Division, in Pike County. The offense took place in Fairfield County, while J.M. resided in Pike County.

{¶5} The juvenile court in Pike County committed J.M. to the legal custody of the Ohio Department of Youth Services for an indefinite term consisting of a minimum period of eighteen months and a maximum period not to exceed his 21st birthday. The court suspended this order on condition that the child be of good behavior until age 21 and successfully complete a program at the Hocking Valley Community Residential Center. The court then released J.M. to the custody of his parents for them to place him in the residential center.

{¶6} The juvenile court in Pike County also considered the issue of classification and classified J.M. as a juvenile offender registrant after considering the factors laid out in the statute. The court further determined that J.M. was a tier III offender under Ohio's current classification scheme. The court also determined that J.M. was a Public Registry Qualified Juvenile Offender Registrant and was subject to community notification provisions.

{¶7} J.M. appeals and assigns the following errors for our review. I. "THE TRIAL COURT ERRED BY PERMITTING A SOCIAL WORKER, HER SUPERVISOR AND A

DOCTOR TO TESTIFY AS 'EXPERTS' WHEN THEIR TESTIMONY AMOUNTED TO NOTHING MORE THAN VOUCHING FOR THE VICTIM IN VIOLATION OF EVIDENCE RULE 702, THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION." II. "INTRODUCTION OF 'OTHER ACTS' EVIDENCE, EXCEPT UNDER LIMITED, CLEARLY DEFINED CIRCUMSTANCES, DENIES A DEFENDANT A FAIR TRIAL AND DUE PROCESS. THE INTRODUCTION OF 'OTHER ACTS' EVIDENCE THAT [J.M.] SEXUALLY ABUSED [A DIFFERENT CHILD], UNFAIRLY DENIED HIM DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I, SECTIONS 2, 9, 10 AND 16 OF THE OHIO CONSTITUTIONS." III. "[J.M'S] RIGHT TO CONFRONTATION, PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WAS VIOLATED WHEN HEARSAY STATEMENTS MADE BY NON-TESTIFYING JUVENILES WERE ADMITTED UNDER THE GUISE OF 'MEDICAL TREATMENT' AND EVIDENCE RULE 803(4)." IV. "THE TRIAL COURT VIOLATED [J.M.'S] RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION WHEN IT ADJUDICATED HIM DELINQUENT OF RAPE WHEN THAT FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE." V. "THE CUMULATIVE ERROR THAT OCCURRED DURING [J.M.'S] TRIAL WARRANTS GRANTING HIM RELIEF PURSUANT TO THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

CONSTITUTION." VI. "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT [J.M'S] CLASSIFICATION AS A TIER III JUVENILE SEX OFFENDER REGISTRANT WAS MANDATORY IN VIOLATION OF R.C. 2950.01 (E)-(G). ADDITIONALLY THE COURT ABUSED ITS DISCRETION IN FINDING THAT [J.M.] WAS A PUBLIC REGISTRANT IN VIOLATION OF R.C. 2152.86." VII. "[J.M] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION AT BOTH THE ADJUDICATION AND DISPOSITION PHASES WHEN DEFENSE COUNSEL FAILED TO: 1) OBJECT TO THE QUALIFICATION OF SEVERAL 'EXPERTS'; 2) OBJECT TO VOUCHING TESTIMONY PROVIDED BY 'EXPERTS'; 3) MAKE CRAWFORD OBJECTIONS AS TO WITNESSES WHO WERE ALSO MANDATORY REPORTERS; 4) FAMILIARIZE HIMSELF ON OHIO'S JUVENILE OFFENDER CLASSIFICATION PROCEDURES; AND 5) PROPERLY ADVISE THE COURT REGARDING HIS CLIENT'S DUTY TO REGISTER UNDER R.C. 2152.82 AND R.C. 2152.83, 2152.86."

II.

