IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Appellant,	:	Case No. 2007-1046
	:	
v.	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District, Case Nos. 06AP-870, 06AP-899
CHRISTOPHER SWANN,	:	
	:	
Appellee.	:	

MEMORANDUM IN RESPONSE OF

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TABLE OF CONTENTS

The State's Appeal Does Not Present a Case of Public or Great General Interest or Involve a Substantial Constitutional Question 1

Statement of the Case and the Facts 1

Argument in response to propositions of law 3

Appellant's First Proposition of Law: The Federal Constitution does not prohibit a trial court from applying the "corroboration" requirement in Evid.R. 804(B)(3) to exclude hearsay testimony offered by a criminal defendant. (*Holmes v. South Carolina* (2006), 126 S. Ct. 1727,distinguished) 4

Appellant's Second Proposition of Law: A trial court's evidentiary rulings are subject to an abuse-of-discretion standard on appeal. Thus, a trial court's application of the "corroboration requirement in Evid.R. 804(B)(3) may not be reversed unless the trial court abused its discretion in addressing whether the corroborating circumstances clearly indicate the truthworthiness of the statement." (State v. Landrum (1990), 53 Ohio St.3d. 107, 114, followed 6

CONCLUSION 12

CERTIFICATE OF SERVICE 12

THE STATE'S APPEAL DOES NOT PRESENT A CASE OF PUBLIC OR GREAT GENERAL LEGAL INTEREST OR INVOLVE 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. 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.

The Court of Appeals conducted an extensive review of the record in this case. The decision it reached was very fact-specific to this case, and does not attempt to reinterpret or alter existing case law or the Rules of Evidence.

This case was built around the testimony of witnesses, not forensic evidence. The sole issue in this case was one of identification of appellee, Christopher Swann, as the perpetrator, and the state relied upon its witnesses for this identification. Unfortunately, the state also attempted to preclude the defense from attacking that identification with testimony showing third party responsibility for this crime. In so doing, appellant prevented Mr. Swann from presenting a complete defense in violation of his due process and compulsory process rights. The court of appeals simply found that in this case, compulsory process requires that Mr. Swann have the opportunity to admit this evidence, which is material to his defense, and that it is for the jury to assess the weight to be given to that evidence.

STATEMENT OF THE CASE AND THE FACTS

A Franklin County Grand Jury returned a two-count indictment against the Defendant-Appellee Christopher Swann alleging that he committed the offenses of Felonious Assault with Specification, and Having Weapon While Under Disability.

The case arose from a shooting that occurred on June 25, 2005, at the intersection of Kossuth and Wager in Columbus.

The case proceeded to a jury trial on count one of the indictment, Felonious Assault; with count 2, Having A Weapon Under Disability being tried to the Court. He was found guilty of count 1, but not guilty of count 2, and sentenced according to law. A timely appeal followed from this judgment of conviction and sentence. The Court of Appeals held that evidentiary errors committed during the course of his trial prejudiced his case and required a remand for purposes of a new trial. The State takes issue with that decision.

On the date of the offense, the victim and a friend, Jazz (James Davis), were in his bedroom preparing to smoke marijuana, when they heard gunshots. Mr. Stith was upset by this and ran outside yelling at the shooters. He testified that Appellee yelled "fuck you" and he was shot in the neck and leg. He testified that he could not see what the shooter held in his hand, but when he heard the shot, he "seen the fire come from him". Before cross examination there was ruling by the court that the witness could not be questioned regarding hearsay statements concerning Carlisle's admissions unless and until Carlyle was voir dired regarding what if any testimony he would give in the case. On cross examination, he was shown the summary of his interview with then Detective Carney, where he indicated that there were two other people with appellant when he was shot. Mr. Stith indicated that the two people mentioned in the summary (including Delmar Carlisle) are normally with appellant, but he denied ever telling the detective that they were with appellant at the time of the shooting.

James Davis (Jazz) testified to the same basic facts as the victim. He stated that after the victim had been gone for some time, Mr. Stith yelled for him, and he went outside to find him bleeding, lying in the middle of the Wager St. Mr. Stith told him "Kurty-Kurt and them shot him". He indicated that it sounded like he heard two larger caliber guns that night.

Kavar Thompson testified that he saw appellee and Dre shooting guns in the alley behind appellee's house at 8:30 or 9:00 p.m. Mr. Thompson saw Mr. Stith come out of his house yelling, and then saw appellee shoot Mr. Stith. On cross-examination, defense counsel impeached him

with a police summary prepared by Detective Carney indicating that Dre and Marty (Carlisle) were with appellee that day. Mr. Thompson insisted that the summary was incorrect, and that he had not said that. There were also inconsistencies regarding whether appellee was inside or outside a fence, and whether appellee had anything covering his head. Counsel then impeached him with a second police summary regarding an interview with Detective Weiss and Prosecutor Farbacher, which indicated that both Dre and Marty were with appellee.

The defense called former Detective Carney to review the statement he took from Mr. Stith several days following the shooting. He acknowledged that Mr. Stith had told him that Dre and Marty were "out there on the porch with . . . Kurt". The report also indicated that all three individuals were firing guns into the air.

The Court then conducted a voir dire of Delmar Carlisle outside the presence of the jury, and the Court ruled that because of invoking his Fifth Amendments rights, Delmar Carlisle was unavailable as a witness. The defense proffered the testimony of the witnesses to Carlisle's confessions, but the Court found that corroboration was lacking, and excluded any testimony regarding the confessions from being admitted.

Faye Glenn, Kenny Green, Tia Holland, and Tony McGrapth all testified that appellee was at 859 Ann Street playing cards and socializing at the time of the shooting and therefore could not have been involved.

ARGUMENT

As the State correctly and repeatedly points out in its memorandum, Judge Tyack's lead opinion had only one vote. However, as the United States Supreme Court has held, when a majority of a court cannot agree on a rationale, the holding of the court is that of the judge taking the narrowest position. *Grutter v. Bollinger,* 539 U.S. 306, 325 (U.S. 2003) quoting *Marks v. United States* (1977), 430 U.S. 188, 193 ("when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be

viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.")

Here, under *Grutter* and *Marks*, Judge Tyack's broad opinion is not the opinion of the court of appeals. The opinion of the court is Judge Brown's opinion concurring on the narrower ground of whether, given the facts of this case, the trial court properly applied Evidence Rule 804.

Contrary to the State's view, although each Judge issued a separate opinion, the concurring opinions do not demonstrate a divided Court, and in fact both indicate that under the ***facts of this case***, the excluded evidence should have been admitted.

Appellant's First Proposition of Law: The Federal Constitution does not prohibit a trial court from applying the "corroboration" requirement in Evid.R. 804(B)(3) to exclude hearsay testimony offered by a criminal defendant. (*Holmes v. South Carolina* (2006), 126 S. Ct.1727,distinguished).

A. The Law

In pertinent part, the *Holmes* decision holds as follows: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane v.. Kentucky,* 476 U. S. 683, 690. This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *Scheffer, supra,* at 308.

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. See, *e.g.,* Fed. Rule Evid. 403; Uniform Rule of Evid. 45 (1953); ALI, Model Code of Evidence Rule 303 (1942); 3 J. Wigmore, Evidence §§1863, 1904

(1904). Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence that is 'repetitive ... , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.' " *Crane, supra,* at 689-690 (quoting *Delaware v.. Van Arsdall,* 475 U. S. 673, 679 (1986); ellipsis and brackets in original). See also *Montana v.. Egelhoff,* 518 U. S. 37, 42 (1996) (plurality opinion) (terming such rules "familiar and unquestionably constitutional").

A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. See, *e.g.,* 41 C. J. S., Homicide §216, pp. 56-58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded"); 40A Am. Jur. 2d, Homicide §286, pp. 136-138 (1999) ("[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged ... . [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial" (footnotes omitted)). Such rules are widely accepted,*(fn*) and neither petitioner nor his *amici* challenge them here.

