[Cite as *State v. Barber*, 2010-Ohio-387.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	William B. Hoffman, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 CAA-01-0005
	:	
	:	
ANTHONY BARBER	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Delaware County Court of Common Pleas Case No. 07 CRI 12700
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 3, 2010

APPEARANCES:

For Plaintiff-Appellee

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BY: BRENDA S. LEIKALA
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For Defendant-Appellant

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Edwards, J.

{¶1} Appellant, Anthony Barber, appeals a judgment of the Delaware County Common Pleas Court convicting him of two counts of gross sexual imposition (R.C. 2907.05(A)(4)), one count of unlawful sexual conduct with a minor (R.C. 2907.04(A)), and four counts of sexual imposition (R.C. 2907.06(A)(4)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} During the summer of 2007, appellant lived in a mobile home in the Westerville Estates trailer park with his mother, fiancée, son and brother. While his fiancée was at work during the afternoons, appellant took his son to the pool. At the pool he met and befriended R.W. and M.W., who were both 15-year-old girls. R.W. and appellant began engaging in sexual activity. Appellant touched R.W. both over and under her clothes, and "a few times" digitally penetrated her vagina.

{¶3} After meeting appellant at the pool, M.W. began hanging out at appellant's home playing video games. Eventually they began kissing and appellant touched her breasts and thigh over her clothes.

{¶4} In June or July of 2007, L.P, who was 12 years old, was spending the night in Westerville Estates with R.W. and another girl. R.W. and the other girl decided to sneak out around midnight and go to appellant's trailer. L.P. went with them to appellant's trailer. The girls watched television and played video games with appellant and other occupants of the mobile home, eventually falling asleep. The next day L.P. was in the trailer hallway, going to retrieve her things from one of the bedrooms.

Appellant pushed L.P. up against the wall of the hallway and put his hand down her pants and inside her underwear, and up her shirt and inside her bra.

{¶5} L.P. participated in a "teen screen" program after school resumed in the fall. During the screening program, she told Angela Oswalt, a licensed social worker, about the incident with appellant. An investigation ensued.

{¶6} On October 22, 2007, Detective Bessinger of the Delaware County Sheriff's Office went to appellant's residence to discuss the allegations. Appellant adamantly denied the allegations against him. The detective asked appellant if he would be willing to come to the Sheriff's Department for an interview and a Computer Voice Stress Analyzer (C.V.S.A.) test. Appellant agreed to come to the department on October 26 for the test.

{¶7} Appellant drove himself to the Sheriff's Department on October 26 for the interview and CVSA test with Detective Paul Mills. Prior to the interview, Det. Mills gave appellant a written *Miranda* rights waiver form, which he briefly explained to appellant. Appellant signed the written waiver. During the interview, appellant admitted touching L.P.'s breasts and vaginal area during the sleepover, but denied touching her under her clothes. He confessed to touching M.W. over her clothes, and admitted to touching R.W.'s breasts and giving her a "finger bang," or digitally penetrating her vagina. Appellant was permitted to leave the department after the interview.

{¶8} Appellant was indicted by the Delaware County Grand Jury on two counts of gross sexual imposition (R.C. 2907.05(A)(4)), one count of unlawful sexual conduct with a minor (R.C. 2907.04(A)), and four counts of sexual imposition (R.C. 2907.06(A)(4)).

{¶9} Appellant filed a motion to suppress his confession on the basis that he was ordered to the station under threat of arrest and that his *Miranda* rights were violated. The case proceeded to a suppression hearing. At the hearing appellant claimed that Det. Bessinger threatened to arrest him if he did not appear at the station for the interview. The court found that appellant was not in custody for purposes of *Miranda* at the time of the interview because he willingly went to the station for the interview, and after he was at the station, the Detective made it clear that appellant could leave and was not under arrest regardless of what the results of the test showed. The court further held that even if appellant was in custody, the written *Miranda* warnings on the waiver form signed by appellant were sufficient to apprise appellant of his rights.

