

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 111935
	:	
v.	:	
	:	
CARLOS LILLO,	:	
	:	
Defendant-Appellant.	:	

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: REVERSED AND REMANDED**  
**RELEASED AND JOURNALIZED: July 13, 2023**

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Criminal Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CR-21-659792-A

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting  
Attorney, and Christine M. Vacha, Assistant Prosecuting  
Attorney, *for appellee*.

Russell S. Bensing, *for appellant*.

MICHELLE J. SHEEHAN, J.:

**{¶ 1}** Defendant-appellant Carlos Lillo was convicted of two counts of gross sexual imposition of a minor after trial. Because the trial court admitted improper

character evidence and opinion testimony at trial that prejudiced Lillo, we reverse the judgment of the trial court and remand the case for a new trial.

### **RELEVANT FACTS AND PROCEDURAL HISTORY**

{¶ 2} Lillo was indicted on three counts of gross sexual imposition of a minor in violation of R.C. 2907.05(A)(4), felonies of the third degree. The case proceeded to trial, and a jury found Lillo guilty of two of the three counts. The trial court sentenced Lillo to an aggregate prison sentence of 24 months.

{¶ 3} At trial, the state presented testimony from the named victim, J.R.; the victim's mother, J.L.; Detective Sarene Saffo of the Cleveland Division of Police; and Katelyn Miller, a social worker from Lorain County Children Services. Lillo's wife testified on his behalf, and in rebuttal, the state recalled J.L. to testify.

{¶ 4} Our recitation of the facts adduced at trial are limited to those facts relevant to the issues raised in this appeal. J.R. testified as to actions of a sexual nature allegedly committed by Lillo against her starting when she was seven years old. She related two incidents in detail — the first at a family barbecue in 2019 when she was 11 years old and the second at a family dinner in 2020 when she was 12 years old. As to the 2019 incident, J.R. stated that while in the kitchen, Lillo had her sit on his lap and he touched her vagina and buttocks over her clothes. Regarding the 2020 incident, J.L. testified that she saw her daughter in a hallway with Lillo and that her daughter was upset and asked for J.L. to get her out of the house. J.L. testified that on the way home, J.R. disclosed that Lillo tried to kiss her in the hallway and put his tongue in her mouth. J.L. testified as to her daughter's

disclosure to her about the incident in 2020, including her recollection of J.R.'s exact statements. J.L.'s testimony was more detailed than J.R.'s testimony regarding this disclosure.

{¶ 5} J.L. testified that she believed what her daughter told her and vouched for her daughter's credibility testifying to the state's question about her and her daughter's reaction at the time of the disclosure. J.L. testified her daughter was shaky, nervous, and scared. J.L. testified:

Q. [PROSECUTOR]	What did she say to you?
[DEFENSE COUNSEL]:	Objection.
THE COURT:	Overruled.
A.	She said to me mom, do you believe me.
Q.	Did she say anything before or is that the first thing she said?
[DEFENSE COUNSEL]:	Objection.
THE COURT:	Overruled.
A.	She said mom, do you believe me.
Q.	And then what did you say?
A.	I said yes.
Q.	And what do you believe?
A.	I believe what she said.

{¶ 6} The state then asked J.L. what her daughter disclosed. After J.L. detailed the disclosure made to her by J.R., the state asked the following question:

Q.	What was your reaction to this?
A.	That it had to be true. There's no way she could make this up. Like it was hard for me hearing that coming from her because I know her. She's not a liar. She doesn't make things up. The way that she expressed it, the way the touching was done, there's no way it could have been a lie to me.

Tr. 392 -393.

{¶ 7} After the disclosure, J.L. ceased to have contact with Lillo. J.L. testified that J.R. was later in therapy and that the sexual assault allegations were eventually reported. Katelyn Miller, the social worker who was part of the investigation, testified that J.R. was interviewed twice. She stated that the second interview was conducted by Detective Saffo. Miller testified that the children services agency found J.R.'s allegations against Lillo to be "indicated," not "substantiated," because at the time of the initial investigation, the allegations were not corroborated by physical evidence or an admission.

{¶ 8} Detective Saffo testified that she was assigned to investigate the incidents and that she interviewed J.R. Detective Saffo testified as to her procedures for interviewing a minor regarding sexual assault. Detective Saffo related that during her interview, J.R. told her that she did not know the difference between a truth and a lie. Further, J.R. stated that at the time she was interviewed by Detective Saffo that she believed her dreams were real and that they would tell her what would happen in the future. During the interview, J.R. told Detective Saffo that a cousin had also been a victim of sexual abuse by Lillo. However, during her testimony, J.R. admitted that she made up the story about her cousin.

