

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant/Cross-Appellee,

vs.

DENNIS D. MUTTART

Appellee/Cross Appellant

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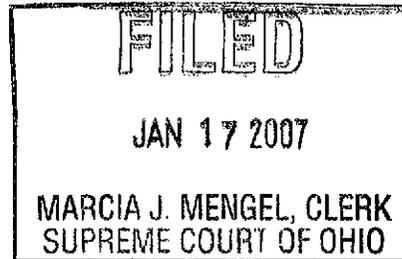
Case No. 06-1293
(Discretionary Appeal)

Case No. 06-1488
(Certified Conflict)

On Appeal from the
Hancock County Court
of Appeals, Third
Appellate District
Court of Appeals
Case No. 5-05-08

MERIT BRIEF OF APPELLEE/CROSS-APPELLANT
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A CHILD VICTIM'S OUT-OF-COURT STATEMENTS TO MEDICAL PERSONNEL ARE ADMISSIBLE UNDER EVIDENCE RULE 804(4) REGARDLESS OF THE COMPETENCY OF THE CHILD.

APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW I:

A NON-TESTIFYING CHILD'S HEARSAY STATEMENTS ARE INADMISSIBLE UNDER EVID. R. 803(4) WHEN A COMPETENCY DETERMINATION, PURSUANT TO EVID. R. 601(A), WAS NEVER MADE BY THE TRIAL COURT.

CERTIFIED CONFLICT QUESTION:

MUST A CHILD VICTIM'S STATEMENTS, MADE FOR PURPOSE OF MEDICAL DIAGNOSIS AND TREATMENT (EVID. R. 803(4), BE EXCLUDED FROM ADMISSION AT TRIAL, PURSUANT TO STATE V. SAID (1994), 71 OHIO ST.3D 473, WHERE THERE HAS BEEN NO PRIOR DETERMINATION BY THE TRIAL COURT THAT THE CHILD WAS COMPETENT AT THE TIME THE STATEMENT WAS MADE?

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STATEMENT OF FACTS AND CASE

On March 24, 2003 A.M. ("victim") (T. 281), disclosed, through her imaginary friend Kelly, to her mother, Angela Hinojosa ("Hinojosa"), and Vicki Higgins ("Higgins") sexual abuse by the Appellee. The victim's brother, Mason Muttart, also told Higgins that the Appellee made A.M. perform oral sex (T. 333). Based on said disclosure, Children's Service (T. 57) was notified, resulting in an investigation between that agency and the Findlay Police Department (T. 58).

A sexual abuse examination with Dr. Schlievert (T. 70) at Mercy Children's Hospital in Toledo (T. 69) was conducted and the results were normal. However, the victim disclosed oral and vaginal sexual abuse during the initial interview with Julie Jones (T. 160-164), who relayed same to Dr. Schlievert prior to his exam (T. 168-169). In June, 2003 the victim began counseling at the Family Resource Center (T. 611) and in February, 2004 she disclosed the sexual abuse to her counselor, Connie Crego-Stahl (T. 635-636).

The Appellee was indicted on October 28, 2003 by the Hancock County Grand Jury for three counts of rape with specification, felonies of the first degree, in violation of R.C. 2907.02(A)(1)(b) & (B).

On February 10, 2004 the Appellee filed a motion in limine seeking to exclude all hearsay statements of the victim, and her mother, made to third parties during the investigation. Said motion was heard on February 17, 2004, after the Appellee waived his right to speedy trial. At the conclusion of the hearing, the trial court granted Appellee leave to supplement the motion to include the expert opinion testimony. Appellant filed said motion in limine on February 26, 2004.

The trial court overruled the motions in limine by a judgment entry of June 7, 2004. The matter proceeded to a jury trial on August 23, 2004 and guilty verdicts on all counts were returned on August 28, 2004. The trial court continued the matter for sentencing, ordered the preparation of a pre-sentence investigation report (PSI) and for the Appellee to be evaluated for determination of the sex offender classification (T. 952-953).

On December 15, 2004, the Appellant filed a motion for an in-camera interview of the victim prior to sentencing. As the sentencing hearing was set for the following day, the trial court heard arguments on the motion, granted the Appellee an opportunity to respond in writing and continued the sentencing and sex offender classification hearing (12/16/04 T. 13-14).

At the January 4, 2005 sentencing hearing, the Appellant withdrew its motion for an in-camera interview (1/4/05 T. 8), as the court had received a victim impact statement (1/4/05 T. 7). The trial court imposed the statutorily mandated term of life imprisonment for the three counts of rape, with said sentences to be served consecutively and classified the Appellee as a sexually oriented offender. Said findings were journalized on February 7, 2005 and on March 1, 2005 the Appellant filed a notice of appeal.

On May 22, 2006, the court of appeals issued its opinion affirming in part and reversing in part. It is from this judgment that this Court accepted jurisdiction in the discretionary appeal. However, this Court also accepted jurisdiction of the conflict which the court of appeals certified on July 12, 2006.

ARGUMENT

APPELLANT'S /CROSS-APPELLEE'S PROPOSITION OF LAW:

A CHILD VICTIM'S OUT-OF-COURT STATEMENTS TO MEDICAL PERSONNEL ARE ADMISSIBLE UNDER EVIDENCE RULE 803(4) REGARDLESS OF THE COMPETENCY OF THE CHILD.

APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW I:

A NON-TESTIFYING CHILD'S HEARSAY STATEMENTS ARE INADMISSIBLE UNDER EVID. R. 803(4) WHEN A COMPETENCY DETERMINATION, PURSUANT TO EVID. R. 601(A), WAS NEVER MADE BY THE TRIAL COURT.

CERTIFIED CONFLICT QUESTION:

MUST A CHILD VICTIM'S STATEMENTS, MADE FOR PURPOSE OF MEDICAL DIAGNOSIS AND TREATMENT (EVID. R. 803(4)), BE EXCLUDED FROM ADMISSION AT TRIAL, PURSUANT TO STATE V. SAID (1994), 71 OHIO ST.3D 473, WHERE THERE HAS BEEN NO PRIOR DETERMINATION BY THE TRIAL COURT THAT THE CHILD WAS COMPETENT AT THE TIME THE STATEMENT WAS MADE?

APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW II:

CONTRARY TO CRAWFOR V. WASHINGTON (2004), 541 U.S. 36, 124 S.CT. 1354, THE TRIAL COURT ADMITTED HEARSAY STATEMENTS IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

A. INTRODUCTION

The Appellee/Cross-Appellant (“Appellee”) asserts that the child victim’s out of court statements made to medical personnel were erroneously admitted into evidence, pursuant to Evid. R. 803(4), for the threshold determination of competency was never determined by the trial court.

Appellee submits that since a child under ten years of age is not competent under Evid. R. 601(A), the court must first determine that said child is capable of receiving just impressions and truthfully relating same prior to finding that the child’s statements were reliable and therefore admissible.

Appellee contends that to accept the position of Appellant, that a competency determination should be applicable only in a determination pursuant to Evid. R. 807 (Appt. First Merit Brief pg.11), is contradictory to the common law foundation for the hearsay exceptions contrary to Evid. R. 102. Further, said approach seeks a narrow and restrictive standard under Evid. R. 807 but a wide open approach to all other hearsay exceptions. Clearly, this will only continue to muddy the waters in trial and appellate courts around the state, for it will merely perpetuate different admissibility standards in the appellate districts..

Further, the Appellee asserts that the admission of the child’s statements were prejudicial since the testimony of the medical personnel gave credibility to the only other evidence, which was also hearsay, and therefore it had to impact the jury determination.

B. A COMPETENCY DETERMINATION, PURSUANT TO EVID. R. 601(A), IS A THRESHOLD REQUIREMENT PRIOR TO THE COURT ADMITTING A CHILD'S STATEMENTS WHICH WERE MADE FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT.

The Appellee asserts that the out of court statements, pursuant to Evid. R. 803(4), are inadmissible unless the trial court makes a determination that the child is competent. As this is a threshold determination, the court of appeals failed to recognize that if the initial requirement is not satisfied the statements are inadmissible, not admissible but harmless.

It is illogical to conclude that a child is incompetent to testify at trial but was competent to truthfully relate facts to medical personnel. In *State v. Miller* (1988), 43 Ohio App. 3d 44, Justice Quillin, in his concurring opinion, discussed said contradiction at 48:

"The hearsay exception for statements made for purpose of medical diagnosis or treatment (Evid. R. 803[41] [sic] is founded on the premise that such statements are reliable because of the declarant's motive to tell the truth because his treatment will depend in part upon what he says. But if the declarant is 'incapable of receiving just impressions of the facts * or of relating them truly' how can the declarant's historical statement be received as truthful when told to a doctor?"**

The majority is saying that a declarant is competent to tell a doctor what happened, even though he is not competent to tell the trier of fact. It is difficult for me to accept this contradiction, especially in a criminal case which has confrontation implications. I would be less troubled if the declarant were available to testify. At least in that situation the trier of fact would be able to compare the hearsay statement with the in-court statement.

It seems to me that the majority is applying what Professor Irving Younger once called 'the guilty SOB theory of admissibility.' In other words, if you need the evidence to get a conviction – let it in."

Thus, prior to concluding that what a child told medical personnel was reliable and therefore the truth, it is inherent to determine the child's ability to perceive and truthfully relay said information.

Although *Miller* was decided prior to *State v. Said* (1994), 71 Ohio St.3d 473, this Court did not depart from the premise that competency is a threshold determination. In following Professor Wigmore's, reasoning, that hearsay statements must meet the same requirements as live witness testimony for admissibility, this Court stated at 475-476:

*****. 'The admission of hearsay statements, by way of exception to the rule, therefore presupposes that the asserter possessed the qualifications of a witness *** in regard to knowledge and the like.' (Emphasis sic.) (Citation omitted.) 5 Wigmore on Evidence (Chadbourn Rev. 1974) 255, Section 1424. Competency is one of the few qualifications required of a witness. Evid.R. 601. See, also, State v. Boston (1989), 46 Ohio St.3d 108, 114, 545 N.E.2d 1220, 1228.**

A competency hearing is an indispensable tool in this and similar cases. A court cannot determine the competency of a child through consideration of the child's out-of-court statements standing alone. As we explained in *State v. Wilson* (1952), 156 Ohio St. 525, 46 O.O. 437, 103 N.E.2d 552, the essential questions of competency can be answered only through an in-person hearing: 'The child's appearance, fear or composure, general demeanor and manner of answering, and any indication of coaching or instruction as to answers to be given are as significant as the words used in answering during the examination, to determine competency. ***

‘Such important and necessary observations cannot be made unless the child appears personally before the court.’ Id. at 532, 46 O.O. at 440, 103 N.E.2d at 556.”

Further, the Fifth District Court of Appeals relied on *Said*, when it found that competency is a threshold determination for admissibility pursuant to Evid. R. 803(4), in both *State v. Ungerer* (June 5, 1998), Ashland App. No. 95COA1125, unreported, 1996 WL 362804 and *State v. Wallick*, 153 Ohio App.3d 748, 2003-Ohio-4534.

In so finding, the court stated in *Ungerer* at *3:

“*. As a result, the *Said* court concluded, even if a statement falls within a hearsay exception, the elements of the declarant’s competency remain at issue and must be established as a threshold matter before the hearsay exception is invoked to demonstrate the reliability of the declarant’s statement. In other words, before we reach the issue of whether the child’s statements were reliable because they were made for purpose of a medical examination or because they were excited utterances, we must first determine this child was able to accurately receive the information and to remember it. This is the issue of competency.***.”**

Said finding was followed in *Wallick*, when the court stated at ¶17:

“We follow our decision in *Ungerer*. We note that Evid.R. 803 applies regardless of whether the declarant is available as a witness. The underlying premise for the exceptions is that they present sufficient indicia of enough trustworthiness and reliability to allow their admission despite the fact that they constitute hearsay. If the declarant cannot receive just impressions of the facts and transactions and also cannot relate them truly, the underlying premise for the exceptions cannot be met. Because the trial court found the child victim incapable of receiving just impressions of the fact and transactions, the trustworthiness premise underlying Evid.R. 803

cannot be met, and the statement cannot be offered into evidence. We cannot assume that G.V. perceived the information or recalled it accurately; therefore, the statements fail at the threshold level, before Evid.R. 803 in invoked. See Ungerer, supra.”

Since the trial court herein never had the opportunity to test the child’s ability to receive just impressions and relate them truthfully, she was incompetent, not by the court’s determination, but by the presumption in Evid. R. 601(A).

In *State v. Wallace* (1988), 37 Ohio St.3d 87, this Court found at 94:

“*. Under Ohio law, the competency of individuals ten years or older is presumed, while the competency of those under ten must be established. [Footnote of Evid. R. 601 omitted] ***.”**

As the record is void that the child herein was able to accurately receive and recollect just impressions and subsequently relate them truthfully, she out of court statements lacked any indicia of trustworthiness and reliability. Therefore, without a competency determination to rebut the presumption of incompetency, the statements to medical personnel were inadmissible under Evid. R. 803(4).

C. THE HOLDING OF STATE V. SAID IS NOT STRICTLY LIMITED TO THE ADMISSION OF HEARSAY STATEMENTS PURSUANT EVID.R. 807

Contrary to the Appellant’s assertion (Appt. First Merit Brief, pg. 20), this Court did not examine the application of Evid. R. 807 in *Said*, for this Court stated at 475:

“The parties and the court of appeals have focused on whether the facts of this case satisfy the particular requirements of Evid.R. 807. We do not reach those issues, because two fundamental errors preclude a proper review of the application of that rule in this case.”

In *Said* this Court found that the trial court erred by failing to record the competency hearing, *Id.* at 475, and by failing to make the findings required by Evid. R. 807 prior to admitting the child's out of court statement. *Id.* at 477.

However, in addition to making these findings, this Court again relied upon its reasoning in *State v. Boston* (1989), 46 Ohio St.3d 108, 114, to conclude that a competency determination was a condition precedent to the admission of hearsay statements, for it stated at 477:

“Out-of-court statements that fall within Evid. R. 807, like the other hearsay exceptions, possess a ‘circumstantial probability of trustworthiness.’ See 5 Wigmore, supra, at 253, Section 1422. In other words, under unique circumstances we make a qualified assumption that the declarant related what she believed to be true at the time she made the statement. However, those same circumstances do not allow us to assume that the declarant accurately received and recollected the information contained in the statement.(fn 1) Whether she accurately received and recollected this information depends upon a different set of circumstances, those covering the time from when she received the information to when she related it. As a result, even though a statement falls within a hearsay exception, two elements of the declarant’s competency remain at issue and must still be established. Thus, a trial court must find that a declarant under the age of ten was competent at the time she made the statement in order to admit that statement under Evid.R. 807. See *Boston*, supra, 46 Ohio St3d at 114, 545N.E.2d at 1228; *Schulte v. Schulte* (1994), 71 Ohio St.3d 41, 42, 641 N.E.2d 719, 720, fn..1. [Footnote concerning excited utterance exception omitted.]”

As *Boston* was prior to Evid. R. 807, it is noteworthy that this Court applied its reasoning concerning competency in *Said*, at 477 and 481 (dissenting opinion of Justice Sweeney). In *Boston*, this Court stated at 114:

“If these tests are not met and the declarant really is incompetent, then it would seem to follow that any statement made by the declarant(fn1) to another person, who is then called upon to repeat for evidentiary purposes the declarant’s statement, would also be tainted by the incompetency of untruthfulness and thus would be inadmissible hearsay. [Footnote concerning excited utterance exception omitted.]”

Clearly, neither the holding, nor reasoning, in *Said* limits a competency determination to the admission of out of court statements under Evid. R. 807 only. Rather, this Court reasoned that like other hearsay exceptions a competency determination was also required prior to the admission of statements under Evid. R. 807.

Additionally, pursuant to Evid. R. 102, courts are to construe the Rules of Evidence to state the common law of Ohio, which is contrary to the broad interpretation of the federal rules. *Boston* at 116; *Miller* at 47 and *State v. Dever* (1992), 64 Ohio St.3d 401, 407. Although *Boston* expanded the common-law doctrine of Evid. R. 803(4), concerning the type of statements made by a patient, *Id.* at 121, it did not relax admissibility based upon a competency determination.

Therefore, nothing in *Said* stands for the proposition that the basic requirements for live witness testimony, i.e. competency, do not apply to hearsay testimony. Nor does *Said* depart from the presumption set forth in Evid. R. 601(A) that a child under ten years of age is incompetent until said presumption is rebutted by the proponent of the out of court statement.

Therefore, limiting the competency requirement to Evid. R. 807 hearsay statements only fails to rebut the presumption in Evid. R. 601(A) and the limitations of Evid. R. 102.

Further, by applying the evidence rules to all hearsay exceptions, including Evid. R. 807, the Appellant is not precluded from admitting the out of court statements. In light of the fact that Evid. R. 807 was created to address the numerous admissibility problems surrounding child victims, the rule clearly increases, not decreases, the prosecutions ability to admit out of court statements of a child victim.

Therefore, this Court's holding in *Said* should not be limited to Evid. R. 807 for this Court never narrowed the competency determination therein. Rather, this Court, in providing lower courts sufficient direction for determining admissibility, should set forth that *Said* does not stand for the proposition that a competency determination is only required under Evid. R. 807 and not the other hearsay exceptions.

Proposition of Law II:

CONTRARY TO CRAWFORD V. WASHINGTON (2004), 541 U.S. 36, 124 S.C.T. 1354, THE TRIAL COURT ADMITTED HEARSAY STATEMENTS IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

Both the trial and appellate courts found that the child's statements to Hinojosa, Higgins, Jones, Humphries and Crego-Stahl were non-testimonial *State v. Muttart*, 2006-Ohio-2506, at ¶17 & ¶38) and therefore did not violate the Appellant's right of confrontation under *Crawford*. The court of appeals further determined whether the

non-testimonial statements were properly admitted under the standards set forth in *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531. The appellate court stated at ¶38:

“*. Under the *Roberts* standard the Sixth Amendment right to confrontation does not bar the admission of a witness’ statement against a criminal defendant if the statement bears “adequate ‘indicia of reliability.’” *Id.* at 66. The *Roberts* test is met when the evidence either falls within a “firmly rooted hearsay exception” or bears “particularized guarantees of trustworthiness.” *Id.*”**

Therefore, the Sixth Amendment right to confrontation is violated if the hearsay statements do not bear an indicia of reliability or guarantee trustworthiness. As set forth above, the admission of the statements were erroneous since the trial court did not make a competency determination.

Until the trial court determines whether the child is capable of receiving just impressions of the facts and relating them truthfully, the indicia of reliability and truthfulness are lacking. Thus, if the underlying premise for the hearsay exception cannot be met, the statements are inadmissible.

The Appellee asserts that under the *Roberts*’ test the child’s statement did not bear a particularized guarantee of trustworthiness or indicia of reliability since same were never scrutinized by a competency determination.

Further, the court of appeals found that the trial court erred in admitting the statements without first holding a competency hearing to determine whether the child was competent at the time the statements were made.

However, the court of appeals further found that the admission of said statements were harmless error. The Appellee asserts that this was the incorrect standard of review for a constitutional error. In *State v. Rorie*, 2005-Ohio-1726, the Fifth Appellate District stated at ¶66:

“*. In determining whether a constitutional error is harmless, “[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.” *Chapman v. California* (1967), 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705; *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (holding that the harmless error analysis established in *Chapman*, *supra*, applies to confrontation clause violations). ***.”**

Followed in *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388, citing *Chapman* and *State v. Siler*, 164 Ohio App.3d 680, 2005-Ohio-6591.

The Appellee asserts that the Confrontation Clause error was not harmless beyond a reasonable doubt, *Siler* at ¶49, and there is a reasonable possibility that the evidence contributed to his convictions. *Madrigal* at 388.

As the victim did not testify at trial, the only evidence presented to the jury was hearsay. If the child’s statements of which were made to the medical personnel were excluded, the only evidence for the jury to consider was from the child’s mother, and Higgins, a person who interjected herself into the situation.

Clearly there is a reasonable possibility that the evidence complained of might have contributed to the conviction, in light of the fact that these witnesses testified in their professional capacities concerning diagnosis and treatment. Thus, the admission of

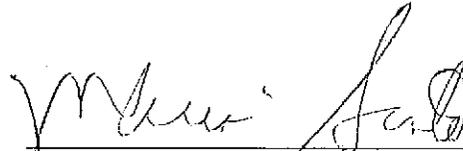
the child's statements through the testimony of Jones, Humphries and Crego-Stahl was not harmless beyond a reasonable doubt and contributed to the conviction resulting in a Confrontation Clause violation.

CONCLUSION

As this Court's decision in *Said* never eliminated the presumption that a child under ten is incompetent, and therefore said determination is a threshold requirement prior to the admission of hearsay statements, pursuant to Evid R. 803(4), the admission of the child-victim's out of court statement were inadmissible herein. Further, said admissibility was not harmless error for under the facts of this case there is a strong possibility that this evidence contributed to the conviction.

Moreover, this Court's decision in *Said* was not initially limited to Evid. R. 807 and this cause fail to present an opportunity to do so in light of the long standing principles of all the hearsay exceptions.

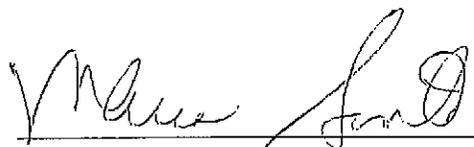
Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of this Merit Brief was sent by regular U.S. mail to Mark C. Miller, Hancock County Assistant Prosecuting Attorney, 222 Broadway, Room 104, Findlay, Ohio 45840 this 17th day of January, 2007.

A handwritten signature in cursive script, appearing to read "Maria Santo", written over a horizontal line.

Maria Santo, #0039762

Counsel for Appellee/Cross-Appellant,
Dennis D. Muttart

APPENDIX

Not Reported in N.E.2d, 1996 WL 362804 (Ohio App. 5 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Ashland County.
STATE of Ohio, Plaintiff-Appellee
v.
Brian B. UNGERER, Defendant-Appellant
No. 95COA1125.
June 5, 1996.

Criminal Appeal from the Ashland County Court of Common Pleas, Case No. 7217. Reversed and Remanded.

Robert P. Desanto, Ashland, for plaintiff-appellee.

James H. Banks, Nina M. Najjar, Dublin, for defendant-appellant.

GWIN, P.J., and READER and WISE, JJ.

OPINION

GWIN, Presiding Judge.

*1 Defendant Brian B. Ungerer appeals a judgment of the Court of Common Pleas of Ashland County, Ohio, convicting and sentencing him for two counts of gross sexual imposition in violation of R.C. 2907.05, after a jury found him guilty. Appellant assigns nine errors to the trial court:

ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE HEARSAY STATEMENTS OF THE ALLEGED VICTIM, AS THE ADMISSION OF SAME DENIED DEFENDANT HIS RIGHTS OF CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION.
2. THE TRIAL COURT ERRED IN REFUSING TO PERMIT AN EXAMINATION OF THE CHILD BY A DEFENSE EXPERT AND THEN USING THE FAILURE OF EXAMINATION AS A BASIS FOR DENYING DEFENDANT THE RIGHT TO PRESENT EXPERT TESTIMONY.
3. THE TRIAL COURT ABUSED ITS DISCRETION IN APPLYING OHIO'S RAPE SHIELD STATUTE TO EXCLUDE EVIDENCE OF THE CHILD'S PRIOR ABUSE.
4. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL AFTER THE TESTIMONY OF GRACE SHEARER WITH REGARD TO ALLEGED PRIOR BAD ACTS OF DEFENDANT.
5. THE TRIAL COURT ERRED IN PERMITTING THE 3 YEAR OLD ALLEGED VICTIM TO BE BROUGHT INTO THE COURTROOM AND PARADED IN FRONT OF THE JURY AFTER A FINDING THAT SHE WAS INCOMPETENT TO TESTIFY.
6. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE TAPED CONVERSATION OF DEFENDANT-APPELLANT.
7. THE TRIAL COURT'S IMPROPER ADMISSION/DENIAL OF ADMISSION OF EVIDENCE DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

8. THE TRIAL COURT ERRED IN REFUSING TO GIVE AN INSTRUCTION OF ITS COMPETENCY FINDING TO THE JURY.

9. DEFENDANT'S CONVICTION IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE AND MUST BE OVERTURNED.

Appellant was originally indicted on three counts of gross sexual imposition for alleged sexual conduct with a person not his spouse under the age of thirteen. The jury found him not guilty on one of the counts. The alleged victim was approximately three years old. Appellant's wife was babysitting the child at the time of the incident. The State presented evidence from the child's mother, who testified when she picked her daughter up from appellant's home on the night of the incident, the child told her mother her butt hurt. The next morning, her grandfather observed the child acting unusual, and questioned her. The child allegedly told her grandfather appellant took her down to the basement of his home and put his butt next to her butt. The grandfather reported this to the child's mother, and the mother questioned the child more regarding the incident. The mother then took the child to Good Samaritan Hospital for a physical examination. The hospital referred the child to Akron Children's Medical Center for an evaluation. The State called a social worker from Akron Children's Hospital Medical Center and an investigator from Ashland County Department of Human Services to testify regarding what the child reported to each of them.

Law officers investigated, arrested appellant, and took a verbal statement from appellant. Appellant took the stand in his own defense, denied any criminal activity took place, and denied giving a confession to police officers.

I

*2 Appellant first argues the trial court erred in admitting into evidence hearsay statements of the child. The trial court conducted an *in camera* examination of the child and determined pursuant to *State v. Said* (1994), 71 Ohio St.3d 473, it "could not make a finding that [the child] was competent at the time she made the statements concerning the incident to the other state's witnesses ..." Judgment Entry of May 24, 1995, page 2. Nevertheless, the court permitted the State to introduce the child's statements from the testimony of the persons to whom the child made the statements. The court found the statements were excited utterances, except for certain statements made to the social worker from the hospital, which the court determined was admissible under Evid.R. 803(4), as being made for the purpose of medical diagnosis or treatment.

Evid.R. 807 provides:

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply:

(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 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 the 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.

The transcript of the hearing before the trial court on May 1, 1995 contains a discussion with both counsel and the court regarding the admissibility of the child's statements under Evid.R. 807. The court overruled the State's motion to admit the evidence because it found the child was incompetent at the time she made the statement. The court indicated pursuant to *State v. Said, supra*, this was threshold issue under Evid.R. 807.

***3** *State v. Said* cites Evid.R. 601(A), which provides a child under ten years of age may be incompetent as a witness if the child appears incapable of receiving accurate impressions of the facts and transactions or of relating them, *Said* at 476. The *Said* court held Evid.R. 807 does not dispose of the need to first find a child competent. The court noted competency is composed of three elements, first, the ability to receive accurate impressions of fact; second the ability to accurately recall those impressions; and third the ability to relate those impressions truthfully, *id*, citing *State v. Frazier* (1991), 61 Ohio St.3d 247, 251 and 5 *Wigmore on Evidence* (Chadborn rev.1979), 712-713, Section 506.

Said went on to note like Evid.R. 807, the other hearsay exceptions imply an assumption under a given set of unique circumstances, the declarant related what he or she believed to be the truth. This does not mean the declarant accurately received the information, nor does it mean she accurately recalled the information. The *Said* court stated: "... these assumptions depend upon a different set of circumstances from the circumstances that give the hearsay their trustworthiness..." As a result, the *Said* court concluded, even if a statement falls within a hearsay exception, the elements of the declarant's competency remain at issue and must be established as a threshold matter before the hearsay exception is invoked to demonstrate the reliability of the declarant's statement. In other words, before we reach the issue of whether the child's statements were reliable because they were made for purpose of a medical examination or because they were excited utterances, we must first determine this child was able to accurately receive the information and to remember it. This is the issue of competency, and this is the issue the trial court very accurately identified for purposes of Evid.R. 807. The court found this child was not competent at the time she made the statements.

The trial court correctly analyzed the statements under Evid.R. 807. However, the court erred in determining the statements were admissible as excited utterances or statements made for the purpose of medical diagnosis or treatment. We do not reach the issue of whether, in fact, the statements qualify under one of those exceptions because the trial court has already made the determination these statements are not reliable because the child was incompetent. We cannot assume she perceived the information or recalled it accurately. The statements fail at the threshold level, before Evid.R. 803 is invoked.

We note under Evid.R. 807(A)(1), the language regarding the totality of the circumstances providing particularized guarantees of trustworthiness closely parallel the sorts of considerations which traditionally provide excited utterances their trustworthiness. Where the court has found in an Evid.R. 807(A)(1) *in camera* examination of the child, the child's statements do not possess the requisite degree of trustworthiness, or where it finds the child simply is not competent to receive, process, and repeat information about events, the court should exclude evidence of the statements.

***4** As a sidelight, we note the statements to the hospital social worker were not properly for "medical treatment" and should not have been admitted under Evid.R. 803, *State v. Chappell* (1994), 97 Ohio App.3d 515.

The first assignment of error is sustained.

II

Appellant asked to have an expert examine the child and develop evidence, among other things, to determine whether the State's expert witnesses had used proper techniques to interview this little girl. The court refused to permit appellant's expert to interview the child because she would not be testifying at trial. The court later refused to permit the expert to testify regarding the techniques used by the State's expert, on the basis the expert did not evaluate the child.

Most if not all of the evidence is the same evidence discussed in I, *supra*. As such, this assignment of error can be considered moot. However, this court must hold a trial court should not restrict a defendant's ability to present evidence the State's experts did not follow proper procedure and technique in formulating their expert opinions. This is a different issue from the issue of whether the defense is entitled to evaluate a victim who will not testify.

The second assignment of error is sustained.

III

The record indicates the child victim in this case had been a victim of earlier abuse approximately three months earlier, perpetrated by a different person. The trial court ruled the Rape Shield Act, R.C. 2907.02(D), prohibited the appellant from bringing evidence of the prior molestation.

R.C.2907.02(D) provides in pertinent part:

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

In *State v. Gardner* (1979), 59 Ohio St.2d 14, the Supreme Court reviewed R.C.2907.02, and found the statute advanced certain legitimate state interests. The court held the statute was intended to guard the complainant's sexual privacy and protect her from undue harassment, by discouraging the tendency in rape cases to try the victim rather than the defendant. The law should encourage reporting of rape and aid in crime prevention, and exclude unduly inflammatory evidence which is only marginally probative, *Gardner, supra*, 17-18.

In *State v. Ferguson* (1983), 5 Ohio St.3d 160, the Supreme Court, citing the earlier *Gardner* case, held evidence of the victim's past sexual activity is not admissible to impeach the credibility of the victim.

In *State v. Guthrie* (1993), 86 Ohio App.3d 465, the Court of Appeals for Clermont County reviewed the applicability of the Rape Shield Law to sexual abuse cases involving child victims. In *Guthrie*, the trial court excluded evidence of allegations made by three juvenile victims in which they claimed they had been previously sexually abused by someone other than the appellant. The *Guthrie* court noted it is within the sound discretion of the trial court to determine the relevancy of evidence in a rape prosecution, and to apply the Rape Shield Law in a manner to best meet the purpose behind the statute, *Guthrie*, at 467, citing *State v. Leslie* (1984), 14 Ohio App.3d 343. In *Guthrie*, the accused argued he did not offer the evidence of the prior allegations of sexual abuse against another party for the purpose of demonstrating the allegations were false. Instead, he wanted to offer the evidence for the limited purpose of showing the victim's ability to describe sexual activity could have resulted from an experience other than the offense charged. In other words, the evidence was offered to establish an alternative explanation for the children's precocious knowledge. The *Guthrie* court determined the trial court properly excluded the evidence because it was not material to any fact at issue in the case, and thus did not amount to abuse of discretion.

***5** In the case at bar, defense counsel argued various rationales for introducing the evidence. First, counsel pointed out the jury would believe the child had to be telling the truth because a child of three generally does not possess this sort of knowledge about sexual matters. Further, counsel argued a young child could very well be confused about what happened and when, because a child's sense of time is not the same as an adult's. At trial, several witnesses made reference to certain behaviors exhibited by the child, and counsel argued to the court the child had exhibited those behaviors prior to the alleged incident, and the jury should be made aware of it.

Clearly the Rape Shield Law cannot apply to a child victim on the issue of either reputation or consent, because those issues simply do not arise with a child victim. It is a much closer call whether the evidence is admissible to explain precocious sexual knowledge. But here, the State's witnesses testified regarding behaviors they observed which contributed to their suspicions the child had been abused. We find the defendant should have been permitted to cross examine the witnesses regarding those behaviors, and what reason the witnesses had to conclude those behaviors were indicative of abuse. For this purpose, the evidence of prior sexual abuse is addressed not to the child's credibility, but rather, to the credibility of the witness testifying regarding how the child behaved and what the behavior implied.

Certainly, if the court admits this evidence, it should be very specific in its instruction to the jury regarding the purpose for admitting the evidence.

We find the trial court abused its discretion in finding the Rape Shield Law prohibited appellant from introducing evidence of prior sexual abuse of this child for the purpose of impeaching the credibility of the witnesses who testified regarding the child's behavior and the opinions the witnesses held regarding significance of the behavior.

The third assignment of error is sustained.

IV

Appellant argues the trial court should have granted a mistrial after, in response to a question on cross examination, the alleged victim's mother alluded to an earlier allegation of abuse of this victim by appellant. The trial court had earlier ruled the evidence was not admissible.

In light of our holding in I *supra*, this matter must be remanded to the trial court. For this reason, we find this issue to be moot.

The fourth assignment of error is overruled.

V

Appellant next argues the trial court should not have permitted the State to bring the three-year old alleged victim into the courtroom to be "paraded in front of the jury", after the court prohibited her from testifying because she was incompetent. The State points out the child's grandfather identified her for the jury without objection. For this reason, we must analyze the alleged error pursuant to Crim.R. 52, the Plain Error Doctrine.

***6** Crim.R. 52(B) provides the court may notice plain errors or defects not brought to the attention of the trial court if they affect substantial rights. The Supreme Court has held plain error may be noticed only in exceptional circumstances in order to prevent a miscarriage of justice, see State v. Lundgren (1995), 73 Ohio St.3d 474. We find this did not amount to error, plain or otherwise.

The fifth assignment of error is overruled.

VI

Appellant argues the State should not have been permitted to play a tape-recorded conversation between the appellant and the alleged victim's mother made shortly after the alleged incident. Appellant notes the mother was at the Sheriff's Department and called him at the officers' request. Appellant argues he was not mirandized and did not know he was being taped.

The State points out first of all appellant was not in custody and so he was not entitled to the warnings set forth in *Miranda v. Arizona* (1966), 384 U.S. 436. Further, appellant was not questioned by any official from the Sheriff's office but rather by the child's mother. The trial court redacted certain portions of the conversation regarding earlier allegations appellant had abused this child.

We find the child's mother was not an agent of the State and the dictates of *Miranda* do not apply. Further, our review of the transcript discloses appellant never made any admissions in the conversation.

We find appellant cannot demonstrate he was prejudiced by this evidence.

The sixth assignment of error is overruled.

VII

The trial court refused to admit certain hospital records appellant argued would demonstrated the child's statements were inconsistent. The court refused to admit the records because they had not been authenticated by someone from the hospital. Appellant argues the documents in question were actually provided to him by the State and discovery, and for this reason, the State could not contest the authenticity of the documents. Further, they were used by some of the State's witnesses during their testimony.

Although we agree the State should not be permitted to contest the authenticity of the documents it provides to an accused in discovery, we also find this issue is moot in light of our decision to remand this case.

The seventh assignment of error is overruled.

VIII

Appellant requested the trial court instruct the jury it found the child to be incompetent at the time she made the statements to the State's witness, so the jury would be aware of this when it considered the testimony of the State's witnesses regarding the child's statements. Again, in light of our holding in I, *supra*, we find this assignment of error is moot.

The eighth assignment of error is overruled.

IX

Appellant argues his conviction was against the weight of the evidence and was insufficient as a matter of law.

In *State v. Jenks* (1991), 61 Ohio St.3d 259, the Supreme Court held:

An appellate court's function when reviewing the sufficiency of the evidence to support criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution,

any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

**7 Syllabus by the court, paragraph two.*

Because on remand the evidence against appellant will be significantly different, we find this assignment of error is premature, and accordingly overrule it.

For the foregoing reasons, the judgment of the Court of Common Pleas of Ashland County, Ohio, is reversed, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion.

GWIN, P.J., and READER and WISE, JJ., concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Ashland County, Ohio, is reversed, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion.

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State v. Ungerer

Not Reported in N.E.2d, 1996 WL 362804 (Ohio App. 5 Dist.)

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§ RULE 102

Ohio Court Rules

RULES OF EVIDENCE

Article I. GENERAL PROVISIONS

RULE 102 Purpose and Construction

RULE 102. Purpose and Construction

The purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. The principles of the common law of Ohio shall supplement the provisions of these rules, and the rules shall be construed to state the principles of the common law of Ohio unless the rule clearly indicates that a change is intended. These rules shall not supersede substantive statutory provisions.

[Effective: July 1, 1980; amended effectively July 1, 1996.]

Staff Note - July 1, 1996 Amendment

Rule 102. Purpose and Construction; Supplementary Principles. As originally adopted, Evid. R. 102 referred to the common law of Ohio, but only as a framework for construing the particular rules within the Rules of Evidence. The original text of Rule 102 did not suggest what role, if any, the common law was to have in regard to evidentiary issues as to which the Rules of Evidence were silent.

In the years since Ohio adopted the Rules of Evidence, Ohio has added rules codifying the common law on certain topics that the rules had not addressed. Thus, for example, prior to the adoption of Evid. R. 616 in 1991, the rules contained no rule governing the impeachment of a witness for bias or interest. See Staff Note (1991), Evid. R. 616. Even after the adoption of Rule 616, other rules of impeachment remained unaddressed. See, e.g., *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St. 3d 97, 110 (use of learned treatises for impeachment). Similarly, the rules do not expressly address questions regarding the admissibility of expert opinions on certain subjects. See, e.g., *Stinson v. England* (1994), 69 Ohio St. 3d 451 (expert opinion on causation is inadmissible unless the opinion is that causation is at least probable).

Omissions such as these occur across the entire body of evidence law. The Rules of Evidence, that is, are not an exhaustive compilation of the rules governing evidence questions, nor are the rules preemptive as to subjects that they do not address. The amendment makes clear in the text of the rule not only that the common law of Ohio provides a framework for construing the content of specific rules, but also that the common law provides the rules of decision as to questions not addressed by specific rules.

In addition, in the portion of the rule that establishes the common law as the basis of interpretation of specific rules, the phrase "common law" was amended to read "principles of the common law." The amendment harmonized the reference with the usage in other rules. See, e.g., Evid. R. 501. In addition, it is intended to acknowledge more clearly the character of the common law as an evolving body of principles and precedents, rather than as a static collection of tightly prescribed rules.

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§ RULE 601

Ohio Court Rules

RULES OF EVIDENCE

Article VI. WITNESSES

RULE 601 General Rule of Competency

RULE 601. General Rule of Competency

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

- (1) a crime against the testifying spouse or a child of either spouse is charged;
- (2) the testifying spouse elects to testify.

(C) An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

(D) A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school. This division shall not prohibit other medical professionals who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

(E) As otherwise provided in these rules.

[Effective: July 1, 1980; amended effective July 1, 1991.]

Staff Note - July 1, 1991 amendment

Rule 601. General Rule of Competency. Rule 601(A) Children and mental incompetents. Evid. R. 601(A) was amended by deleting "and;" from the end of the rule. This is a technical change only.

Rule 601(B). Spouse testifying. As adopted in 1980, Evid. R. 601(B) provided that a witness was incompetent to testify against his or her spouse in a criminal case unless the charged offense involved a crime against the testifying spouse or the children of either spouse. The rule was based on the policy of

protecting the marital relationship from "dissension" and the "natural repugnance" for convicting a defendant upon the testimony of his or her "intimate life partner." 8 J. Wigmore, Evidence 216-17 (McNaughton rev. 1961).

The important issue is who can waive the rule - the defendant or the witness. Under the old rule, the defendant could prevent his or spouse from testifying. In some situations the policy underlying the rule simply does not apply, but the rule does. For example, if a husband kills his mother-in-law and his wife is a witness, she could be prevented from testifying. This would be true even if they were separated and she desired to testify. Cf. *Locke v. State* (1929), 33 Ohio App. 445, 169 N.E. 833. The amendment changes this result, by permitting the wife to elect to testify.

The approach is supported by a number of commentators. As McCormick has pointed out: "The privilege has sometimes been defended on the ground that it protects family harmony. But family harmony is nearly always past saving when the spouse is willing to aid the prosecution. The privilege is an archaic survival of a mystical religious dogma and of a way of thinking about the marital relation that is today outmoded." C. McCormick, Evidence 162 (3d ed. 1984). See also 8 J. Wigmore, Evidence 221 (McNaughton rev. 1961) ("This marital privilege is the merest anachronism in legal theory and an indefensible obstruction to truth in practice."); Huhn, "Sacred Seal of Secrecy"; The Rules of Spousal Incompetency and Marital Privilege in Criminal Cases (1987), 20 Akron L. Rev. 433.

The 1991 amendment does not abolish the spousal incompetency rule. The spouse could not be compelled to testify if he or she did not want to testify. In January 1981, the Supreme Court proposed an amendment that would have deleted Evid. R. 601(B). 54 Ohio Bar 175 (1981). This amendment subsequently was withdrawn. 54 Ohio Bar 972 (1981). The 1991 amendment differs from the 1981 proposal. The 1981 proposal would have abolished the spousal incompetency rule in its entirety, thereby permitting the prosecution to force the spouse to testify. The 1991 amendment does not permit the prosecutor to force testimony from an unwilling spouse.

Moreover, the amendment still leaves the defendant with the protection of the confidential communication privilege, which is recognized in R.C. 2317.02(C) and R.C. 2945.42 and governed by Evid. R. 501. This privilege is not affected by Evid. R. 601(B).

Rule 601(D) Medical experts. Evid. R. 601(D) was amended to prevent the application of the rule in cases in which a physician, podiatrist, hospital, or medical professional is sued as a result of alleged negligence on the part of a nurse or other medical professional. Some cases have held that a nurse is not competent under Evid. R. 601(D) to testify about the standard of nursing care in such a case. See *Harter v. Wadsworth-Rittman* (August 30, 1989), Medina App. No. 1790, unreported, motion to certify record overruled (December 20, 1989), 47 Ohio St.3d 715, 549 N.E.2d 170.

The amendment limits the rule to claims involving care by a physician or podiatrist, and does not prohibit other medical professionals, including nurses, from testifying as to the appropriate standards of professional care in their field.

Also, the requirement that an expert medical witness devote three-fourths of his or her time to active clinical practice or instruction was reduced to at least one-half. The phrase "accredited university" was changed to "accredited school" because some accredited medical schools are not associated with a university.

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