[Cite as *State v. Taylor*, 2015-Ohio-2513.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101704

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIE R. TAYLOR, III

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577335-A

BEFORE: Blackmon, J., E.A. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: June 25, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Willie R. Taylor, III ("Taylor") appeals his conviction for gross sexual imposition and assigns the following three errors for our review:

> I. The trial court erred and abused its discretion in the admission of hearsay evidence and testimonial statements, in derogation of defendant's right to confront his accusers, as protected by the Sixth Amendment to the United States Constitution.
>
> II. Defendant was denied his right to the effective assistance of counsel, as protected by the Sixth Amendment to the United States Constitution.
>
> III. The trial court erred in entering a judgment of conviction which was against the manifest weight of the evidence, in derogation of defendant's right to due process of law, as protected by the Fourteenth Amendment to the United States Constitution.

{¶2} Having reviewed the record and pertinent law, we affirm Taylor's conviction. The apposite facts follow.

{¶3} On September 24, 2013, the Cuyahoga County Grand Jury indicted Taylor for one count of gross sexual imposition and one count of kidnapping. The charges arose from allegations that Taylor sexually abused his four-year-old daughter. The matter proceeded to a jury trial where the following evidence was presented.

{¶4} Taylor has had custody of his daughter since she was approximately one-and-one-half years old. At the time of the alleged incident, M.S. was four years old; at the time of trial, she was six years old. After the trial court conducted voir dire to

determine that M.S. was competent, she was permitted to testify. No objection was made regarding her competency.

{¶5} M.S. testified that she did not recall telling anyone that her father touched her. She does remember telling her foster mother Carol Skinner about pointy bugs trying to crawl into her vagina.

{¶6} M.S.'s mother Latasha Scott ("mother") has unsupervised visitation with her daughter every Saturday for approximately seven hours. The mother stated that in December 2012, near the end of one of her visitations, M.S. told her that her stomach and private area hurt. She then told her mother that Taylor was touching her private parts and that he and his girlfriend had hit her. According to the mother, she did not seek medical assistance for her child out of fear of being held in contempt for failing to return the child. Previously, she had been found to be in contempt for visitation issues and placed in jail.

{¶7} At the next visit, a week later, M.S., her mother, and the mother's boyfriend were at Burger King. According to the mother, M.S. was not acting like herself. She was quiet, shy, and not playing. She asked M.S. if she was "okay"; M.S. initially said that she was okay. M.S. then stated "out of the blue" that her stomach and privates were hurting. She also again told her mother that Taylor and his girlfriend had hit her and that Taylor had put his fingers inside her private area. According to the mother, when M.S. told her this, the mother's boyfriend was sitting next to her and could hear what the child

said. The mother denied that M.S. told her that her father's girlfriend was also sexually abusing her.

{¶8} The mother took M.S. into the restaurant bathroom and saw that the child's private area was red. She then concluded, "enough was enough" and took M.S. to the emergency room. After that, the father and his family did not allow her to see the child. She did not see M.S. again until she was placed in foster care. She is currently working with family services in order to obtain custody of M.S., but has not filed paper work on her own to gain custody of M.S.

{¶9} On December 8, 2012, Brian Walker ("Walker"), a sex-abuse social worker who investigates referrals from the child-abuse hotline for the Cuyahoga County Division of Children & Family Services ("CCDCFS" or "agency"), went to the emergency room at University Hospital in response to a call from the hospital informing him that there were allegations that then four-year-old M.S. had been physically and sexually abused by Taylor.

{¶10} On cross-examination, Walker was permitted to review his report to refresh his memory. After reviewing the report, he stated that the mother was at the hospital when he arrived and told him that the child had told her that Taylor and his girlfriend had abused M.S.. The mother also told him that the child would not be forthcoming about the abuse because the child had told her that the father threatened to put nails under her fingernails if she told anyone. Walker stated that the mother's boyfriend was also at the

hospital and had told him that the child had first told him about the father's abuse, and he told her to tell her mother.

{¶11} According to Walker, the child denied that the father abused her. When the child was asked by an officer if anybody touched her privates, she said, "no." She then stated that her father touched her "bump." She showed the officer that the "bump" was a mosquito bite on her thigh. She also stated that she was afraid to go home because her father braided her doll's hair. The child also denied that her father hit her, but stated that his girlfriend pinched her when she was bad. When the father arrived, a police officer questioned him. The father cried and claimed the mother fabricated the abuse because she wanted custody of M.S.

{¶12} On redirect, over objection, Walker was permitted to read his report into the record. Basically, reading the report reiterated what Walker had testified to on cross-examination as stated above, but he added that the mother was upset because she did not want the child to go home with the father. According to the notes in his report, M.S. did not appear to be scared, frightened, or anxious. His notes also indicated that the nurse told him after examining the child that the sexual abuse claims were unsubstantiated.

{¶13} Lisa Arnold, a University Hospital sexual abuse nurse examiner (SANE), attended to M.S. upon her arrival at the hospital. She testified that M.S. was four years old when she examined her. The external exam of M.S. showed she had bruising above her left rib and a small bug bite on her left thigh. The internal exam revealed that M.S.

had a notch on her hymen. Arnold stated that the notch was indicative of a prior injury that had healed. She explained that young children heal fast in this area of the body; therefore, the injury could have occurred recently.

{¶14} On cross-examination, Arnold stated that the child's mother told her that the father had placed his fingers inside M.S.'s vagina but did not say anything about the father's girlfriend sexually abusing the child. M.S. did not disclose anything to the nurse regarding abuse. Arnold did not recall telling Walker that the physical exam did not substantiate the abuse claims. However, she explained that it was not uncommon to have no acute findings of abuse with children as young as M.S.

{¶15} Arnold admitted on cross-examination that some vaginas naturally have numerous notches. She clarified, however, that one notch instead of several notches is more indicative of an injury and that a notch found in the area of the vagina where M.S.'s was, is where "you would most likely see an injury that could be indicating sexual assault." Tr. 288, 290.

{¶16} Lisa Moore, a forensic scientist with the Cuyahoga County Medical Examiner's Office, testified that a DNA analysis was conducted on the underwear obtained from M.S. at the emergency room. A one-inch stain containing sperm was found near the back waistline of M.S.'s underwear. The DNA from the sperm matched Taylor's DNA. Moore stated that it was possible that the DNA could have been transferred by touching another object or clothing. However, she did not think the DNA

would still be in its current form if the underwear had been washed because the sperm was not diluted or dispersed.

{¶17} Social worker Heather Cigoi was assigned on August 13, 2013, to remove M.S. from Taylor's home after Taylor's semen was detected in M.S.'s underwear. She could not explain why it took eight months to obtain the DNA results. Cigoi stated that as the intake social worker, she was required to "assess for safety and to make the necessary psychological and medical references for the child." She stated that it was not her job to "go and get convictions."

{¶18} When she arrived at the father's home to take custody of M.S., the father immediately denied doing anything and called his parents. She stated that everybody was screaming, and M.S. was just sitting there "looking traumatized."

{¶19} After removing M.S. from the home, Cigoi conducted a forensic interview with M.S. at the agency. She stated that she showed M.S. an anatomically correct drawing, and the child indicated she had been touched in her vaginal area by a "man." M.S. would not identify who the "man" was. Cigoi then asked M.S. if she was afraid of anyone, and M.S. said she was afraid her dad was going to go to jail, but did not explain. After reviewing what a lie was, Cigoi asked M.S. if what she said at the hospital in December was a lie. M.S. admitted that she had lied and that someone had touched her. At this point, M.S. was crying and hyperventilating; therefore, Cigoi concluded the interview. Cigoi referred M.S. for psychological counseling, but the grandmother stated she would use the services provided through the grandparents' church. Custody of M.S.

was temporarily awarded to the paternal grandparents with an order of no contact with the father.

{¶20} After Cigoi completed the intake investigation, Toi Bradley of the CCDCFS sexual abuse department was assigned M.S.'s case. She stated that the case was originally unsubstantiated at the emergency room because of the lack of physical or circumstantial evidence. However, when the DNA results were obtained, the claims were considered substantiated. Once criminal charges were filed against Taylor, the grandparents refused to allow CCDCFS access to M.S. As a result, CCDCFS obtained emergency custody of M.S., and she was placed in a foster home with Carol Skinner ("Skinner").

{¶21} Bradley told Skinner to watch for typical behavior exhibited by abused children, such as bed wetting, nightmares, and inappropriate touching. According to Bradley, M.S.'s ensuing bed wetting and nightmares were typical of abused children. Bradley also stated that based on her experience in handling hundreds of sexual abuse cases, it was typical for abused children to have nightmares about snakes and phallic shaped bugs. On cross-examination, Bradley admitted that M.S. had never told anyone but her mother that Taylor abused her.

{¶22} According to Skinner, nothing unusual happened the first two weeks M.S. was with her. However, around the second week, M.S. began wetting the bed. M.S. also repeatedly complained sporadically that her vagina, stomach, and left leg were hurting. The doctor found no medical reason why she should be in pain. Skinner

testified that she repeatedly assured M.S. that she was okay, and M.S. would resume playing.

{¶23} Skinner recalled that one night, she went into M.S.'s room to take her to the bathroom, and M.S.'s pajama bottoms were pulled down. She told Skinner that she was afraid and hurting and that there were bugs on her. Another night, M.S. became hysterical, claiming there was a big "pointy" bug in her bed trying to climb into her vagina. Skinner was unable to soothe her, and M.S. refused to sleep in the bed. Skinner tried to remove her from the bedroom, but M.S. claimed to be in so much pain she could not walk; therefore, Skinner had to carry her to the living room couch to sleep. M.S. remained so upset that Skinner kept her home from school the next day. On cross-examination, Skinner stated that M.S. did talk about her family and that all of her memories of her father seemed loving and pleasant.

{¶24} Taylor testified in his own defense. He denied abusing his daughter and claimed the mother fabricated the allegations because she wanted custody of M.S. He claimed the DNA could have transferred to the underwear when it was placed with his clothes in the laundry basket because the family laundry was regularly mixed together in the same basket.

{¶25} At the conclusion of the trial, the trial court granted Taylor's motion for acquittal on the kidnapping charge but denied the motion as to the gross sexual imposition charge. The jury found Taylor guilty of gross sexual imposition. The trial court

sentenced Taylor to one year of community control and classified him as a Tier II sex offender.

Hearsay

{¶26} In his first assigned error, Taylor contends the trial court abused its discretion by allowing the admission of hearsay. Taylor cites to the alleged hearsay testimony of the following five witnesses: Brian Walker, Heather Cigoi, Toi Bradley, Lisa Arnold, and Latasha Scott.

{¶27} "The admission of evidence lies within the broad discretion of a trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 43. Our inquiry is limited to determining whether the trial court has acted unreasonably, arbitrarily, or unconscionably in resolving the evidentiary issues of which appellant complains. *Id*.

{¶28} Hearsay is defined 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." Evid.R. 801(C). Pursuant to Evid.R. 802, hearsay is inadmissible unless it falls within an exception provided by the rules of evidence. *State v. Wright*, 8th Dist. Cuyahoga No. 100803, 2014-Ohio-5424.

1) Latasha Scott

{¶29} The trial court did not abuse its discretion by permitting the mother to testify that M.S. told her that her father had stuck his fingers inside her privates because M.S.'s

statements were nontestimonial and constituted excited utterances. Evid.R. 803(2) provides as follows:

> (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. * * *.

{¶30} The excited utterance exception to the hearsay rule should be applied liberally in a case involving the sexual abuse of a young child. *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989).

{¶31} In the instant case, it is not clear when the actual abuse occurred. According to the mother, M.S.'s private area was red and the SANE nurse testified that injury to the genital area heals quickly in children. Regardless, as we explained in *In re D.M.*, 158 Ohio App.3d 780, 2004-Ohio-5858, 822 N.E.2d 433, ¶ 13 (8th Dist.), when the abuse occurred is not dispositive in determining whether M.S.'s statement is an excited utterance. We stated as follows:

> The excited hearsay exception is treated differently when the declarant is an alleged sexually abused child; the test is extremely liberal. *State v. Shoop* (1993), 87 Ohio App.3d 462, 472, 622 N.E.2d 665. *See also Taylor*,[66 Ohio St.3d 295, 304, 612 N.E.2d 316 (1993)]. The scrutiny for the child declarant is less than that of an adult. The liberal scrutiny is based on the court's recognition that young children are more trustworthy because of their limited reflective powers. *Taylor*, *supra* at 304; *State v. Wagner* (1986), 30 Ohio App.3d 261, 264, 30 Ohio B. 458, 508 N.E.2d 164. With

> this in mind, cases involving very young children focus on the spontaneity of the statement not the progression of a startling event or occurrence.

Id. at ¶ 13.

{¶32} We understand that each excited utterance must be reviewed on a case-by-case basis. *Id.* at ¶ 20. However, based on the circumstances of this case, where the victim is of such a young age, and the statement was made spontaneously without prompting by the mother and did not indicate a reflective process, the statement constituted an excited utterance. Although Taylor contends the mother did not tell anyone about the statement until a week after the child made the statement, at the time the child made it, she was not prompted by the mother. Moreover, according to the mother, the child again spontaneously told her at the second visit about the abuse, which prompted the mother to check the child's privates; upon observing that the area was red, she took the child to the emergency room.

{¶33} Moreover, the child victim in the instant case testified at trial. As this court in *State v. Thompson*, 8th Dist. Cuyahoga No. 99846, 2014-Ohio-1056, held under similar circumstances:

> We need not resolve [whether the child's statement to her mother was an excited utterance], because even if the testimony was inadmissible hearsay, and even if Thompson's trial counsel was deficient in failing to object to the testimony, Thompson was not prejudiced by the deficiency. "The main premise behind the hearsay rule is that the adverse party is not afforded the opportunity to cross-examine the declarant." [*State v.*] Primeau, 8th Dist. Cuyahoga No. 97901, 2012-Ohio-5172, ¶ 69. In *Primeau*, we found harmless error where the defense had the opportunity to cross-examine the declarant. *Id.* Similarly, in the instant case, [the child] was subject to cross-examination.

Id. at ¶ 31.

{¶34} We realize that the witnesses testified after the child testified. However, in *State v. Ceron*, 8th Dist. Cuyahoga No. 99388 , 2013-Ohio-5241, the defendant argued that although the child victim testified, the defendant was unable to confront the child with the hearsay statement because the child had testified prior to the witness's hearsay testimony and was never questioned about the statement. This court concluded that these arguments were "completely unfounded" because the defense attorney had previous knowledge about the statements and "had the opportunity to cross-examine the victim in any way that he wished * * * but he chose not to." *Id.* at ¶ 61. In the instant case, Taylor clearly was aware what the mother was alleging her daughter had told her; therefore, he could have confronted M.S. about the statements on cross- examination. Taylor has never objected to the child's competency.

2) Brian Walker

{¶35} Taylor argues that Brian Walker should not have been permitted to read his report into the record because it contained hearsay statements by M.S.'s mother, the mother's boyfriend, the police officer, and the SANE nurse.

{¶36} We note that Taylor's counsel presented the report during cross-examination to refresh Walker's recollection because he did not recall if M.S.'s mother was already at the hospital when he arrived. Counsel then used the report extensively to cross-examine Walker. On re-direct, the prosecutor over defense counsel's objection, had Walker read the report in its entirety on the record.

{¶37} Under Evid.R. 612, which is a "'present recollection refreshed' situation, the witness looks at the memorandum to refresh his memory of the events, but then proceeds to testify upon the basis of his present independent knowledge." *State v. Scott*, 31 Ohio St.2d 1, 5-6, 285 N.E.2d 344 (1972). "However, a party may not read the statement aloud, have the witness read it aloud, or otherwise place it before the jury." *State v. Ballew*, 76 Ohio St.3d 244, 254, 667 N.E.2d 369 (1996).

{¶38} In the instant case, there was absolutely no reason for the prosecutor to request on redirect examination that Walker read his report out loud. There was no indication that Walker's memory was not refreshed by reading it to himself on cross-examination. We find, however, that Walker's reading of his report does not require overturning the conviction. The statements that were contra to Taylor were all brought out by Taylor's counsel on cross-examination. Additionally, as we stated above, the mother's testimony as to what M.S. told her was admissible. Therefore, M.S.'s statements to her mother would have come into evidence even if not read from the report.

{¶39} We realize that the mother's boyfriend did not testify, and his statements were contained within Walker's report. However, he simply stated that the child told him the same thing she told the mother. The fact that he noticed a bruise in the area of the child's rib was also not prejudicial because the SANE nurse testified to seeing the bruise. Moreover, the child could have been cross-examined regarding any statements she allegedly made regarding the father and girlfriend "whipping" or beating her.

{¶40} The remainder of Walker's report was not prejudicial to Walker. It consisted of M.S.'s denial that her father abused her, and that she was upset because her father braided her doll's hair and touched her mosquito bite. These were also statements on which Taylor could have cross-examined M.S. Therefore, Walker's reading the report did not prejudice the defense.

3) Heather Cigoi

{¶41} Taylor argues that the trial court erred by allowing Cigoi to testify regarding what the child told her during their interview. Hearsay statements made to a social worker may be admissible if they are made for purposes of medical diagnosis or treatment. *See State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944. "We are cognizant that the medical diagnosis or treatment hearsay exception can apply to psychological issues, and may be applied to counselors or social workers." *State v. Scott*, 8th Dist. No. 91890, 2010-Ohio-3057, ¶ 47, *reversed on other grounds*, citing *State v. Chappell*, 97 Ohio App.3d 515, 530-531, 646 N.E. 1191 (8th Dist.1994).

> Statements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford* [*v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)] because they are not even remotely related to the evils that the Confrontation Clause was designed to avoid. See, e.g., *People v. Cage* (2007), 40 Cal.4th 965, 991, 56 Cal.Rptr.3d 789, 155 P.3d 205.

Muttart at ¶ 63.

{¶42} The Ohio Supreme Court in *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, considered the admissibility of statements given during interviews at child advocacy centers. *Arnold* held that these types of interviews seek to

elicit two types of statements, to wit: statements for the purposes of medical diagnosis and treatment and forensic statements. *Id*. at ¶ 33. *Arnold* focused on the admissibility of these statements under the Confrontation Clause and held that, to the extent this evidence is obtained to assist police in a "forensic investigation" of abuse, it is "testimonial," and is therefore barred by the Confrontation Clause. *Id*. at ¶ 36. However, to the extent the evidence is obtained to medically diagnose and treat a child, the evidence is "nontestimonial" and not barred from admission at trial. *Id*. at ¶ 41.

{¶43} In the instant case, Cigoi stated that it was her job "to make the necessary psychological and medical references for the child" and to assure the child is in a safe place pending the investigation. In fact, after interviewing M.S., Cigoi recommended psychological counseling for the child.

{¶44} Cigoi stated that M.S. told her that she had been touched in her vaginal area by a "man." In *Arnold,* the Supreme Court found that a child's statements regarding the identity of the perpetrator, the type of abuse alleged, the time frame of the alleged abuse, and the identification of the areas where the child had been touched, were all for medical diagnosis. *Id.* at ¶ 32, 38. Thus, M.S.'s statements would fall within the medical statements outlined by *Arnold*. M.S. also stated that she was afraid her father was going to be sent to jail, without explaining why he would have to go to jail. This does not appear to be a statement for medical diagnosis unless it goes to her psychological health. Regardless, any error would be harmless because M.S. testified at trial; therefore, counsel had the opportunity to confront M.S. about this statement.

4) Tori Bradley

{¶45} Social worker Bradley was permitted, over objection, to testify regarding what M.S.'s foster mother had told her. Even if this testimony should not have been allowed, it was not prejudicial because it was cumulative. Skinner testified to what she observed and what the child had said to her, which were exactly the same things to which Bradley testified. This was permissible testimony by Skinner because M.S. was clearly still in an excited state when telling her about the pointy bugs and the pain she was feeling. Skinner stated M.S. was crying and could not be calmed down. In fact, M.S. did not go to school the next day due to being still upset and claiming to be in pain.

{¶46} M.S. also testified herself about the pointy bugs trying to get into her privates and admitted she told Skinner about them. Therefore, Taylor's confrontation rights were not violated because M.S. could have been cross-examined regarding her statements.

