

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	Case No. 2007-0100
)	
Appellant,)	
)	
v.)	On Appeal from the Ashtabula County
)	Court of Appeals, Eleventh
JERRY BUTCHER,)	Appellate District
)	
Appellee.)	
)	
)	
)	
)	

MEMORANDUM IN RESPONSE
OF APPELLEE JERRY BUTCHER

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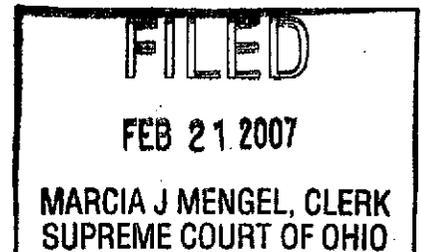


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EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR
GREAT GENERAL INTEREST NOR INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION

Appellant advances in its Memorandum in Support of Jurisdiction two propositions of law. However, what Appellant truly brings before this Honorable Court are assignments of error directed to the decision of the Court of Appeals. Appellant advances no argument for any change to or clarification of law. It raises no issues previously unaddressed by the courts. In fact, there is clear precedent of this Court which is outcome-determinative of all the issues presented. These precedents were applied by the Court of Appeals. And properly so. There truly is no debate concerning the law applicable to the issues presented.

The Court of Appeals conducted an extensive review of the record in this case. The decision it reached was very fact-specific because such is the nature of this case. It involves child victims of alleged sexual abuse and the testimony was often contradictory. This was not a "smoking gun" evidence style of case. The case was built around the testimony of witnesses.

Unfortunately, while the State built its case around hearsay statements and expert testimony, it now argues such testimony was merely cumulative and therefore not prejudicial to Mr. Butcher. This assertion is belied by the State's own arguments to the jury. In the words of the prosecuting attorney during closing argument: "On three different occasions, ladies and gentlemen, these two little girls, they told their grandmother that it was this defendant sexing them. They told Dr. DeWar. And now they came in and they told you the same thing. Consistent, consistent, consistent." This asserted consistency was central to its case. Now arguing that the introduction of this testimony was immaterial and harmless is simply untenable.

STATEMENT OF THE CASE AND FACTS

Jerry Butcher was indicted on three counts of rape (R.C. §2907.02) and two counts of kidnapping (R.C. §2905.01) for events alleged to have occurred on September 6, 2003 in the city of Ashtabula. Tessa and Dominique are the alleged child victims in this matter. They were, respectively, six and five years old at the time alleged. The case proceeded to jury trial. At the conclusion of trial, the Mr. Butcher was found guilty on all counts. A life sentence was imposed. Timely appeal followed from this judgment of conviction and sentence. The Court of Appeals held that evidential errors committed during the course of his trial, coupled with his counsel's ineffective performance, prejudiced his case and required a remand for purposes of a new trial. The State takes issue with that decision.

While the State alleged the incident occurred on September 6, 2003, the case itself really begins on November 13, 2003. On that date, Dominique called their grandmother, Mary Beth Askew, about coming over to her house. The girls were picked up and the night started out in what was described as a happy time driving and listening to carols.

The girls were taking a bath together at their grandmother's house when, per the grandmother, she saw them in the bathroom doorway standing and appearing nervous. "They were moving, like, from one foot to the other, and they were just moving like this and they were looking at each other and one would say you tell her. No, you tell her. Oh, let's tell her together." At that time, she reported the children told her that Jerry, i.e., Mr. Butcher, was "sexing with them" and "he put his man thing in us..." Mrs. Askew contacted their mother, Bethany Askew, and told her about what occurred.

Of significance is the fact that what the children detailed during their competency hearing with respect to their initial disclosure to Mrs. Askew was very different from what

she portrayed. There was no indication from the children that the name of Mr. Butcher was even mentioned at that time. Tessa indicated that her mother and father came over the next day to ask them about Mr. Butcher.

A critical inconsistency was in regard to the date of the incident. Tessa stated during the competency hearing that she and Dominique told their grandmother about the incident only three days after it happened. She was very specific in this regard: "It was three days later I told my grandmother." Dominique also indicated at the competency hearing that she told her grandmother about the incident: "It was when we came home from Tessa's Auntie Porsha's house." "Porsha" refers to Naporsha Turner, who is Tessa's aunt and the girlfriend of Mr. Butcher, with whom she resides. The significance of the dates cannot be overstated. All witnesses agree that Mr. Butcher had no contact with the children in the days or even weeks before November 13.

Ms. Turner and Mr. Butcher have two children together, Corey and Kaylee. The children's mother testified that the last time the children stayed at Ms. Turner's house was for a birthday party for Kaylee. She was quite specific about the date: "Because it was the last time my babies, my girls were around them...." The birthday party was held at roller rink on September 6, 2003. The girls ended up staying the night at Ms. Turner and Mr. Butcher's house. Bethany Askew saw her daughters the next day in the afternoon. She testified that she saw no weird signs or behavior on their part.

Dominique testified at trial. She remembered going to a roller skating party. She recalled spending the night at Ms. Turner and Mr. Butcher's home. She said they were sitting on a couch watching cartoons when Mr. Butcher called them upstairs. Numerous other children were in the house at this time. Ms. Turner was downstairs with their baby.

Dominique recalled going into a bathroom and then back into a room. Someone shut the door. They then took their clothes off. She does not know why they had to take their clothes off, but stated that Mr. Butcher told them to. She went on to describe the pertinent facts of the sexual conduct. Near the conclusion of her testimony, Dominique was asked if the perpetrator was in the court room. She failed to identify Mr. Butcher as being that person. After the incident, she stated that they went downstairs and sat on the couch. Ms. Turner was in the kitchen at that time. She remembered having played video games in the older boy's room. She, Tessa and a cousin were all in that room playing games.

Tessa also testified at trial. She remembered the skating party. After the party, she remembered that they went to her grandmother, Diane Turner's, house. Per Tessa, she and Dominique then went to Naporsha Turner and Mr. Butcher's house, getting there sometime in the early evening. At the house, a child brought out a ball and they all played kick ball outside. Numerous children were present. Tessa indicated that she and Dominique did not watch television. She stated the other children did. It was while the other children were watching television that she and Dominique were in Mr. Butcher's room.

Tessa indicated that they went up there because Ms. Turner called them in and told them Mr. Butcher wanted them upstairs. They went to see what he wanted. They went into his room. She stated that Mr. Butcher shut and locked the door. He told them to get naked. She went on to testify with respect to the details of the sexual conduct. Her testimony continued with her and Dominique going downstairs. They sat on the couch with the other children and watched cartoons. On cross-examination, Tessa admitted previously saying the other children were not all downstairs the whole time. She admitted that Corey banged on the door asking for juice and that Mr. Butcher told him to go downstairs and ask her

aunt. She further admitted that she earlier stated that, after the incident, they left the room and walked across the hall and started to watch movies with the other children. These were older children who were right across the hall. Contrary to her other testimony, she stated that her mother came and picked them up and they went home to bed that night. She later testified that she spent the night at her aunt's house.

The children in this case had been taken twice to a clinic in Ashtabula and examined by a doctor. They had been taken to counseling by their mother. Nonetheless, investigators told the family to take the children to be examined by Dr. Stephanie Dewar, a pediatrician from Tod Children's Hospital in Youngstown. She testified as the State's expert. She saw both girls on November 25, 2003. She both interviewed and performed a physical examination on each of the children. In regard to the physical examination, the doctor detailed the nature of injuries to both children in the form of a fissure and a flattening of the folds, or "rugae," of each child's anus. The doctor's testimony established that the presence of these injuries was: "[C]onsistent with anal penetration. It's not diagnostic of but it is consistent with." The doctor admitted that she could not date when the injuries occurred, however, of significance was the fact that the doctor noted that this area of the body heals up very quickly and thoroughly. She stated it is more common to find nothing.

ARGUMENT IN RESPONSE TO PROPOSITIONS OF LAW

Appellant's First Proposition of Law: Admission of Mary Beth Askew's identification testimony of Appellee as the perpetrator did not constitute prejudicial error requiring reversal of Appellee's convictions.

The statements at issue herein were purported to be the first instance of disclosure by the children to anyone about the incident. They consisted of comments reported by Mary Beth Askew that "Jerry was sexing with them," "he put his man thing in us," and that

it happened at "Jerry's house." Timely objection was made to the introduction of this testimony. Additional statements were admitted that the children told her "Jerry would be mad at them." This was offered as explanation for why they had not disclosed sooner.

These statements were made out-of-court and offered for the truth of matters asserted therein. They are classic hearsay. See, Evid.R. 801(C); Evid.R. 802. The State asserts the children's statements were admissible as excited utterances pursuant to Evid.R.803(2). As detailed below, this exception was inapplicable given the facts of this case. In *Potter v. Baker* (1955), 162 Ohio St. 488, paragraph two of the syllabus (*italics in original*), a four-part test was established to determine whether a statement falls within the excited utterance exception; the first two elements of which are:

(a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective

(b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination *continued* to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs

This Court addressed a further exception in the context of an abused child in *State v. Duncan* (1978), 53 Ohio St.2d 215. In *Duncan*, a six-year-old girl was sexually abused by her stepfather. Two hours after the incident the mother returned home and found the child shaking violently while emerging from a closet. The child described the incident upon being questioned. *Id.* at 218. The Court noted the child had related the incident at the

earliest possible time and there was no indication the child had engaged in reflective thought. *Id.* at 222. See, also, *State v. Wallace* (1988), 37 Ohio St.3d 87.

In *State v. Boston* (1989), 46 Ohio St.3d 108, the Court held that it was not error for the trial court to admit the statement of a 2½ year old child made to her mother several hours after the alleged assault occurred. The Court determined that considering the surprise of the assault, its shocking nature, and the age of the declarant, it was reasonable for the trial court to determine that the child was still in a state of excitement when the statement was made. *Id.* at 118. The facts of that case, as detailed in the Court's opinion, are in stark contrast to those of the case at bar:

There is nothing in the record to indicate that Cynthia had engaged in reflective thought in the intervening time period. According to the record, Cynthia fell asleep in her mother's car on the return trip to her mother's home. The girl did not awaken until the middle of the night when, according to the mother, the girl awoke crying and screaming. As Deidre took Cynthia to the bathroom and placed her on the toilet, Cynthia continued to cry and was in pain when she tried to urinate. *Id.*

While the trend has been toward a somewhat liberalized application of Evid.R. 803(2) where child victims are issue, it has not trended to any extent such as would completely eviscerate the rule. In *State v. Bowles* (April 28, 1998), 10th Dist. No. 97APA09-1213, 1998 Ohio App. LEXIS 1889, the court held it was to error to admit the hearsay testimony of the twelve-year-old victim's statements to her grandmother and friend a few days after alleged sexual abuse:

Although both witnesses indicated that L.K. was "upset," the record does not support a finding that she was divulging these details in any fashion other than after deliberation and reflection. As unequivocally stated by the Supreme Court of Ohio in [*State v. Taylor* (1993), 66 Ohio St.3d 295, 303], "merely being 'upset' clearly does not meet the standard for admissibility under Evid.R. 803(2)...." *Id.* at *15 (internal citation expanded).

See, also, *State v. Harr*, 158 Ohio App.3d 704, 2004-Ohio-5771.

Per the State's position, statements were made to Mary Beth Askew two months after the alleged incident. Earlier that day, Ms. Askew described driving in the car with the children, listening to carols, in what she indicated was a "very happy time." The children bathed after their arrival at her home. They subsequently stood in the doorway and appeared to Ms. Askew as being "nervous" and "agitated." She further described them looking at each other, each telling the other to "tell her." The children then agreed to tell her together "on the count of three."

Taking Ms. Askew's testimony at face value, it is evident that the children did deliberate and discuss with each other in advance what they were going to say and, inferentially, even the timing of their declaration. This deliberative process is antithetical to the concept of an excited utterance. Further, while Ms. Askew described the children as being nervous and agitated, consternation over making a declaration does not equate with the level of emotional upset which is contemplated by the excited utterance exception. The emotional state contemplated by the exception is that which would be present in someone still affected by the incident's recent occurrence. There was no evidence the children were in an uninterrupted state of emotional distress for two months.

Appellant's Second Proposition of Law: Appellee was not denied effective assistance of trial counsel where trial counsel failed to object to hearsay that was cumulative to the victims' testimony and where hearsay statements were made for the purpose of medical diagnosis and treatment.

Ineffective assistance of counsel is present when a counsel's performance falls below an objective standard of reasonable representation and prejudice arose from that deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the

syllabus. Prejudice is demonstrated where there is a reasonable probability that, but for counsel's errors, the result of trial would have been different. *Id.* at paragraph three of syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 80 L.Ed.2d 674. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Bradley, supra* at 142, quoting from, *Strickland, supra* at 694. This was the decision reached by the Court of Appeals which the State now asserts was in error.

The children's mother, Bethany Askew, testified without any objection that the children stated to her they had intercourse with Jerry Butcher. These statements were made out-of-court and offered for the truth of matters asserted therein. They are hearsay and not admissible at trial. Evid.R. 801(C); Evid.R. 802. Nothing in the record even placed these statements in context let alone established the applicability of any exception. Trial counsel's failure to object to these statements was only one in a series of basic failures to adequately challenge the admission of this type of improper and prejudicial testimony.

Even more egregious was the testimony of Dr. Stephanie Dewar. She was the pediatrician the investigating officer sent the children to, purportedly for purposes of diagnosis and treatment. The doctor took a history from the children concerning the events alleged against Mr. Butcher. These statements ultimately were offered at trial for the truth of the matters asserted therein. The State's assertion was that, because the statements were made for purposes of medical diagnosis or treatment, they were admissible per Evid.R. 803(4). The Court of Appeals correctly held that the State failed to meet its burden to demonstrate the applicability of this exception and that counsel for Mr. Butcher's

performance in not objecting to the introduction of such highly prejudicial testimony fell below any objective standard of reasonableness.

Included in the doctor's testimony was the children's version of events as well as the identity of their abuser. As stated, no objection was made by defense counsel at the time this testimony was introduced, although, this testimony was the subject of a motion in limine previously made to preclude its introduction. The trial court simply did not accept the argument that the children's state of mind at the time was the outcome-determinative issue and it refused to allow any voir dire of them concerning this issue. Nonetheless, the trial court made clear that it was not ruling on the motion in limine to preclude this testimony until it heard what the doctor had to say on the issue. When this issue actually then arose during Dr. Dewar's testimony, defense counsel sat silent and did not raise any objection.

The testimony elicited from Dr. Dewar explained *her* purpose and motivations, but said absolutely nothing about whether it was ever explained to the children why they were there to see her. No testimony along these lines was elicited from the children's grandmother, Mary Beth Askew, their mother, Bethany Askew, nor even from the children themselves. No proper foundation was established by the State which would have permitted the admission of this testimony. Evid.R. 803(4). This Court already has leading precedent on this issue. *State v. Dever* (1992), 64 Ohio St.3d 401. This precedent was applied by the Court of Appeals.

The Eleventh District unequivocally follows *Dever*. In *In re Corry M.* (1999), 134 Ohio App.3d 274, the state argued that hearsay statements a child made to a social worker were admissible, inter alia, pursuant to Evid.R. 803(4) as a statement made for purposes of

medical diagnosis or treatment. The court wrote: "Traditionally, the rationale behind the hearsay exception found in Evid.R. 803(4) stemmed from the 'selfish-interest rationale' or the belief that a person was motivated to tell the truth when seeking medical diagnosis or treatment because the person's well-being might depend on expressing truthful information to the medical professional." *Id.* at 281, citing to, *Jett*, *infra* at 26; *Dever*, *supra*. "[P]ursuant to *Dever*, statements made by a child to a medical professional are not automatically excluded simply because the child did not possess the initial motivation to seek diagnosis or treatment, but rather were directed there by an adult. Once at the medical professional's office, however, it must be established that the child's statements were made for the purpose of medical diagnosis or treatment." *Id.* at 282. "In making this determination, a trial court must consider the circumstances surrounding the child's out-of-court statement to determine if it was made to a medical professional for the purposes of diagnosis or treatment." *Id.* In *Corry*, the court held the state offered "absolutely no evidence from which this court can discern the child's motivation for participating in the interview...." *Id.* See, also, *State v. Jett* (Mar. 31, 1998), 11th Dist. No. 97-P-0023, 1998 Ohio App. LEXIS 1451.

There is even evidence in the record that the children were fully aware from early on that what they said would be used in court. At the competency hearing, Tessa stated that, after she and Dominique told their grandmother about the event, "Then the next day our grandmother came up and said she wants to write all this down because she might have to go into Court to talk about this." No testimony was presented from which to even infer that the children knew why they were speaking to Dr. Dewar or even that they knew who she was. Counsel should have challenged the introduction of this testimony.

The prejudice which flowed to Mr. Butcher from this deficient performance has been discussed, in part, above. Dr. Dewar was part of the State's "consistent, consistent, consistent" theory of the case. But beyond that, without objection from defense counsel, the doctor was permitted to testify that, to a "reasonable degree of scientific certainty," the children were sexually abused. The doctor admitted that, medically, the conclusion could not be made that the injuries were the product of sexual abuse as other things can cause those types of injuries. On cross-examination, defense counsel then asked her directly whether it was in light of the history that she had taken that she determined the children were sexually abused. The doctor admitted that was the case.

Expert medical testimony must be based upon "reliable scientific, technical, or other specialized information," not supposition, intuition, or anything else that is solely within the province of the jury. Evid.R. 702(C). This testimony was objectionable and should have been excluded as such. It unduly bolstered the State's case. Defense counsel erred to their client's prejudice in not raising any objection.

The doctor's opinion was based upon two items: her examination of the children and what she was told in regard to their allegations against Mr. Butcher. The factor by which she premised her opinion was the report of sexual abuse. It follows that the doctor had to believe the allegations were true in order to render her ultimate opinion. That aspect of her testimony was objectionable. The doctor's opinion of the truth of the children's statements, and by implication their identification of Mr. Butcher as the perpetrator, was objectionable.

"An expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *State v. Boston* (1989), 46 Ohio St. 3d 108, syllabus. Expert testimony cannot be used to show that a child is or is not telling the truth, or that a child accurately

or inaccurately testified because the trier of fact, not the expert, is burdened with assessing the credibility and veracity of witnesses. *State v. Moreland* (1990), 50 Ohio St. 3d 58, citing *Boston, supra*, at 128-29. It is asserted that the doctor's testimony was, in substance unambiguous to any observer, opinion testimony of her personal belief in the truthfulness of the children's statements regarding sexual abuse and the perpetrator being Mr. Butcher.

The State went to lengths in examination of this witness that the jury would hear of her extensive qualifications and the number of cases she has handled. The State selected her and built her up to the jury as preeminent in her field and an opinion that carried weight. She was integral to the State's case. The State now argues to the contrary, seeking to brush this testimony aside as merely cumulative. Yet, in closing argument to the jury, the State argued the following: "And Dr. DeWar, on both of these little girls after interviewing them and physical findings, gave her opinion, as a specialized doctor in dealing with sexually abused children, that both had been sexually abused. And that, in fact, she had ascertained the identity of the perpetrator for medical reasons and safety reasons and that is consistently this defendant, Jerry Butcher." Having argued the point to the jury, it ought to now be precluded from making contrary assertions. The significance of this testimony was considerable.

CONCLUSION

These were children of tender years. Unprompted by any leading questions during the course of the competency hearing, they both were clear that the disclosure to their grandmother occurred shortly after the incident. This fact was glossed-over at trial via the introduction of hearsay statements, that being the "consistent, consistent, consistent" part of the prosecution's case.

The danger in cases such as this is that, ultimately, the truth is not in the hands of the child victims but in the adults who surround them who, consciously or otherwise, can easily influence what the children say. The lingering fact remains that the children both indicated that the disclosure was very shortly after the incident. Tessa was extremely specific: three days later. If a person believed Mr. Butcher responsible, and directed the children in that direction, then they would have to be directed toward the day of Kaylee's birthday to make the connection to Mr. Butcher fit. Much of this case relied on the admission of the children's statements to others to both establish and bolster the version of events which played out at trial. By the time of trial, their version of the facts was well-settled. Inconsistencies which pre-dated their trial testimony were obviated by the introduction of the hearsay testimony.

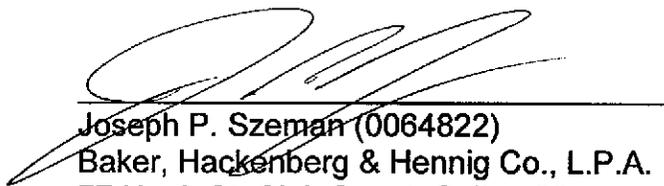
Many of the claimed facts simply made little sense. Mr. Butcher was accused of raping the children in a house filled with people, some of whom were reportedly just across the hall. No one heard crying. No one asked what was going on. No one noticed anything. Per the children, he or Ms. Turner told them to go upstairs where he was waiting for them. The children did so without comment and then later left the room without comment.

Defense witnesses, inclusive of Mr. Butcher, denied he had any contact with these children the date in question. As detailed above, there is room for doubt with respect to when this incident actually occurred and, therefore, who was responsible. Dominique could not even identify Mr. Butcher in the court room as being the perpetrator. Far too much of the evidence against him was improperly admitted, either by the trial court or by his own counsel's inattention in failing to make basic objections to highly incriminating hearsay testimony. This is the very evidence the State relied upon to make its case. When one

removes all this hearsay from the record, as the Court of Appeals concluded, what is left is evidence subject to sufficient doubt as to undermine confidence in the verdict.

For all of the foregoing reasons, this is a very fact-specific case which does not involve any matters either of public or great general interest nor does it involve a substantial constitutional question. The propositions of law raised by Appellant are well-settled by existing precedent properly applied by the Court of Appeals. Accordingly, Appellee respectfully requests this Honorable Court not grant jurisdiction.

Respectfully submitted,

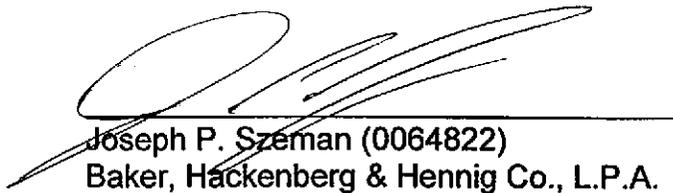


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I certify that a copy of this Memorandum in Response was sent by ordinary U.S. mail to counsel for Appellant, Thomas L. Sartini, Ashtabula County Prosecutor, and Shelley M. Pratt, Assistant Prosecuting Attorney, 25 West Jefferson Street, Jefferson, Ohio 44047 on February 16, 2007.



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