{¶10} The case proceeded to jury trial in Delaware County Common Pleas Court. Appellant testified at trial, denying all the allegations. Appellant was convicted as charged and sentenced to a total term of incarceration of four years, 110 days. Appellant assigns three errors on appeal:

{¶11} "I. THE TRIAL COURT ERRED BY NOT GRANTING THE APPELLANT'S MOTION TO SUPPRESS AND THUS ALLOWING HIS CONFESSION TO BE USED AS EVIDENCE AGAINST HIM AT TRIAL.

{¶12} "II. THE TRIAL COURT ERRED BY GRANTING THE APPELLEE'S MOTION IN LIMINE AND LIMITING THE APPELLANTS ABILITY TO QUESTIONS APPELLEE'S WITNESS.

{¶13} "III. THE TRIAL COURT ERRED BY NOT ADMITTING EXHIBIT 5."

I

{¶14} Appellant argues that the court erred in finding that the written waiver of his *Miranda* rights was valid, and therefore erred in overruling his motion to suppress.

{¶15} The court set forth two alternative reasons for overruling appellant's motion to suppress: (1) appellant was not in custody and therefore *Miranda* did not apply, and (2) assuming arguendo that appellant was in custody, the state secured a valid written waiver of his *Miranda* rights before questioning appellant. Appellant does not challenge the court's finding that he was not in custody, and argues solely in his brief that the written waiver was invalid. Even if we accepted appellant's argument, we would still sustain the judgment of the court on the basis that appellant was not in custody at the time of the interview, a finding which appellant does not challenge in this Court.

{¶16} Further, appellant's argument that the written waiver was not valid is without merit. Whether a suspect validly waived his right to counsel and right against self-incrimination is measured by a "totality of the circumstances" standard. *State v. Eley*, 77 Ohio St.3d 174, 672 N.E.2d 640, 646, 1996-Ohio-323. Evidence of police coercion or overreaching is necessary for a finding of involuntariness. Id. Evidence of a written waiver form signed by the accused is strong proof that the waiver is valid. Id. at 647, citing *North Carolina v. Butler* (1979), 441 U.S. 369, 375-376, 99 S.Ct. 1755, 1758-1759, 60 L.Ed.2d 286, 293-294.

{¶17} The DVD of the interview, admitted into evidence at the suppression hearing, shows that appellant was asked to review a written form which included his constitutional rights under *Miranda*. Appellant spent several minutes looking at the form

and appeared to be reading the form. Detective Mills asked appellant if he understood everything or if he had any questions and appellant responded that he did not. Det. Mills did not read appellant his rights as stated on the form word for word, but did give a brief, albeit incomplete, summary of the rights. While appellant claimed he was ordered to appear for the interview or face arrest, there was evidence that he appeared voluntarily and was told by Detective Mills that he would be free to go when the interview is over. There was no evidence of coercion.

{¶18} The written waiver form was a single-page document. While appellant argues that the Miranda warnings are "buried" in the document, they are in the center of the page under a bold-print heading reading, "YOUR RIGHTS." This section was set apart from the paragraphs above and below with double-spacing. Underneath the written statement of rights is a bold-print heading reading, "WAIVER OF RIGHTS." The only other information on the paper is the "truth verification release," stating that appellant voluntarily submitted to the voice stress analysis truth verification test. The statement of rights was not buried in the document. The trial court did not err in finding that even if appellant was in custody, the written waiver was valid.

{¶19} The first assignment of error is overruled.

II

{¶20} In his second assignment of error, appellant argues that the court erred in granting the state's motion in limine to exclude evidence that appellant made exculpatory statements to Detective Mills prior to giving his confession.

{¶21} The admission or exclusion of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Sage*

(1987), 31 Ohio St.3d 173, 182, 510 N.E.2d 343. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶22} While ordinarily an appellant must have proffered the excluded evidence to challenge the ruling on appeal, an offer of proof is not necessary if the evidence is excluded during cross-examination. Evid. R. 103(A)(2). Because Det. Mills was the state's witness, any evidence of exculpatory statements made by appellant would have been adduced by appellant on cross-examination.

{¶23} The court did not abuse its discretion in excluding evidence of exculpatory statements made by appellant to Detective Mills. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid. R. 801(C). Hearsay is not admissible unless it falls within one of the recognized exceptions. *State v. Steffen* (1987), 31 Ohio St.3d 111, 119, 509 N.E.2d 383.