{¶ 9} Lillo's wife testified in his defense. During her cross-examination, the state proceeded to impeach her as follows:

Q. Now, [defense counsel] asked you about the defendant's character and if you feel safe with him around your grandkids?

A. Yes, I am.

Q. And that he has never given you any indication that he's done this before?

- A. No.
- Q. That's not true, because we know, isn't it true, other family members have come to you about his conduct on touching other kids?
- A. No, never.
- Q. Isn't it true that [J.L.'s] sister doesn't allow her kids around [Lillo] because they know how [Lillo] is?
- A. No.
- Q. That's not true?
- A. That's not true.
- Q. So if there's conversations about that, those conversations are false?
- A. Yes.

**{¶ 10}** On rebuttal, the state recalled J.L. to testify. She testified that she had conversations with her sister about Lillo. She testified that her sister, J.S., expressed concerns about Lillo and that she had recordings of the conversations. Over objection, the trial court allowed the recordings to be played to the jury.<sup>1</sup> The first recording was a conversation containing references about what happened with J.S. when she was little. J.L. further testified that the recordings contained her and J.S.'s conversations about Lillo and that J.S. talked about not having her children around Lillo. Following this testimony, the trial court allowed Lillo to recall his wife to testify. She testified that J.L. and her children were at her home with Lillo for dinner before the trial.

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<sup>1</sup> The recordings were not offered into evidence and were not made a part of the record on appeal.

## **LAW AND ARGUMENT**

**{¶ 11}** Lillo raises four separate assignments of error but we need to only address the first two assignments of error to resolve the appeal.<sup>2</sup> These read:

Assignment of Error No. 1: The trial court erred in permitting the State to introduce propensity evidence and extrinsic hearsay evidence of a collateral matter, in derogation of [d]efendant's right to [d]ue [p]rocess under the Fifth and Fourteenth Amendments to the United States Constitution

Assignment of Error No. 2: The trial court erred in allowing the complainant's mother to testify as to whether the complainant was telling the truth, in derogation of [d]efendant's right to [d]ue [p]rocess under the Fifth and Fourteenth Amendments to the United States Constitution.

**{¶ 12}** Lillo argues that the trial court erred by allowing hearsay evidence from J.S. to be introduced in rebuttal because it was improper rebuttal testimony containing hearsay and prohibited character evidence. Lillo also argues that the trial court erred by allowing J.L. to vouch for her daughter's credibility. The state concedes that the trial court erred by admitting improper rebuttal testimony

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<sup>2</sup> Appellant's third and fourth assignments of error not addressed read:

Assignment of Error No. 3: The defendant was provided ineffective assistance of counsel by counsel's failure to object to opinion testimony regarding whether the complainant was telling the truth, in derogation of [d]efendant's right to counsel under the Fifth and Fourteenth Amendments to the United States Constitution.

Assignment of Error No. 4: The trial court erred by entering a conviction that was against the manifest weight of the evidence, in derogation of [d]efendant's right to [d]ue [p]rocess under the Fifth and Fourteenth Amendments to the United States Constitution.

containing character evidence. The state argues that J.L.’s testimony regarding her reaction to her daughter’s testimony was properly admitted.

**{¶ 13}** As to the first assignment of error, the parties disagree on the standard of review to be employed; Lillo argues that the review is de novo because the trial court improperly allowed hearsay evidence. The state contends we are to review the error for plain error because Lillo’s counsel only objected to the recordings on the basis of hearsay, which evidence was properly admitted as an exception pursuant to Evid.R. 803(21). In resolving this assignment of error, we agree with the parties that the recordings played to the jury contained inadmissible character evidence under Evid.R. 403(B) and, because the recordings were objected to at trial, we review the admission of that evidence for an abuse of discretion. “The trial court has broad discretion in the admission of evidence, and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should not disturb the decision of the trial court.” *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 61.

**{¶ 14}** An abuse of discretion occurs when a court exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 35. In other words, “[a] court abuses its discretion when a legal rule entrusts a decision to a judge’s discretion and the judge’s exercise of that discretion is outside of the legally permissible range of choices.” *State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, 172 N.E.3d 75, ¶ 19. An abuse of discretion may be found where a

trial court “applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.” *State v. McFarland*, 8th Dist. Cuyahoga No. 111390, 2022-Ohio-4638, ¶ 20, citing *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.).

