[Cite as *State v. Rios*, 2014-Ohio-341.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

State of Ohio — Court of Appeals No. WM-13-004

Appellee — Trial Court No. 12 CR 028

v.

Steven Rios — **DECISION AND JUDGMENT**

Appellant — Decided: January 31, 2014

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney,
and Katherine J. Zartman, Assistant Prosecuting Attorney, for appellee.

Clayton M. Gerbitz, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction for three counts of rape of a child under age 13, with two of the counts carrying a specification that the victim was under age 10, entered on a jury verdict in the Williams County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} On August 12, 2010, then nine-year-old C.N. was brought to a Montpelier, Ohio emergency room by her mother. Mother and daughter told the emergency room physician that C.N. had experienced vaginal bleeding and irritation earlier that month. The mother told the physician that she believed her daughter might be experiencing an early onset of puberty.

{¶ 3} The physician examined the girl and found she exhibited no other traits associated with the onset of puberty. Neither did he find anything to explain the vaginal bleeding and irritation of which she complained. On suspicion that C.N. might be the victim of child abuse, the physician reported the matter to the Williams County Department of Job and Family Services.

{¶ 4} Sometime later, a child abuse investigator visited the school where C.N. and her 11-year-old brother, T.N., attended. The investigator conducted an interview with both children, the result of which was the immediate removal of the children from their home and placement in foster care.

{¶ 5} C.N. later testified at trial that, while her mother worked, she was sometimes left in the care of her mother's boyfriend, appellant, Steven Rios. During one such occasion, C.N. testified, appellant undressed the girl and inserted his "boy part" into her "girl part." "It hurt" and caused bleeding, the girl reported. Another time, "He stuck his boy part in, or in my mouth." [sic] C.N. was examined by a physician, Dr. Randall Schlievert, who specializes in child abuse. Based on his on examination and interview

with the child and a review of the emergency room report, Dr. Schlievert diagnosed C.N. as a victim of sexual abuse.

{¶ 6} T.N. testified that on multiple occasions appellant "would make me suck his talliwacker." Both children testified that appellant threatened to harm them if they told anyone. Even so, according to C.N., she told her mother, the result of which was the 2010 trip to the emergency room.

{¶ 7} On February 15, 2012, appellant was named in a three count indictment handed down by the Williams County Grand Jury. The indictment charged three counts of rape of a child under age 13, with a specification on two of the counts that the victim was under age 10. Appellant pled not guilty and the matter proceeded to a trial before a jury.

{¶ 8} At trial, C.N. and T.N both testified, as did the emergency room physician, the child abuse expert and his assistant. Appellant rested without presenting evidence.

{¶ 9} The jury found appellant guilty of all counts and specifications. The court accepted the verdict and, on December 13, 2012, sentenced appellant to mandatory indefinite terms of imprisonment of 15 years to life on two counts and from 10 years to life on the third count. The court ordered the terms of imprisonment to be served consecutively. This appeal followed.

{¶ 10} Appellant sets forth the following three assignments of error:

I. The trial court abused its discretion by permitting expert testimony by Dr. Randall Schlievert.

II. The diagnosis by appellee's expert was an inadmissible and prejudicial opinion of the veracity of appellant's child accuser.

III. The trial court abused its discretion by permitting witnesses to repeat the child accuser's out of court statements.

I. Diagnosis v. Opinion

{¶ 11} Each of appellant's assigned errors relate to the admission of evidence during the trial. In his first assignment of error, appellant maintains that the trial court erred in permitting Dr. Schlievert to testify that following his examination of C.N. and a review of her records, he diagnosed her to have been sexually abused. Appellant maintains that the physician's "diagnosis" was not an opinion as may be rendered by expert testimony and that Dr. Schlievert had insufficient data to either make a diagnosis of sexual abuse or render an opinion that C.N. had been sexually abused.

{¶ 12} At trial Dr. Schlievert presented his credentials and testified that he had testified as an expert in the field of pediatric abuse multiple times in Ohio and Michigan courts. He was qualified as an expert in this case without objection.

{¶ 13} During cross-examination, the physician sparred with appellant's trial counsel over whether Dr. Schlievert's assessment that C.N. was sexually abused was an opinion or a diagnosis. The physician insisted that the result of his evaluation was a diagnosis: "Diagnosis is what we do." Appellant's trial counsel characterized the physician's statement as "just a diagnosis."

{¶ 14} At this point the court intervened:

> The Court: Let me clarify this. Do you have, can you put a percentage of probability on how firmly you believe your diagnosis?
>
> [Dr. Schlievert]: Now I understand that one. I don't have a diagnostic number that I would use. What I would feel comfortable stating is that I believe today as I did back then that there was no other indication for what her words and physical exam and symptoms and behaviors meant than she was sexually abused and raped. * * * I'm very comfortable with my diagnosis to be here today under oath to say that.

{¶ 15} Appellant concedes that expert medical testimony is no longer inadmissible simply because it is not stated to a reasonable degree of medical certainly. *State v. D'Ambrosio*, 67 Ohio St.3d 185, 191, 616 N.E.2d 909 (1993). It is sufficient if the testimony is in terms of possibility. *Id.* According to appellant, Dr. Schlievert's testimony "was not based upon medical certainty, probability or possibility. He refused to use any of those words to describe his diagnosis." Because of this, appellant maintains, the trial court should have not permitted admission of this testimony. Alternatively, appellant asserts that because Dr. Schlievert himself found no physical evidence of rape, there was insufficient foundation for his testimony and it should have been stricken.

{¶ 16} A trial court is vested with broad discretion concerning the admission of evidence and its rulings on such matters will not be disturbed absent an abuse of that

discretion. *State v. Valsadi*, 6th Dist. Wood No. WD-09-064, 2010-Ohio-5030, ¶ 40. An abuse of discretion is more than an error in judgment or mistake of law, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 17} We decline appellant's invitation to impose a set of magic words that qualify an expert's testimony for admission. While Dr. Schlievert characterized his conclusion as a diagnosis rather than opinion, this is a distinction without a difference in this context. Moreover, although the physician failed to use the words medical certainty, probability or possibility, taking his testimony as a whole, there is little doubt that he held his conclusion with considerable certitude.

{¶ 18} With respect to the expert's foundation for his conclusion, although no physical findings were noted during Dr. Schlievert's examination, he testified that, given the lapse of time between the alleged rape and the examination, a lack of physical evidence was expected. The diagnosis was based on the physician's review of the emergency room report and the statements of C.N. and her mother contained in the report, his own interview of C.N. and impressions of her appearance and demeanor. This was sufficient foundation for admission of the expert's testimony. Assessment of the weight of this testimony is a function of the trier of fact. Appellant's first assignment of error is not well-taken.

II. Vouching for Child's Veracity

{¶ 19} In his second assignment of error, appellant suggests that Dr. Schlievert improperly vouched for C.N.'s veracity.

{¶ 20} "An expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), syllabus. Admission of such testimony constitutes reversible error. *Id*. at 128.

{¶ 21} Appellant maintains that the facts of the present matter are indistinguishable from those in *State v. Burrell*, 89 Ohio App.3d 737, 627 N.E.2d 605 (9th Dist.1993). In *Burrell*, the court applied *Boston* to strike the testimony of a child pediatric sexual abuse expert and reverse Burrell's conviction for gross sexual imposition.

{¶ 22} In *Burrell,* at the trial of a defendant accused of sexual contact with his 13-year-old stepdaughter, a pediatric sexual abuse expert testified that his examination of the girl revealed no physical evidence of sexual abuse. The expert explained, however, that a lack of physical findings in child sexual abuse cases was not unusual and, indeed, was consistent with the events as the girl reported them. The lack of physical manifestations of sexual abuse did not necessarily indicate the allegation was false, according to the expert. *Id.* at 742-743. Moreover, the expert testified, based on his experience, training and the history provided by the victim, it was his opinion that the girl had been indeed sexually assaulted and molested. *Id.* at 744.

{¶ 23} On cross-examination, defense counsel noted that, because the expert's opinion was based solely upon the physical examination—which resulted in no findings—and the history provided by the girl, the sole basis of the expert's opinion was what he was told by the alleged victim. The witness agreed. The defense continued:

> Q. You believe her is really what you're saying, isn't that, Doctor? Isn't that what you're dealing with here?
>
> A. That's correct.
>
> Q. How is that a medical opinion?
>
> A. Because I interview lots of children and I generally get some idea of what they're telling me, whether it's true or not * * * [b]ecause she looked at me directly in my eye and she gave me a history of what happened. We asked her several times, we asked her several different ways of what happened to her and she was very consistent with what she told us.

Id.

{¶ 24} The appeals court concluded that the expert's testimony constituted improper expert opinion of the veracity of the statement of the child declarant and reversed Burrell's conviction.

{¶ 25} In the present matter, notably absent from Dr. Schlievert's testimony was any specific indicia that he believed C.N. to be truthful. It is the usurpation by an expert of the fact finder's role in determining the veracity and credibility of witnesses that

makes introduction of an expert's opinion of a child's truthfulness improper. *Boston* at 128-129.

{¶ 26} Equally salient, although appellant seeks to minimize its importance, is Dr. Schlievert's testimony that he did not rely solely on C.N.'s statements in reaching his diagnosis. The physician testified that he considered not only C.N.'s medical interview and physical examination, but other information provided by professionals and caregivers, as well as the child's behavior and demeanor. His report, which was introduced into evidence, references information from the children's services referral and consideration of the evaluation for vaginal bleed at the emergency room. From this testimony, it is clear that, unlike with the opinion of the expert in *Burrell*, Dr. Schlievert's diagnosis was based on such a diversity of data that it could not be inferentially viewed as an assessment of C.N.'s veracity. Accordingly, appellant's second assignment of error is not well-taken.

III. Hearsay

{¶ 27} In his final assignment of error, appellant contends that the trial court abused its discretion when it permitted Dr. Schlievert and his clinical assistant to testify to statements made by C.N. during the interview prior to her physical examination.

{¶ 28} Appellant maintains such statements were inadmissible hearsay and the state failed to establish proper foundation for their admission under one of the Evid.R. 803 exceptions.

{¶ 29} "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). In general, hearsay is inadmissible in court, Evid.R. 802, unless the testimony falls under one of the hearsay exceptions articulated in Evid.R. 803 and 804 or deemed "not hearsay" by Evid.R. 801(D).

{¶ 30} Evid.R. 803(3) excepts from the hearsay rule "[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."

{¶ 31} Appellant maintains that C.N.'s statement during the pre-examination interview that she was there because "Steve raped me" was not reasonably pertinent to diagnosis or treatment.

{¶ 32} Appellant failed to object to the introduction of this testimony. Absent plain error, failure to object to the admission of hearsay evidence waives any claim of error. *State v. Santiago*, 10th Dist. Franklin No. 02AP-1094, 2003-Ohio-2877, ¶ 11. "Plain error" occurs only when an error or defect occurring during a trial affects a substantial right. Crim.R. 52(B). The rule is that an error to which no objection has been interposed will not be recognized "unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶ 33} In this matter, C.N. herself testified before the jury and testified in conformity with the statements appellant now claims should not have been admitted when reported in medical testimony. Appellant also had the opportunity to cross-examine her on this testimony. The jury had the opportunity to observe and evaluate this testimony. Under these circumstances, we cannot say that the exclusion of the testimony appellant seeks would have altered the verdict. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 34} On consideration, the judgment of the Williams County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE