

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

STATE OF OHIO,	:	APPEAL NO. C-070872
	:	TRIAL NO. B-0705491
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
JEFFREY HALL,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

While alone with the victim, defendant-appellant Jeffrey Hall rubbed his penis on the victim's genitals such that there was bruising on her labia minora. The victim was his wife's niece, who was four years old at the time. The extent of penetration is not clear from the record. This was the only conduct that was testified to at trial.

Shortly after the incident, the victim's mother noticed a discharge in the victim's underwear, and the victim told her mother what had happened. The mother took the victim to Cincinnati Children's Hospital, where she and the victim spoke to a social worker. Because the Mayerson Clinic, the clinic in the hospital that dealt with sexual abuse, was closed for the evening, the mother was told to return the next day with the child. She did so, and the child was interviewed by a trained social worker. That interview was recorded.

---

<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Hall was charged with two counts of rape<sup>2</sup> and two counts of gross sexual imposition.<sup>3</sup> When the victim was called to testify, she was unwilling to answer questions from the witness stand. She was brought into chambers, but remained unable to testify about what had happened. The trial court determined that she would not be able to testify and allowed the state to present the child's prior statements through the testimony of her mother and the social workers, as well as through the video recording of the interview of the child.

Hall was convicted of one count of rape and both counts of gross sexual imposition. He was sentenced to prison for life for the rape count and to five years for each count of gross sexual imposition. The trial court ordered that the prison terms be served consecutively. At the same time, Hall was "automatically" labeled a sexual predator.

The first issue in this case is whether the child's statements were properly admitted under Evid.R. 807. That rule requires the following: "(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's

---

<sup>2</sup> R.C. 2907.02(A)(1).

<sup>3</sup> R.C. 2907.05(A)(4).

motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence. (2) The child's testimony is not reasonably obtainable by the proponent of the statement. (3) There is independent proof of the sexual act or act of physical violence. (4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.”<sup>4</sup>

While Hall argues all four prongs of the test on appeal, trial counsel only objected on the basis of one prong—that the child's testimony was not reasonably obtainable by the state.<sup>5</sup> The only argument that Hall now makes on this point is that the trial court did not fully explore whether testimony by closed-circuit television would have been successful.

First, nothing in the rule requires the trial court to consider closed-circuit testimony, let alone to consider it and rule it out. In this case, the trial court explained that it was not an option and then went on to explain why. The victim had been brought into chambers—the judge, counsel, the victim, the court reporter, and the victim's mother were present—and the victim was not willing to talk about what had happened. This was the same setting that the victim would have faced had she testified by closed-circuit television. It was for this reason that the trial court ruled

---

<sup>4</sup> Evid.R. 807(A).

<sup>5</sup> Evid.R. 807(A)(2).

out the option and found that the victim's testimony was not "reasonably obtainable."

A review of the record indicates that the trial court conducted a hearing and made the findings necessary to allow the admission of the statements of the child pursuant to Evid.R. 807. The admission of the testimony was not an abuse of discretion.

Within this argument, Hall also contends that the trial court "did not properly establish that A.D. was competent to testify." This issue was not raised below, but the trial court specifically found that the child was competent. The court questioned the child and concluded that that the child was competent. No plain error exists in this regard.

Also in this assignment, Hall argues that the testimony from the victim's mother and the social workers from the Mayerson Clinic was hearsay and violated the right to confrontation as enunciated in *Crawford v. Washington*.<sup>6</sup> We first note that statements admitted under Evid.R. 807 are exceptions to the rule against hearsay found in Evid.R. 802,<sup>7</sup> and that the admission of such evidence does not violate the Confrontation Clause.<sup>8</sup> Additionally, this court has previously rejected these arguments as they relate to Mayerson employees.<sup>9</sup> Hall's first assignment of error is overruled.

---

<sup>6</sup> (2004), 541 U.S. 36, 124 S.Ct. 1354.

<sup>7</sup> See Evid.R. 807(A) ("An out-of-court statement made by a child who is under twelve years of age at the time of trial \* \* \* is not excluded as hearsay under Evid. R. 802 if all of the following apply \* \* \*").

<sup>8</sup> See *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, at ¶37 ("Evid.R. 807's 'totality of the circumstances' test is designed specifically with the Confrontation Clause requirements in mind"), quoting *State v. Dever* (1992), 64 Ohio St.3d 401, 414, 1992-Ohio-41, 596 N.E.2d 436.

<sup>9</sup> See *State v. Walker*, 1st Dist. No. C-060910, 2007-Ohio-6337, at ¶¶29-42, citing *State v. Tapke*, 1st Dist. No. C-060494, 2007-Ohio-5124, and *State v. Abdur-Rahman* (Oct. 23, 1996), 1st Dist. No. C-950942.

In his second assignment of error, Hall argues that his convictions were based upon insufficient evidence and were against the weight of the evidence. The standard of review for these arguments is well established.<sup>10</sup>

The crux of Hall's argument is that there was insufficient evidence of penetration to support the rape conviction. We disagree. The doctor who examined the victim testified that she saw "the area of the labia minora that could be consistent with a submucosal hemorrhage."

The labia minora are two small folds of skin that extend backward on each side of the opening into the vagina.<sup>11</sup> They lie inside the labia majora.<sup>12</sup> The labia majora are two marked folds of skin that extend from the mons pubis downward and backward to merge with the skin of the perineum.<sup>13</sup> The labia majora form the lateral boundaries of the vulval or pudendal cleft, which receives the openings of the vagina and the urethra.<sup>14</sup>

A number of appellate courts, including this court, have held that penetration of the labia is sufficient to prove penetration of the vagina for the purpose of satisfying R.C. 2907.02.<sup>15</sup> Since the doctor testified that there was bruising of the labia minora, a structure within the labia majora, there was necessarily some

---

<sup>10</sup> See *State v. Mizell*, 1st Dist. Nos. C-070750, and C-070751, 2008-Ohio-4907, at ¶43, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, and *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

<sup>11</sup> See <http://www.britannica.com/EBchecked/topic/498625/human-reproductive-system/75972/External-genitalia#ref=ref607129> (last visited Mar. 2, 2009).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See *State v. Roberts*, 1st Dist. No. C-040547, 2005-Ohio-6391, at ¶62; see, also, *State v. Schuster*, 6th Dist. No. L-05-1365, 2007-Ohio-3463, ¶¶67-68; *State v. Gilbert*, 10th Dist. No. 04AP-933, 2005-Ohio-5536; *State v. Falkenstein*, 8th Dist. No. 83316, 2004-Ohio-2561; *State v. Grant*, 2nd Dist. No. 19824, 2003-Ohio-7240; *State v. Childers* (Dec. 19, 1996), 10th Dist. No. 96APA05-640; *State v. Blankenship* (Dec. 13, 2001), 8th Dist. No. 77900; *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236; *State v. Ullis* (July 23, 1994), 6th Dist. No. L-93-247; *State v. Carpenter* (1989), 60 Ohio App.3d 104, 573 N.E.2d 1206.

evidence of penetration of the labia from which the jury could have concluded that a rape had occurred. As a result, we overrule Hall's second assignment of error.

In a related argument, Hall contends in his fifth assignment of error that he could not have been convicted of two counts of gross sexual imposition and one count of rape based upon the conduct that occurred in this case. We must agree.

Hall argues that the two counts of gross sexual imposition involved lesser-included offenses of the rape for which he was convicted, and that he should not have been separately sentenced for them. "Gross sexual imposition is a lesser included offense of rape. Consequently, a defendant may not be convicted of both gross sexual imposition and rape when the counts arise out of the same conduct."<sup>16</sup>

In this case, there was no testimony concerning any conduct that was separate from the conduct of Hall in rubbing his penis against the victim's genitalia. The version of the events given by the child to her mother was that Hall had touched her genitals with his penis, and that it had ended when Hall's wife entered the room and yelled at him to stop. While the state argues that the interview with the child demonstrated a separate touching with Hall's hand, our review of the interview does not disclose any contact that did not arise out of the conduct that constituted the rape. Under these circumstances, the trial court should have merged the two counts of gross sexual imposition into the rape conviction. We sustain Hall's fifth assignment of error.

In his third assignment of error, Hall argues that trial counsel was ineffective for (1) failing to object to the competency finding, (2) failing to effectively cross-

---

<sup>16</sup> *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, at ¶143, citing *State v. Johnson* (1988), 36 Ohio St.3d 224, 522 N.E.2d 1082, paragraph one of the syllabus.

examine the investigating detective, (3) failing to properly prepare Hall's wife for cross-examination, and (4) failing to object to the sexual-classification hearing.

We have already determined that the trial court properly found that the child was competent to testify. As to the second and third issues, Hall does not argue how the outcome would have been different in the absence of the alleged ineffectiveness or what specifically counsel should have done differently.<sup>17</sup> To that extent, we overrule Hall's third assignment of error. The fourth issue will be discussed in conjunction with Hall's remaining assignment of error.

In Hall's fourth assignment of error, he argues that the trial court erred when it determined that he was "automatically" a sexual predator and that a hearing to determine the likelihood of recidivism was not necessary. We agree.

The record indicates that both counsel and the trial court were under the impression that the classification of Hall as a sexual predator was automatic. The reason for this belief is unclear. But, the only time that a sexual-predator classification is automatic is when a defendant has been convicted of a violent sexual offender specification,<sup>18</sup> which did not occur in this case.

While the state argues that the issue is moot because Hall is now automatically a Tier III offender under the current version of R.C. Chapter 2950,<sup>19</sup> this court has rejected the mootness argument in *State v. Clay*.<sup>20</sup> In *Clay*, this court held that "because classification under former R.C. Chapter 2950 as a sexually oriented offender would exempt a sex offender from amended R.C. Chapter 2950's

---

<sup>17</sup> *State v. Taylor*, 174 Ohio App.3d 477, 2007-Ohio-7066, 882 N.E.2d 945, at ¶31, discretionary appeal not allowed, 117 Ohio St. 3d 1462, 2008-Ohio-1635, 884 N.E.2d 69.

<sup>18</sup> See *State v. Scott* (Feb. 17, 2000), 10th Dist. No. 99AP-595 ("[A]utomatic classification under R.C. 2950.09(A) only applies to sex offenders who are convicted of or plead guilty to a sexually violent predator specification.").

<sup>19</sup> Am.Sub.S.B. No. 10.

<sup>20</sup> 177 Ohio App.3d 78, 2008-Ohio-2980, 893 N.E.2d 909.

community-notification provisions, Clay’s contention on appeal that he should have been classified under former R.C. Chapter 2950 as a sexually oriented offender is not moot.”<sup>21</sup>

In this case, the trial court mistakenly found Hall to be a sexual predator “by operation of law.” Because of this mistake, it did not make a finding that Hall was likely to offend in the future and did not consider the factors under former R.C. 2950.11(F)(2)(a) through (k). For this reason, and pursuant to our decision in *Clay*, Hall is entitled to a new sexual-predator hearing.<sup>22</sup>

We affirm the judgment of the trial court in part, vacate the sentences, and remand this case for the trial court to (1) conduct a hearing to determine whether Hall should be classified as a sexual predator, and (2) resentence Hall only for the single count of rape.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., CUNNINGHAM and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on March 11, 2009

per order of the Court \_\_\_\_\_  
Presiding Judge

---

<sup>21</sup> Id. at ¶22.

<sup>22</sup> Id. at ¶¶35-38.