{¶24} Evid. R. 801(D)(2) excepts from the definition of hearsay an out-of-court statement by a party opponent that amounts to an admission of the claims against him. It does not necessarily follow that the reverse, a denial of liability, is likewise admissible. *State v. Beeson*, Montgomery App. No. 19312, 2002-Ohio-4341, ¶55. A denial does not have the same inherent reliability as an admission against interest, and very well may be self-serving. Id. Therefore, a denial remains inadmissible hearsay if the proponent offers the statement to prove the truth of the matter asserted in the statement. Id.

{¶25} Appellant attempts to argue that evidence of his denial was not offered to prove the truth of the matter asserted, but was offered to challenge the reliability of the

confession. However, appellant did not advance this theory at trial. He argued at trial that he believed it was not "appropriate" for the state to admit evidence that he said "I did it" without admitting evidence that he said "I didn't do it." Tr. 10-11. Appellant did not advance any exception to the hearsay rule, nor did he claim that he wanted to elicit this evidence on cross-examination for anything other than to prove the truth of the matter asserted in the statement. The court did not abuse its discretion in excluding this evidence.

{¶26} The second assignment of error is overruled.

III

{¶27} In his third assignment of error, appellant argues that the court erred in excluding Exhibit 5 at trial. He argues that Exhibit 5, like Exhibit 4, is a written statement by a victim denying her earlier testimony and therefore there is no "logic" in admitting one and not the other. The state argues that Exhibit 5 is a written statement given to police by appellant's girlfriend, and is not the same as Exhibit 4, which was a written statement by a victim recanting her claims that appellant touched her inappropriately.

{¶28} The transcript supports the state's claim that Exhibit 5 was a prior statement of appellant's girlfriend. Tr. 210. However, at the time the court made it's ruling excluding Exhibit 5, appellant did not proffer the substance of the statement or the document itself. Tr. 226. As a result, Exhibit 5 is not a part of the record as transmitted to this Court.

{¶29} The failure to proffer or object at trial does not preserve the issue for appellate review. *State v. Grubb* (1986), 28 Ohio St.3d 199, 203, 503 N.E.2d 142.

Further, it is the appellant's responsibility to ensure that the complete record is before this Court, and we cannot pass on the admissibility of exhibits not before us based solely on the representations of counsel as to what these exhibits contain. *State v. Lovelace* (199), 137 Ohio App.3d 206, 738 N.E.2d 418, 431.

{¶30} Because the exhibit was not preserved for appellate review, we cannot reach the merits of appellant's claim and the third assignment of error is overruled.

{¶31} The judgment of the Delaware County Common Pleas Court is affirmed.

By: Edwards, J.

Delaney, J. concur

Hoffman, J. concurs separately

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES

JAE/r1208

Hoffman, P.J., concurring

{¶32} I concur in the majority's analysis and disposition of Appellant's first and third assignments of error.

{¶33} I further concur in the majority's disposition of Appellant's second assignment of error, but disagree with its reasoning.

{¶34} The majority states Evid.R. 801(D)(2) excepts from the definition of hearsay an out-of-court statement by a party opponent which amounts to an admission of the claims against him.[1] I disagree.

{¶35} When considering application of the hearsay rule to the statement of a party, whether the statement amounts to an admission of the claims against the party is not the determinative issue. Unlike the analysis under Evid.R. 804(B)(3) regarding the exception to the hearsay rule concerning a declarant's admission against interest, the focus under Evid.R. 801(D)(2) is whether the statement of the party opponent is being offered against him or her.

{¶36} I agree with the majority the statement at issue herein is not excepted from the definition of hearsay under Evid.R. 801(D)(2). I do so because the statement was not being offered by Appellant *against* himself, as is required before the statement is excepted from the definition of hearsay.

s/William B. Hoffman
HON. WILLIAM B. HOFFMAN

[1] Majority Opinion at ¶24.

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FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ANTHONY BARBER	:	
Defendant-Appellant	:	CASE NO. 09 CAA-01-0005

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

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES