

[Cite as *State v. Daniels*, 2010-Ohio-5258.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

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| STATE OF OHIO, | : | APPEAL NO. C-090566 |
| | : | TRIAL NO. B-0808717 |
| Plaintiff-Appellee, | : | |
| vs. | : | <i>DECISION.</i> |
| BARRY DANIELS, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: October 29, 2010

Joseph T. Deters, Prosecuting Attorney, and Judith Anton Lapp, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Scott A. Rubenstein and Rubenstein & Thurman, L.P.A., for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Judge.

{¶1} Following a jury trial, defendant-appellant Barry Daniels was found guilty of two counts of rape and one count of gross sexual imposition. The trial court merged the two rape counts for purposes of sentencing. It imposed life in prison without the possibility of parole for the offense of rape, as well as five years' imprisonment for the offense of gross sexual imposition. These sentences were made consecutive. Daniels now appeals from the trial court's judgment, raising four assignments of error for our review. We address these assignments out of order.

Sufficiency and Weight of the Evidence

{¶2} In his third and fourth assignments of error, Daniels argues that his convictions for rape and gross sexual imposition were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶3} At trial, the state presented evidence that Daniels had committed these offenses against his nine-year-old niece, T.S. On September 17, 2008, T.S. spent the day with Daniels and his daughter Barresha. T.S. received permission from her mother, Auja Williams, to spend the night with Barresha at Daniels' apartment. T.S. and Barresha slept in a bed together in Daniels' living room. The two watched movies while lying in bed. T.S. testified that, after Barresha had fallen asleep, Daniels came into the living room and turned off the television. Daniels then placed the covers over the girls' heads. After covering her face, Daniels lifted T.S.'s leg and began rubbing his hand on her private parts. He placed his hands underneath her underwear and inserted his fingers into her vagina. T.S. began crying and told Daniels to stop. The next morning, she told Barresha that somebody had touched

her the night before. After Daniels took her back home, she also told her mother what had happened.

{¶4} Auja Williams testified that she had sensed that something was wrong with T.S. immediately upon her return home. She questioned T.S., who revealed what Daniels had done. Williams testified that she had called Daniels to confront him. Daniels told Williams that the previous night T.S. had dreamt about being molested. T.S. denied dreaming that these events had occurred. Williams reported the rape to the police that morning, and T.S. was taken to Cincinnati Children's Hospital for a medical examination.

{¶5} Cincinnati Police Detective Malynda Jordan testified at trial regarding her investigation of this case. Jordan interviewed Daniels' daughter Barresha and stated that, based on their interview, she believed that Barresha had been coached regarding what to say about the incident. Acting on this suspicion, Detective Jordan obtained records of all Daniels' jail conversations. These conversations were played for the jury. They included Daniels' instructions to Barresha regarding what she needed to say at trial. He instructed Barresha to say that she had seen her father turn off the television and go immediately to bed, and that he had never touched T.S..

{¶6} The state presented additional testimony from Kathi Makoroff, the doctor who had examined T.S. at the hospital's Mayerson Center. Makoroff testified that T.S.'s genitalia had not shown any sign of trauma, but that such a finding was normal in cases of child abuse. Makoroff revealed that over 90% of cases involving actual abuse showed such findings, and she believed that abuse had been probable in this case. After Makoroff testified, the state played for the jury a videotape of T.S.'s

interview with a social worker at the Mayerson Center, in which she described how Daniels had touched her.

{¶7} Daniels testified on his behalf and denied all of T.S.'s allegations. He testified that the morning after T.S. had spent the night with Barresha, T.S. had told him that she had dreamt that a man had broken into Daniels' apartment and touched her. Daniels further attempted to explain his instructions to Barresha on the recorded conversations. He explained that Barresha suffered from attention deficit disorder and that, as a result, he needed to "parent" her because she had trouble comprehending information. While testifying, Daniels also revealed to the jury that he had served time in prison for a prior rape conviction.

{¶8} Following our review of the record, we conclude that Daniels' convictions were supported by sufficient evidence. Daniels was convicted of rape pursuant to R.C. 2907.02(A)(1)(b), which states that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender * * * when * * * [t]he other person is less than thirteen years of age." Daniels was additionally convicted of gross sexual imposition under R.C. 2907.05, which states that "[n]o person shall knowingly touch the genitalia of another, when the touching is not through clothing, the other person is less than twelve years of age * * * and the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." T.S.'s testimony that Daniels had rubbed her private parts and had inserted his fingers into her vagina was sufficient to establish the elements of these offenses.¹

¹ See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶9} We further conclude that Daniels' convictions were not against the manifest weight of the evidence. The jury was in the best position to judge the credibility of the witnesses, and it was entitled to reject Daniels' testimony that T.S. had dreamt about being molested. Weighing on the jury's credibility determination were Daniels' instructions to his daughter Barresha regarding exactly how to testify and Doctor Makoroff's opinion that abuse had been probable despite the lack of trauma to T.S.'s genitalia. This is not the rare case in which the jury lost its way and created a manifest miscarriage of justice in finding Daniels guilty.² Daniels' convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. The third and fourth assignments of error are overruled.

Mayerson Center Interview

{¶10} In his first assignment of error, Daniels argues that the trial court erred in admitting a videotape of T.S.'s interview at the Mayerson Center. Daniels argues that this interview was inadmissible under Evid.R. 803(4) because it was conducted to collect evidence rather than to assist in medical diagnosis or treatment. Daniels had filed a motion in limine seeking to prevent the state's introduction of this videotaped interview, but the trial court overruled Daniels' motion.

{¶11} Evid.R. 803(4) explicitly states that statements made for the purposes of medical diagnosis and treatment are not hearsay. This court has previously held that statements given by child-abuse victims to social workers during interviews at the Mayerson Center were admissible under Evid.R. 803(4).³ Whether a child's statements were given for the purposes of medical diagnosis or treatment falls within

² *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

³ See *State v. Walker*, 1st Dist. No. C-060910, 2007-Ohio-6337, ¶36.

the sound discretion of the trial court.⁴ Relevant factors to consider include “whether the child was questioned in a leading or suggestive manner; whether a motive to fabricate existed, such as a custody battle; whether the child understood the need to tell medical personnel the truth; the child’s age; and the consistency of the child’s declarations.”⁵

{¶12} The Ohio Supreme Court recently gave further guidance on this issue in *State v. Arnold*, when it considered the admissibility of statements given during interviews at child-advocacy centers such as the Mayerson Center.⁶ The court noted that these types of interviews seek to elicit two types of statements: statements for the purposes of medical diagnosis and treatment and forensic statements.⁷ The *Arnold* court focused its analysis on the admissibility of these statements under the Confrontation Clause, rather than on admissibility under Evid.R. 803(4).

{¶13} The *Arnold* court held that statements given during these interviews for the purposes of medical diagnosis and treatment were nontestimonial in nature and were admissible in court.⁸ But the court further concluded that statements elicited for forensic purposes were testimonial and were inadmissible in court under the Confrontation Clause.⁹ Notably, the court recognized that most interviews contain both types of statements. Accordingly, when the interview contains both types of statements, only the nontestimonial statements are admissible in court. The testimonial statements must be excluded to prevent a Confrontation Clause violation.¹⁰

⁴ *State v. Lukacs*, 1st Dist. Nos. C-090309 and C-090310, 2010-Ohio-2364, ¶7.

⁵ *Id.*

⁶ *State v. Arnold*, 126 Ohio St. 3d 290, 2010-Ohio-2742, 933 N.E.2d 775.

⁷ *Id.* at ¶28.

⁸ *Id.* at paragraph two of the syllabus.

⁹ *Id.* at paragraph one of the syllabus.

¹⁰ *Id.* at ¶41.

{¶14} Following our review of the record in this case, we conclude that T.S.'s interview at the Mayerson Center contained both statements given for the purposes of medical diagnosis and treatment and forensic statements. Those statements given for the purposes of medical diagnosis and treatment were not hearsay and were admissible under Evid.R. 803(4).

{¶15} And no error resulted from the admission of those statements that were forensic in nature. T.S. testified at trial and was subject to cross-examination on all statements given during her interview at the Mayerson Center.¹¹ For this reason, the Confrontation Clause was not implicated. Further, the record indicates that Daniels himself first introduced T.S.'s statements given during this interview. During cross-examination, and without renewing the objection raised in the motion in limine, Daniels' counsel questioned T.S. about statements given during her interview. The videotaped interview was later introduced over Daniels' renewed objection. But Daniels had invited any alleged error by introducing the interview himself.¹²

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

Not "Victim Impact" Testimony

{¶17} In his second assignment of error, Daniels argues that the trial court erred in admitting what he has deemed "victim impact" testimony from T.S.'s mother, Auja Williams. While Daniels has characterized this testimony as "victim impact testimony," it should not be confused with a victim-impact statement appropriately used only at the sentencing phase of a prosecution. Rather, Daniels

¹¹ See Evid.R. 801(D)(1).

¹² See *State v. Robertson*, 1st Dist. Nos. C-070151 and C-070159, 2008-Ohio-2562, ¶20.

has used the term “victim impact” in reference to testimony provided during trial from the victim’s mother. He asserts that Williams’ testimony concerning the emotional state of T.S. immediately upon returning home from her night at Daniels’ apartment was offered to elicit sympathy from the jury. We disagree.

{¶18} Williams testified that when T.S. had returned home from Daniels’ apartment, she was extremely quiet and reserved. This was in contrast to T.S.’s typical upbeat and outgoing personality. Based on T.S.’s changed demeanor, Williams suspected that something had happened to her daughter. She questioned T.S. about what had occurred at Daniels’ apartment, and that is when T.S. revealed that Daniels had raped her.

{¶19} We find no impropriety in Williams’ testimony. It was not offered to elicit sympathy, but rather to explain to the jury how these offenses were discovered. This testimony was relevant, and no error occurred in its admission. The second assignment of error is overruled.

{¶20} Having overruled Daniels’ assignments of error, we accordingly affirm the judgment of the trial court.

Judgment affirmed.

CUNNINGHAM, P.J., and MALLORY, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.