{¶ 15} In this case, the trial court permitted the state to play conversations over Lillo’s objection. The conversations between J.L. and her sister included improper character evidence. As such, we find the trial court erred in admitting this evidence.

{¶ 16} As to Lillo’s second assignment of error, the parties agree that we are to apply a plain error standard of review. Pursuant to Crim.R. 52(B), “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” *State v. Robinson*, 8th Dist. Cuyahoga No. 110467, 2022-Ohio-1311, ¶ 48. Plain error requires (1) “an error, i.e., a deviation from a legal rule”; (2) that is “plain” or “an ‘obvious’ defect in the trial proceedings”; and (3) that “must have affected ‘substantial rights.’” *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). For an error to have affected substantial rights, “the trial court’s error must have affected the outcome of the trial.” *Id.*

{¶ 17} The state elicited testimony from J.L. that contained her belief that her daughter was telling the truth when she disclosed sexual abuse. J.L.’s testimony went further than a statement of belief because J.L. testified

[t]hat it had to be true. There’s no way she could make this up. Like it was hard for me hearing that coming from her because I know her. She’s not a liar. She doesn’t make things up. The way that she



expressed it, the way the touching was done, there's no way it could have been a lie to me.

Evid.R. 701 states as follows:

If the witness is not testifying as an expert, his [or her] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

**{¶ 18}** Although an opinion by a lay witness may be allowed, “opinion testimony cannot be used to show a child is telling the truth or that the child accurately testified.” *State v. Stevenson*, 8th Dist. Cuyahoga No. 61074, 1992 Ohio App. LEXIS 5143, 7-8 (Oct. 8, 1992), citing *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), syllabus.

**{¶ 19}** The state argues that J.L.’s testimony was not about J.R.’s credibility, but about the effect the disclosure had on both J.L. and J.R. We disagree. The testimony concerns not only the physical or emotional reactions to the event by J.L. and her daughter, but directly states that J.L. believed her daughter’s account of what happened. Moreover, that belief is supported by further statements that J.L. believed J.R.’s account to be probable. We find the trial court abused its discretion by admitting this testimony.

**{¶ 20}** Having found error in the admission of improper opinion testimony and in the admission of improper character evidence, we need to determine whether the error caused prejudice. *Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, at ¶ 61. The state presented the victim’s and her mother’s testimony, as

well as testimony from a social worker and the police officer who investigated the allegations, which support the convictions entered in this case. However, Lillo elicited testimony from J.R. that she fabricated a story about Lillo abusing another child. He elicited testimony from the social worker that at the time of her involvement in the case, allegations had only been “indicated” and that they had not been corroborated by physical evidence nor was she aware of an admission made by Lillo. By the time of trial, there was no such corroborative physical evidence presented, nor was there an admission by Lillo. Further, both J.R. and Detective Saffo testified that at the time J.R. was interviewed about the allegations of sexual abuse, J.R. stated she did not know the difference between the truth and a lie. They also both testified that at that time, J.R. believed her dreams were real and would become reality and that J.R. created a story of another child being abused by Lillo.

**{¶ 21}** The credibility of a witness is an issue to be considered in all cases. In this case, Lillo elicited evidence from the state’s witnesses that raised specific questions about J.R.’s credibility. In contrast, the improperly admitted evidence served to both bolster J.R.’s testimony and allow the jury to improperly consider character evidence. In light of these errors, we are not confident the outcome at trial would be the same without considering the improperly admitted evidence. Although we make no finding as to J.R.’s credibility in this case, her credibility was questioned by evidence that the state countered with improper opinion testimony and character evidence. As such, we find Lillo suffered prejudice by the admission of character evidence. Further, we find that the testimony regarding J.R.’s

truthfulness affected the outcome at trial. The first and second assignments of error are sustained.

### **CONCLUSION**

**{¶ 22}** Improper character evidence regarding Lillo and improper opinion testimony regarding J.R.'s credibility was admitted at trial. In consideration of the evidence at issue at trial, we cannot say that the outcome of trial would be the same absent the improper character and opinion testimony. Accordingly, we reverse the judgment of the trial court and remand the case for a new trial.

**{¶ 23}** Judgment reversed, and matter remanded.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court 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.

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MICHELLE J. SHEEHAN, JUDGE

KATHLEEN ANN KEOUGH, P.J., and  
MICHAEL JOHN RYAN, J., CONCUR