[Cite as *State v. Frankenbery*, 2009-Ohio-3853.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-131
CASEY L. FRANKENBERY	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas Case No. 08-CR-433
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	July 30, 2009

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant, Casey Frankenbery, appeals from his conviction of two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), felonies of the third degree. The State of Ohio is Plaintiff-Appellee.

STATEMENT OF THE CASE AND FACTS

{¶2} On April 4, 2008, D.F., the five-year old biological daughter of Appellant, was visiting with her grandmother, Brenda Robinson, when she disclosed to her grandmother that her father had sexually abused her. Mrs. Robinson immediately contacted D.F.'s mother, Melinda. D.F.'s mother and grandmother then decided to take D.F. to the police station to report the abuse.

{¶3} They met with Detective Robert Huffman of the Newark Police Department, who instructed them to go to Kid's Place, which is an independent children's center in Licking County designed to investigate allegations of child abuse. While at Kid's Place, D.F. was examined by Dr. Richard Baltisberger. Additionally, Detective Huffman interviewed D.F's mother, grandmother, and D.F.

{¶4} Appellant was then indicted on two counts of rape, in violation of R.C. 2907.02(A)(1)(b) with sexually violent predator specifications, both felonies of the first degree, and two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), both felonies of the third degree. Appellant pled not guilty to all counts at his arraignment.

{¶5} The trial court held a competency hearing on September 16, 2008, wherein the court found D.F. competent to testify at trial. Appellant proceeded to

exercise his right to a jury trial on September 17 and 18, 2008, but waived jury as to the sexually violent predator specifications.

{¶6} At trial, D.F. testified that Appellant "did nasty stuff" to her. The "nasty stuff" was "the parts I don't like to touch." D.F. testified that she had been made to touch her father's private parts and stated that the events took place in her parents' bedroom. She also testified that her privates touched her dad's privates and stated that "spit" came out of his private and that the "spit" went into her mouth. She testified that this occurred three times. She also stated that the television was on at the time with the "private stuff" on. D.F. testified that her mom was at work when the pictures of the naked people were on the television at the house. She also stated that her dad told her not to tell.

{¶7} Detective Huffman also testified at trial that a pornographic video was found in the home. Melinda confirmed that she was living with her husband at their home at that time and that the pornographic movie was theirs. She also testified that she worked from 2:45 p.m. to 11:20 p.m. and that D.F. was in preschool from noon to 3:00 p.m. She testified that Appellant was typically home alone with D.F. after school.

{¶8} Dr. Richard Baltisberger also testified at trial and was declared an expert in the field of diagnosis and treatment of sexual abuse in children. He testified as to his examination of D.F. and also stated that D.F. disclosed to him that her dad played the "butt game" with her and that her dad "stuck his wiener between my legs and moved it back and forth." She also told Dr. Baltisberger that her father "stuck his wiener in my mouth and squeezed his wiener and spit came out into my mouth." Dr. Baltisberger testified that D.F. told him that these incidents occurred in her parents' bedroom.

{¶9} The jury failed to find Appellant guilty of the two counts of rape, but found him guilty of the two counts of gross sexual imposition. Because the jury acquitted Appellant of the rape charges, the trial court had to then dismiss the sexually violent predator specifications. The trial court sentenced Appellant to ten years in prison and labeled him a tier III sex offender.

{¶10} Appellant raises one Assignment of Error:

{¶11} "I. THE DEFENDANT-APPELLANT WAS DENIED A FAIR TRIAL AND THE RIGHT OF CONFRONTATION BY THE IMPROPER AND PREJUDICIAL ADMISSION OF AN OPINION BY A LAW ENFORCEMENT OFFICER THAT A CHILD SEXUAL ABUSE VICTIM'S OUT-OF-COURT DEMEANOR WAS CONSISTENT WITH HER RELATION OF ABUSE."

I.

{¶12} In his sole assignment of error, Appellant argues that the trial court erred in permitting a law enforcement officer to testify as to the demeanor of the victim during the victim interview.

{¶13} Trial courts are granted broad discretion with respect to the admission or exclusion of evidence at trial. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343, 348. Thus, an appellate court will not reverse a trial court's ruling absent an abuse of discretion. *State v. Myers*, 97 Ohio St.3d 335, 348, 2002-Ohio-6658, ¶75. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial

court's decision in this regard. *State v. Hymore* (1967), 9 Ohio St.2d 122, 224 N.E.2d 126.

{¶14} Moreover, Appellant did not object to the complained about testimony at trial, and therefore we review this claim under a plain error standard of review. Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The rule places several limitations on a reviewing court's determination to correct an error despite the absence of a timely objection at trial: (1) "there must be an error, i.e., a deviation from a legal rule," (2) "the error must be plain," that is, an error that constitutes "an 'obvious' defect in the trial proceedings," and (3) the error must have affected "substantial rights" such that " the trial court's error must have affected the outcome of the trial." *State v. Morales*, 10th Dist. Nos. 03-AP-318, 03-AP-319, 2004-Ohio-3391, at ¶19, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *State v. Gross*, 97 Ohio St.3d 121, 776 N.E.2d 1061, 2002-Ohio-5524, ¶ 45. The decision to correct a plain error is discretionary and should be made "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Barnes*, supra, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

{¶15} Appellant argues that the trial court erred in admitting the testimony of Detective Huffman with respect to D.F.'s demeanor during her interview at the Kid's Place. Appellant claims that the following testimony amounts to "inadmissible hearsay":

{¶16} "Q: Detective Huffman, you stated that you asked [D.F.] about you - - that you showed [D.F.] those drawings; is that fair?

{¶17} "A: Yes.

{¶18} "Q: And at some point you asked her about good touches and bad touches?

{¶19} "A: Yes.

{¶20} "Q: At that point did you get that far in your - - in your questioning with [D.F.]?

{¶21} "A: Yes.

{¶22} "Q: At some point did [D.F.] make certain disclosures to you, again without going into the nature of what those disclosures were?

{¶23} "MR. BREHM: Objection.

{¶24} "THE COURT: Well, she can answer - - or he can answer that. Again, do not disclose what was stated. It's just a yes or no.

{¶25} "THE WITNESS: Yes.

{¶26} "Q: And were those disclosures in reference to specific questions you had asked?

{¶27} "A: Yes, they were.

{¶28} "Q: Can you describe to us, Detective Huffman, what [D.F.]'s demeanor was when she was making these disclosures to you?

{¶29} "A: She appeared to be a - - I guess a very intelligent child, very - - I guess - - she was - - she seemed comfortable with us. It was obvious that she was talking about something that she would rather not be talking about.

{¶30} "Q: Was her demeanor consistent with what she was telling you?

{¶31} "A: Yes."

{¶32} Hearsay is defined in Evid. R. 801(C) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "hearsay statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Evid. R. 801(A).

{¶33} A non-verbal statement, as discussed in Evid. R. 801(A)(2) is also called an "implied assertion." See Committee Notes to Evid. R. 801. This "nonverbal conduct" category of assertions falling within the definition of a "statement" is conduct intended as assertive.

{¶34} Statements which are offered to explain a person's conduct are not hearsay. See *State v. Price* (1992), 80 Ohio App.3d 108, 608 N.E.2d 1088 (police officer's statements during investigation of a crime not hearsay when not offered to prove truth of the matter asserted).

{¶35} The Ohio Supreme Court has stated that "an assertion for hearsay purposes simply means to say that something is so, e.g., that an event happened or that a condition existed." *State v. Carter* (1995), 72 Ohio St.3d 545, 549, 651 N.E.2d 965. In our opinion, the demeanor of the victim testified to by Huffman was not assertive, therefore it was not hearsay. See *State v. Fawcett*, 3rd Dist. No. 13-99-14, 2001-Ohio-2167 (holding that witness's statement regarding victim as being was "totally out of it. She's not in reality right now. She's not believing what happened. She's traumatized" Was not hearsay).

{¶36} Moreover, the Second District has held that an officer's testimony regarding his observation of a victim's demeanor is not equivalent to relaying an out-of-

court statement. Such observations are, therefore, admissible since they are not hearsay at all. *State v. Watts* (Dec. 31, 1998), 2nd Dist No. 17060.

{¶37} We find Appellant's reliance on *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220, to be misplaced. Appellant relies on *Boston* for the premise that it was error for a trial court to admit testimony of a doctor relating a child victim's identification of her perpetrator and thereby vouching for the victim's veracity. Here, as we are not discussing statements made by the child, but rather her demeanor as observed by an experienced child abuse detective, we do not find *Boston* to be relevant to our analysis. We would also note that the premise that Appellant relies upon in *Boston* has been modified and narrowly tailored by the Supreme Court in *State v. Dever* (1992), 64 Ohio St.3d 401, 596 N.E.2d 436, paragraphs 1 and 2 of the syllabus.

{¶38} Moreover, the cases which have applied *Boston* and/or *Moreland* (also relied upon by Appellant; see e.g. *State v. Moreland* (1990), 50 Ohio St.3d 58, 552 N.E.2d 894) generally involve statements by experts which in some manner relate to the expert's opinion regarding the veracity of a child declarant. See *State v. Hamilton* (1991), 77 Ohio App.3d 293, 602 N.E.2d 278; *State v. McWhite* (1991), 73 Ohio App.3d 323, 597 N.E.2d 168; *State v. Davis* (1989), 64 Ohio App.3d 334, 581 N.E.2d 604.

{¶39} No such opinion was elicited in this case. "*Boston* and *Moreland* prohibit an expert from testifying that a witness told the truth about a specific situation or that the witness meets some indicia or criteria which demonstrate that the witness was being truthful. These cases do not prohibit an expert from giving testimony which bolsters the credibility of the witness by substantiating her version of the events in question." *State v. Daws* (1994), 104 Ohio App.3d 448, 465, 662 N.E.2d 805.

{¶40} We agree with both the Third and Second Districts and hold that an officer's testimony regarding his observations of a victim's demeanor is not hearsay because it is not relaying an out-of-court statement, either verbal or non-verbal. As such, the trial court did not err in admitting the evidence and Appellant's rights were not violated.

{¶41} For the foregoing reasons, we overrule Appellant's assignment of error and affirm the judgment of the Licking County Court of Common Pleas.

By: Delaney, J.

Edwards, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER

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CASEY L. FRANKENBERY	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-131
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

_____
HON. SHEILA G. FARMER