5) Lisa Arnold

{¶47} Arnold was the SANE nurse who physically examined M.S. when she was initially brought to the emergency room. Arnold stated that M.S. made no disclosures. Taylor contends that Arnold should not have been permitted to testify that the mother told her that the child stated the father had abused her by putting his fingers in her vagina. However, even if this was error, because the mother's testimony was permissible under the excited utterance exception, Arnold's testimony as to what the child told her mother was merely cumulative.

{¶48} In conclusion, although we agree the trial court permitted the admission of an alarming amount of hearsay, none of the hearsay testimony was prejudicial. Even if the objectionable hearsay was excluded, the remaining evidence consists of 1) the child' admissible statements to her mother that her father abused her; 2) Arnold's testimony regarding the notch found on M.S.'s vagina that, given there was only one, and the location of the notch was likely indicative of prior injury; 3) the child's statement to social worker Cigoi that she had lied and that a "man" had touched her; 4) Taylor's undiluted semen was found by the inside back waistband of the child's underwear; 5) the foster mother's testimony regarding the child's bed wetting and nightmare's regarding phallic shaped bugs was evidence of behavior typical of abused children; and 6) the child herself testified she told her foster mother about the pointy bugs trying to get into her vagina. Accordingly, Taylor's first assigned error is overruled.

Ineffective Assistance of Counsel

{¶49} In his second assigned error, Taylor argues his counsel was ineffective for failing to object to the hearsay statements.

{¶50} To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688.

{¶51} In *Strickland*, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be deferential. The court further stated that it is too tempting for an appellant to second-guess his attorney after conviction and appeal and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, this court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Id*. at 689. Further, to establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. *Id*. at 694.

{¶52} In resolving the first assigned error, we concluded that the trial court did not err by allowing the mother to testify regarding what M.S. told her. Therefore, counsel was not ineffective for failing to object to the testimony. Regarding the remaining statements, we concluded the testimony was cumulative; therefore, counsel's failure to object was not prejudicial. Accordingly, Taylor's second assigned error is overruled.

Manifest Weight of the Evidence

{¶53} In his third assigned error, Taylor argues his conviction was against the manifest weight of the evidence.

{¶54} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id*. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id*. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id*. at 387, 678 N.E.2d 541. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id*. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

Id. at ¶ 25.

{¶55} An appellate court may not merely substitute its view for that of the jury, but must find that "in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case that the evidence weighs heavily against the conviction." *Id*.

{¶56} Taylor argues that the entire case against him was premised upon witnesses testifying to what M.S. had told the mother. M.S. herself had denied that Taylor had abused her and her physical examination was inconclusive.

{¶57} The jury heard the mother's testimony that M.S. told her that Taylor was putting his fingers in her privates. As we stated, this testimony was admissible under the excited utterance exception to hearsay. We defer to the jury regarding the mother's credibility because the jury viewed the demeanor, voice inflections, and gestures of the witnesses testifying. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1994); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). In the same vein, the jury also was able to see M.S.'s and Taylor's demeanor on the stand when they testified.

{¶58} Although the notch on M.S.'s hymen and the undiluted semen stain in her underwear could have innocent origins, this evidence along with M.S.'s statement to her mother about her father touching her and her statement to social worker Cigoi that a man touched her, could have led the jury to believe the origins were not so innocent.[1]

{¶59} Additionally, according to M.S.'s foster mother, M.S. is having nightmares about phallic shaped bugs trying to get into her vagina, wetting her bed, and complaining about pain, which has no physical basis. According to social worker Bradley, who has

[1] Taylor argues that the fact the semen is found near the back inside waistband of the underwear would go to a conviction for rape, for which Taylor was not indicted. However, the father could have been holding the child in a position where her back was against him while he touched her with her underwear pulled down.

handled hundreds of sex abuse cases, these behaviors are common to children who are sexually abused. The jury could have concluded based on this evidence that the child was sexually abused and that Taylor's undiluted semen stain on the back inside waistband of the child's underwear places him with the child while engaging in an act of a sexual nature. Accordingly, Taylor's third assigned error is overruled.

{¶60} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence

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

PATRICIA ANN BLACKMON, JUDGE

MARY J. BOYLE, J., CONCURS;
EILEEN A. GALLAGHER, P.J., DISSENTS
(NO SEPARATE OPINION ATTACHED)