{¶8} J.M. first contends that the state's expert witnesses in Fairfield County engaged in impermissible vouching. J.M. contends Sarah Kuss (a social worker), Helen Nemith (Kuss's supervisor), and Dr. Scansen all impermissibly vouched for the credibility of the victim in this case.

{¶9} All three witnesses testified as experts under Evid.R. 702. Evid.R. 702 provides that if a "witness is qualified as an expert by specialized knowledge, skill, experience,

training, or education regarding the subject matter of the testimony" then that expert may testify "to matters beyond the knowledge or experience possessed by lay persons or [to dispel] a misconception common among lay persons" so long as the "testimony is based on reliable scientific, technical, or other specialized information." "The determination of whether a witness possesses the qualifications necessary to allow expert testimony lies within the sound discretion of the trial court." *Willis v. Martin*, Scioto App. No. 06CA3053, 2006-Ohio-4846, at ¶20; see, also, *State v. Maupin* (1975), 42 Ohio St.2d 473, 479. Likewise, we review the scope of an expert's testimony for an abuse of discretion. See *Werts v. Goodyear Tire & Rubber Co.*, Cuyahoga App. No. 91403, 2009-Ohio-2581, at ¶33.

{¶10} An abuse of discretion connotes more than an error of judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. So long as a trial court exercises its discretion in accordance with the rules of procedure and evidence, a reviewing court will not reverse that judgment absent a clear showing of an abuse of discretion with attendant material prejudice to defendant. *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271-72; *State v. Hymore* (1967), 9 Ohio St.2d 122, 128.

A.

{¶11} Kuss testified as to her qualification. She stated that she had a bachelor's degree in fine arts from the University of Notre Dame as well as a master's of science degree from Auburn University. See Transcript, vol. I, at 175-79 for her qualifications. She said that she was studying in the clinical psychology program at New Horizon's Youth and Family Center and had completed all requirements for her Ph.D. in clinical

psychology except the dissertation. Finally, she indicated that she had been a counselor and therapist since 1982 in various capacities, and had previously testified as an expert in Alabama regarding delinquency charges and abuse. However, Kuss said that she was not independently licensed and any of her diagnoses had to be approved by her supervisor. The state then offered Kuss as an expert witness in the counseling field, and the defense offered no objection to that certification. Id. at 179.

{¶12} Kuss testified about the four-year-old victim's behavior at her therapy sessions as well as the victim's reported behavior at home. Kuss offered her expert opinion that the victim suffered from "[a]djustment disorder with mixed disturbance of emotions and conduct." Transcript, vol. II, at 120. Defense counsel made no objection to this particular diagnosis, and Kuss testified that this condition would require "a traumatic psychosocial stressor[.]" Id. at 122. Finally, Kuss testified that she could not identify any stressor other than the alleged conduct of J.M.

{¶13} On cross examination, defense counsel pursued a line of questioning that indicated the victim may have simply repeated what she had heard her mother say. In part, this theory was based on the fact that the mother was present during Kuss's questioning of the victim. Id. at 109, 126-29. "Is it possible that [the victim] mimicked what you and her mother discussed there in front of her?" Id. at 127. In response, the state elicited Kuss's opinion that the statements did not at all appear to be parroted or mimicked from the mother. And the state then proceeded to have Kuss explain the basis for this opinion. J.M. contends that the admission of this evidence is reversible error.

{¶14} "Once qualified, '[a]n expert witness's testimony that the behavior of an alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible under the Ohio Rules of Evidence.'" *State v. Konkel*, Summit App. No. 23592, 2007-Ohio-6186, at ¶20, citing *State v. Stowers*, 81 Ohio St.3d 260, 261. However, "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *State v. Boston* (1989), 46 Ohio St.3d 108, syllabus, overruled on other grounds by *State v. Dever* (1992), 64 Ohio St.3d 401.

{¶15} In *Boston*, the expert testified that the victim "had not fantasized her abuse and that [the victim] had not been programmed to make accusations against her father." *Boston* at 128. The Supreme Court of Ohio held that the admission of this testimony was "egregious, prejudicial and constitutes reversible error." Id. But as the Supreme Court of Ohio explained in *Stowers*: "*Boston*'s syllabus excludes expert testimony offering an opinion as to the truth of a child's statements (*e.g.*, the child does or does not appear to be fantasizing or to have been programmed, or is or is not truthful in accusing a particular person). It does not proscribe testimony 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." *Stowers* at 262-63.

{¶16} Here, J.M.'s trial counsel arguably opened the door in his questioning of Kuss because the prosecution only went into this issue on redirect after J.M.'s counsel raised it. Nonetheless, Kuss's testimony did go too far in that she offered an opinion on the truthfulness of the victim, or more precisely, an opinion that the victim was not straying from the truth by parroting or mimicking her mother. But J.M.'s counsel made no objection to this opinion, and his counsel elicited the same opinion on re-cross

examination. Transcript, vol. II, at 145. In fact, the only objection the defense raised was related to Kuss's introduction of certain statements of the victim.

{¶17} J.M. failed to raise an objection to the admission of this evidence at trial and so he must show the trial court committed plain error in its admission of the evidence.

{¶18} Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights. "Inherent in the rule are three limits placed on reviewing courts for correcting plain error." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15. "First, there must be an error, *i.e.,* a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." Id. at ¶16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (omissions in original). We will notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus. And "[r]eversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill*, 92 Ohio St.3d 191, 203.

{¶19} Here J.M. cannot demonstrate the error affected substantial rights. On page 142 of the transcript, Kuss clearly did offer her opinion that the victim was not mimicking her mother. This, under *Boston*, is impermissible testimony. However, the thrust of her testimony explained why she believed the victim. This testimony concerned the manner and circumstances of the victim's statements, all permissible testimony under *Stowers*. Kuss's plain opinion is not by itself particularly persuasive. Her observations that the

victim stated her account with relative ease, that the victim used different language than the mother, and that the victim's account was elicited without the use of leading questions carry far more weight. This permissible testimony appears more important, both in substance and persuasiveness, than the impermissible testimony. As a result, we find that it is unlikely that the trial court was unduly swayed by the impermissible opinion.

{¶20} Accordingly, we do not find plain error on this issue.

B.

{¶21} J.M. next contends that the trial court erred by permitting Kuss's supervisor Nemith to testify. J.M. contends that "Given the lack of any personal interaction between Nemith and the [victim], the sole purpose of Nemith's testimony was to bolster Kuss'[s] testimony. Because Kuss'[s] testimony vouched for [the victim] * * * Nemith's testimony did as well."

{¶22} However, as noted above we find that any vouching on the part of Kuss was de minimis. Nemith testified that she was Kuss's supervisor and was a child case manager coordinator. She also testified that she graduated in 1980 with a master's degree in clinical counseling, and indicated that she was presently licensed to make independent diagnoses. She explained the procedure that she used to review the assessments of her employees and to ensure that the diagnoses matched the symptoms. She admitted that she had never met with the victim in this case, but that she agreed with Kuss's diagnosis based on the facts in the file.

{¶23} J.M. objected to her testimony at trial, but did so based on her admission that she had no personal knowledge of the victim in this case. Thus, he has forfeited all but plain error.

{¶24} However, after reviewing the record, we see no basis to conclude that Nemith engaged in impermissible vouching on the stand.

{¶25} Accordingly, we find no error, let alone plain error, regarding this issue.

C.

{¶26} J.M. further contends that the testimony of Dr. Scansen also included impermissible vouching. J.M. asserts that her testimony was based on nothing more than the victim's statement, and under Ohio law this constitutes nothing more than impermissible vouching by a more circuitous means. J.M. cites two cases in support of this proposition.

{¶27} In the first case, a doctor testified that it was her opinion that the victim was sexually abused "based solely on the history that [the victim] provided and on the physical exam. Since the physical exam's results were normal, the doctor admitted that her opinion was based on what [the victim] told her." *State v. Schewirey*, Mahoning App. No. 05 MA 155, 2006-Ohio-7054, at ¶51. In the second case, again the expert testified "to a reasonable degree of medical certainty, [the victim] was sexually abused[, and this opinion] was based solely upon the child's statements." *State v. Knight*, Cuyahoga App. No. 87737, 2006-Ohio-6437, at ¶31.

{¶28} Here, Dr. Scansen explained the procedures the hospital used in the emergency room for dealing with child abuse cases. The doctor also explained the medical examinations, and stated that they were negative. And she offered her opinion that this

result did not confirm J.M.'s denial that any sexual abuse took place. Dr. Scansen testified that "[a] child's skin is very elastic and very resilient, so, you may not see any changes, even if there was penetration or sexual abuse." Transcript, vol. I, at 92. Finally, the doctor indicated she did observe an abrasion on the buttocks, and a bruise on the thigh, and these injuries were consistent with the history as given by the victim.

{¶29} Unlike the cases cited by J.M., Dr. Scansen never testified it was her opinion that abuse took place. She merely testified that the negative findings of the medical examinations did not foreclose the possibility of sexual abuse, and that the other observed injuries were consistent with the victim's account. On cross-examination, Dr. Scansen admitted there were other possible explanations for the injuries.

{¶30} This distinction, that Dr. Scansen never offered her expert opinion that the child was in fact abused, may seem like a small one, but it is crucial. If an expert offers an opinion that the victim was abused and only relies upon the statements of the victim, then the expert is doing nothing more than stating that the jury should believe the victim. This is an impermissible opinion under the *Boston* case cited earlier. Here, Dr. Scansen never testified that the child had in fact been raped, but instead testified that the medical examinations and observed injuries were consistent with rape.

{¶31} J.M. also claims that Dr. Scansen's testimony would not have been helpful to the trier of fact as it did not involve matters outside the normal lay person's experience. Hopefully, the nature of injuries suffered by a four-year-old as a result of sexual abuse is outside the common experience of a lay person. Thus, we cannot say that the trial court abused its discretion in admitting her testimony.

{¶32} Accordingly, for the foregoing reasons, we overrule J.M.'s first assignment of error.

III.

{¶33} J.M. contends in his second assignment of error that the trial court erred in the admission of "other acts" evidence. The disputed evidence concerns an alleged prior rape of a different victim, who was a five-year-old cousin of J.M.

{¶34} As we stated earlier, a trial court has discretion in the admission or exclusion of evidence. Thus, under our standard of review, we must decide if the trial court abused its discretion.

{¶35} Evid.R. 404(A) prohibits the use of evidence of other acts to prove that an individual has acted in conformity with those other acts on a particular occasion. Evid.R. 404(B) and R.C. 2945.59 provide an exception that allows the admission of the same other act evidence so long as it is used to prove something other than the fact an individual acted in conformity with those other acts.

{¶36} Specifically, Evid.R. 404(B) states, "**Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶37} Because Evid.R. 404(B) and R.C. 2945.59[1] create an exception to the common law, we must construe the standard for admissibility against the state. *State v. Jamison*

[1] R.C. 2945.59 provides "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether

(1990), 49 Ohio St.3d 182, 183-84. For proper admissibility, the trial court must determine that: (1) the other act is relevant to the crime in question, and (2) evidence of the other act is relevant to an issue placed in question at trial. *State v. McCornell* (1993), 91 Ohio App.3d 141, 146, citing *State v. Strong* (1963), 119 Ohio App. 31; *State v. Howard* (1978), 57 Ohio App.2d 1, 6. Additionally, the court must consider factors such as (1) the time of the other act, *State v. Henderson* (1991), 76 Ohio App.3d 290, 294; (2) the accused's modus operandi, see *State v. Coleman* (1988), 37 Ohio St.3d 286, 291-92; *State v. Hill* (1992), 64 Ohio St.3d 313, 323; (3) the nature of the other acts committed, *State v. Smith*, Ross App. No. 02CA2687, 2003-Ohio-5524, ¶¶13-14; and (4) the location of the other acts, *State v. Moorehead* (1970), 24 Ohio St.2d 166, 169, vacated on different grounds by *Moorehead v. Ohio*, 408 U.S. 938 (1972).

{¶38} Introduction of other acts evidence to prove a scheme or plan is permissible in only one of two situations. *State v. Curry* (1975), 43 Ohio St.2d 66, 72-73. "First, those situations in which the 'other acts' form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment." Id. at 73. The second potential situation is where the identity of a perpetrator of the crime is at issue. Id. "One recognized method of establishing that the accused committed the offense set forth in the indictment is to show that he has committed similar crimes within a period of time reasonably near to the offense on trial, and that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes." Id., citing *Whiteman v. State* (1928), 119 Ohio St. 285; *Barnett v. State* (1922), 104 Ohio St. 298.

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they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶39} The trial court explained its rationale for admitting the evidence as follows. "And the Court finds that, under Evidence Rule 404(B), although normally not admitted, they may be admitted for purposes other than showing a defendant's character as to criminal propensity, and specifically being admissible to prove the identity of the person through modus operandi. And here specifically the two girls are of tender age, four and five, I believe, both acts are acts of similar nature, acts of sodomy, both girls are relatives to the defendant; therefore, based upon the answers to those questions, the Court does find them admissible and, therefore, overrules the objection to the prior acts[.]" Transcript, vol. II, at 25-26.

{¶40} J.M. cites a case from the fifth district, *State v. Lindsay*, Richland App. No. 02CA66, 2003-Ohio-2748. In that case, the state prosecuted the defendant for sexual abuse and introduced allegations from the victim that the defendant had attempted to abuse her earlier. *Lindsay* at ¶6. The fifth district reversed and remanded, finding that the admission of the prior incident and other violations constituted plain error. *Lindsay* at ¶16. However, the *Lindsay* case defies application. The court did not describe the prior incident nor explain why it did not qualify for admission under Evid.R. 404(B).

{¶41} We find a third district case more persuasive. *State v. Pearson* (1996), 114 Ohio App.3d 168. In *Pearson*, the court held a prior rape was admissible to prove identity where both rapes were committed in the same area, within a three month period, by a similarly described individual, and the individual attacked in a similar manner. *Pearson* at 186-87. Here, the trial court noted the similarity of the victims, their relationship to the offender, and the similarity of the offense itself both in the nature of the abuse and the familial setting.

{¶42} Therefore, under these circumstances, we find that the trial court did not abuse its discretion in admitting this evidence.

{¶43} Accordingly, we overrule J.M.'s second assignment of error.

IV.

{¶44} J.M. contends that the admission of certain evidence at trial, involving hearsay statements, violated his rights under the Sixth Amendment to the United States Constitution. He asserts that as a matter of law any statement made to a mandatory reporter is testimonial. Thus, our review is de novo.

{¶45} The Sixth Amendment of the United States Constitution guarantees among other things an accused's right "to be confronted with the witnesses against him[.]" "Where testimonial evidence is at issue * * * the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington* (2004), 541 U.S. 36, 68.

{¶46} The *Crawford* court avoided defining testimonial for the purpose of the Sixth Amendment, but the court did note that statements made to the police in the course of interrogations qualify as testimonial under any definition. *Crawford* at 52. "For Confrontation Clause purposes, a testimonial statement includes one made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, paragraph one of the syllabus, quoting *Crawford* at 52. "In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable

declarant's expectations." Id. at paragraph two of the syllabus. "The proper inquiry, then, is whether the *declarant* intends to bear testimony against the accused. That intent, in turn may be determined by querying *whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime*." *United States v. Johnson* (C.A.6, 2006), 440 F.3d 832, 843 (emphasis in original), citing *United States v. Cromer* (C.A.6, 2004), 389 F.3d 662, 675.

{¶47} At trial, neither of the victims testified. Instead, the state introduced their statements through various hearsay exceptions to which the defense offered various objections. On appeal, J.M. only argues the admission of hearsay statements under 803(4) violates his confrontation clause rights where the declarant was speaking to an individual who had a mandatory duty to report any allegation of child abuse to the authorities. As persuasive precedent, J. M. cites *People v. Stechly* (2007), 225 Ill.2d 246, 870 N.E.2d 333.

{¶48} Evid.R. 803(4) permits the admission of "[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." Evid.R. 803(4). Ohio Courts have extended this rule to social workers and psychologists. *State v. Arnold*, Franklin App. No. 07AP-789, 2008-Ohio-3471, at ¶37 (statements to social worker admissible); *State v. Sheppard*, 164 Ohio App.3d 372, 2005-Ohio-6065, at ¶23, 36 (statements to psychologist admissible).

{¶49} The Illinois Supreme Court in *Stechly* concluded that an interview conducted in a similar manner to those in this case resulted in testimonial statements. In part, the *Stechly* Court reached this conclusion because of the mandatory reporting duty Illinois law placed on the relevant medical personnel. *Stechly* at 365. However, the Supreme Court of Ohio has already had the occasion to address statements like those in the present case. *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267. In *Muttart*, the disputed statements included statements to a social worker conducting a screening before the child victim saw the doctor and statements to a clinical counselor during play therapy. Id. at ¶15, 19. The *Muttart c*ourt held that these statements were not testimonial. Id. at ¶61. And we find the present case factually indistinguishable from *Muttart*.

{¶50} Therefore, we find that the trial court did not err.

{¶51} Accordingly, we overrule J.M.'s third assignment of error.

V.

{¶52} J.M. contends in his fourth assignment of error that the trial court's finding of delinquency was against the manifest weight of the evidence.

{¶53} When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph two of the syllabus. See, also, *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶41. We "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine

whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted." *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-71; *State v. Martin* (1983), 20 Ohio App.3d 172, 175. However, "[o]n the trial of a case, * * * the weight to be given 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, paragraph one of the syllabus.

{¶54} Here, the state introduced evidence of the following: the victim alleged J.M. raped her, doctors and other medical personnel testified that her physical condition was consistent with her accusation, a psychologist testified that the victim suffered a diagnosable condition consistent with the victim's accusation, and the mother of the victim testified the victim's behavior had altered in accord with the psychologist's diagnosis. Therefore, substantial evidence supports the trial court's finding of delinquency.

{¶55} Accordingly, we overrule J.M.'s fourth assignment of error.

VI.

{¶56} J.M. contends in his fifth assignment of error that the cumulative errors that transpired during the trial requires this court to reverse and remand this matter back to the trial court.

{¶57} Under the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner* (1995), 74 Ohio St.3d 49, 64;

State v. DeMarco (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. "If, however, a reviewing court finds no prior instances of error, then the doctrine has no application." *State v. McKnight*, Vinton App. No. 07CA665, 2008-Ohio-2435, at ¶108; *State v. Hairston,* Scioto App. No. 06CA3089, 2007-Ohio-3707, at ¶41.

{¶58} As explained above, we find that the only assignment of error that actually brought error to our attention is the first one. And this error, as we noted, was relatively minor. Therefore, we find that cumulative errors did not occur.

{¶59} Accordingly, we overrule J.M.'s fifth assignment of error.

VII.

{¶60} J.M. contends in his sixth assignment of error that the trial court abused its discretion when it found that J.M.'s classification as a tier III juvenile sex offender was mandatory. J.M. also states that his classification as a public registrant status was an abuse of discretion. Apparently, the parties have resolved the public registrant issue by agreement.

{¶61} Based on our resolution of J.M.'s seventh assignment of error, we find J.M.'s sixth assignment of error moot and decline to address it. See App.R. 12(A)(1)(c).

VIII.

{¶62} Finally, J.M. contends in his seventh assignment of error that he was denied the effective assistance of counsel. J.M. contends the following actions or omissions demonstrate that his trial counsel was ineffective. Counsel's failure to object to the state's requests to designate Kuss, Nemith, and Dr. Scansen as experts. Counsel's failure to object to admission of hearsay statements. J.M. also contends his counsel was ineffective at his classification hearing because he failed to argue that he was only

a discretionary registrant and that he was not a public registrant qualified juvenile offender registrant.

{¶63} Ohio law provides a statutory right to counsel for juveniles in proceedings held under R.C. 2152.83. R.C. 2151.352; see, also, *In re C.A.C.*, 2nd Dist. Nos. 2005-CA-134, 2005-CA-135, 2006-Ohio-4003, at ¶44 (affording a juvenile a right to counsel at a classification hearing without considering the basis of the right). Ohio courts have construed other statutory rights to counsel as requiring the effective assistance of counsel. *State v. Jordan*, 6th Dist. No. L-02-1270, 2003-Ohio-3428, at ¶28; *State v. Price* (Dec. 31, 2001), 10th Dist. No. 00AP-1434, unreported; *State v. Dotson* (Mar. 12, 2001), 4th Dist. No. 99CA33, 2001-Ohio-2507.

{¶64} "'In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.'" *State v. Countryman*, 4th Dist. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright,* 4th Dist. No. 00CA39, 2001-Ohio-2473, unreported; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient * * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by [law;]" and (2) "that the deficient performance prejudiced the defense * * * [,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20. "Failure to establish either element is fatal to the claim." *In re B.C.S.*, Washington App. No. 07CA60, 2008-Ohio-5771, at

¶16, citing *Strickland*; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

{¶65} "A defendant establishes prejudice if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Meddock*, Ross App. No. 08CA3020, 2008-Ohio-6051, at ¶13, quoting *Strickland* at 694.

{¶66} First, J.M. contends his counsel's failure to object to expert testimony offered by the state demonstrates ineffective assistance of counsel. However, as we explained in regard to J.M.'s first assignment of error, any error in the examination of these witnesses was relatively minor. All of the witnesses had at least one degree in the relevant field as well as substantial work experience in the field. So any argument related to certification would almost certainly have failed. Some of Kuss's testimony likely transgressed into offering an opinion on the credibility of the victim in this case, but the exclusion of the offending portion of the testimony would have left the proof substantially intact. In other words, regardless of whether the error indicated the attorney fell below standards of professional conduct, J.M. fails to demonstrate that he suffered any prejudice on account of those alleged errors.

{¶67} Next, J.M. contends that his attorney's performance was deficient because he failed to raise a confrontation clause challenge to the hearsay "coming in via the other mandatory reporters." However, as noted above, this legal argument conflicts with Supreme Court of Ohio case law. We cannot say that an attorney has provided

deficient performance where the attorney fails to make an objection foreclosed by Supreme Court of Ohio case law.

{¶68} Finally, J.M. contends that trial counsel was ineffective at the classification hearing for two reasons. First, counsel failed to argue that the trial court should have exercised its discretion and declined to issue an order classifying J.M. as both a juvenile offender registrant and as a tier III offender. Second, counsel failed to argue that the trial court erred when it classified J.M. as a public registrant. As noted above, the second issue was resolved through the agreement of the parties and any ineffective assistance of counsel in relation to it is now moot so we need not address it. See App.R. 12(A)(1)(c).

{¶69} However, the trial court clearly erred in concluding that classification here is mandatory. Likewise, counsel clearly erred in failing to object or in failing to argue that J.M. was a discretionary registrant.

{¶70} The trial court classified J.M. a juvenile offender registrant pursuant to R.C. 2152.83(B). "The court that adjudicates a child a delinquent child, on the judge's own motion, may conduct at the time of disposition of the child or, if the court commits the child for the delinquent act to the custody of a secure facility, may conduct at the time of the child's release from the secure facility a [hearing to determine whether the child should be classified as a juvenile offender registrant.]" R.C 2152.83(B)(1). A second provision of the same section clearly provides the juvenile court with the discretion to decline to issue an order at this hearing. R.C. 2152.83(B)(2)(a).

{¶71} If a juvenile court decides to issue an order classifying the juvenile as a juvenile offender registrant, then the court must determine which tier the juvenile should be

classified under. For adults, this determination is mechanical and is answered exclusively by the nature of the convictions. However, under R.C. 2950.01(E) – (G), each tier includes a definition for delinquent children, which states that the tier includes "sex offender[s] who [are] adjudicated a delinquent child * * * for committing *any* sexually oriented offense[.]" R.C. 2950.01(E)(3), (F)(3), (G)(3) (emphasis added). This provision is precisely the same in each division defining the three different tiers. Ohio courts considering these provisions have generally concluded that these provisions provide the juvenile court with the discretion to classify a juvenile offender registrant in any of the three tiers. *In re G.E.S.*, Summit App. No. 24079, 2008-Ohio-4076, at ¶37; *In re: A.R.*, Warren App. No. CA2008-03-036, 2008-Ohio-6566, at ¶36; *In re P.M.*, Cuyahoga App. No. 91922, 2009-Ohio-1694, at ¶5; *In re Adrian R.*, Licking App. No. 08-CA-17, 2008-Ohio-6581, at ¶17; *In re Antwon C.*, Hamilton App. No. C-080847, 2009-Ohio-2567, at ¶13; But, see, *In re S.R.B.*, Miami App. No. 08-CA-8, 2008-Ohio-6340, at ¶7. Given the text of the statute, we join the majority of the courts of appeals who have held that a trial court has the discretion in classifying a juvenile offender registrant to a particular tier.

{¶72} The trial court expressly stated that the classification of the juvenile was "mandatory." Disposition Transcript at 4. Whether the trial court was referring to the classification as a juvenile offender registrant or as a tier III offender, the trial court's classification was discretionary. A subsequent judgment entry indicated that the court understood classification of J.M. as a juvenile offender registrant was discretionary, and therefore it is likely that the trial court erroneously thought its classification of J.M. as a tier III offender was mandatory. Trial counsel failed make any argument related to

J.M.'s classification as either a juvenile offender registrant or as a tier III registrant. Therefore, we find the performance of J.M.'s attorney was deficient under the first prong of the *Strickland* test.

{¶73} As to the prejudice prong of the *Strickland* test, J.M. contends that "[t]he outcome in [J.M.]'s case clearly would have been different if defense counsel would have familiarized himself with the law; educated the court as to the statutes; and simply assisted the court in applying the law to his client." The failures of J.M.'s attorney do not so easily translate into evidence that the outcome of the proceedings would have been different. Nonetheless, where a court fails to appreciate it has discretion and an attorney fails to argue based on that discretion, we find our confidence in the outcome of the proceedings is undermined. See *In the Matter of B.W.*, Darke App. No. 1702, 2007-Ohio-2096, at ¶28-30.

{¶74} Accordingly, we sustain J.M.'s seventh assignment of error insofar as he contends that he was denied effective assistance of counsel at his classification hearing.

IX.

{¶75} In conclusion, for the above stated reasons, we find J.M.'s sixth assignment of error moot; overrule all of J.M.'s remaining assignments of error except for part of his seventh. We sustain J.M.'s seventh assignment of error, in part, vacate J.M.'s classification and remand this matter to the trial court for a re-classification hearing.

JUDGMENT AFFIRMED, IN PART, AND VACATED, IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, IN PART, and BE VACATED, IN PART, and this cause BE REMANDED to the trial court for a re-classification hearing. Appellant shall pay three-fourths of the costs taxed and Appellee shall pay one-fourth of the same.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.