B. Discussion

Judge Tyack's opinion simply does not stand for the proposition asserted in Appellant's brief. It is merely the application of the *Holmes* decision to the facts of this case. Judge Tyack initially engages in a lengthy evaluation of the facts regarding the strengths and weaknesses of the State's case, the proffered testimony of the defense, and the corroboration regarding that testimony. Op., at ¶ 8, 9, 10, 11. Had his opinion been based solely on the constitutional grounds

raised in *Holmes*, there would have been no need to explore the facts of this case. Judge Tyack would have simply announced a blanket rule regarding the unconstitutionality of the Evidence Rule at issue. Instead, the Court states "the trial court's exclusion of the defense's evidence essentially allowed them to present only half of their case-the alibi portion.. The second half-that a third party, who had motive to shoot John Srith, made statements claiming responsibility for the shooting-was kept entirely from the jury." Op., at ¶ 12. Judge Tyack then goes on to say that "In light of *Holmes*, we hold that Evid.R. 804(B)(3) cannot be construed in a way that denies an accused a meaningful opportunity to present a complete defense" (Id.). Most telling on this issue is the last two sentences of the same paragraph, where Judge Tyack holds "***In this case***, (emphasis added), the trial court should have allowed the proffered testimony and evidence to be presented to the jury for its own consideration. Thus, the trial court erred by denying Swann a meaningful opportunity to present a complete defense. (Id.).The Court's holding effects only this case and not the validity of the corroboration requirement of Evid.R. 804(B)(3) itself.

Appellant's Second Proposition of Law: A trial court's evidentiary rulings are subject to an abuse-of-discretion standard on appeal. Thus, a trial court's application of the "corroboration requirement in Evid.R. 804(B)(3) may not be reversed unless the trial court abused its discretion in addressing whether the corroborating circumstances clearly indicate the truthworthiness of the statement." (*State v. Landrum* (1990), 53 Ohio St.3d. 107, 114, followed)

A. Introduction

Judge Brown's opinion does not present this Court with a substantial constitutional question. In a two paragraph opinion, Judge Brown found that the defense presented sufficient corroborating evidence to justify presentation of evidence that another person had confessed to the offense and, as with Judge Tyack's decision, is therefore entirely fact specific to this case and does not present any great question of general interest or a substantial constitution question. Opinion, at ¶35-36.

The State asks this Court to reverse a holding that Judge Brown did not make. Specifically, the State faults Judge Brown for not expressly stating in her opinion that she

applied an abuse of discretion standard. The state and Mr. Swann both argued in their appellate briefs, and therefore agreed, that an abuse of discretion standard applied. There was, therefore, no question as to the applicable standard. Although Judge Brown did not state the standard she used, her silence should not form the basis for an appeal. Further, applying the presumption of regularity, this Court should presume that the court used the correct test. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3.

So even if this Court found that the abuse of discretion standard was appropriate, it would be left only with the question of whether Judge Brown properly applied the standard to the specific facts of this case. This Court normally does not engage in such error correction.

The State also asks this Court to reverse because it alleges Judge Brown "ignored" a key word in the rule. However, in the first paragraph of her opinion, Judge Brown clarifies that in this case "at issue is whether corroborating circumstances clearly indicate the trustworthiness of Carlisle's statement." Opinion, at ¶35. There is no question from Judge Brown's own opinion that she understood and correctly analyzed the facts of the case under the requirements of Evid.R. 804.

B. The Law

Both Evid. R. 804(B)(3) and the Due Process Clause demand that appellee be permitted to offer the testimony at issue. In relevant part, Evid. R. 804(B)(3) provides: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: * * *

(3) *Statement against interest*. A statement that so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. In *State v. Gilliam*, (1994), 70 Ohio St.3d. 17, the Court set forth the three elements that must be met for

a confession to a third party to be admissible: (1) the declarant was unavailable to testify at trial; (2) the confession tended to subject him to criminal liability such that a reasonable person in his position would not have made the confession unless he believed it to be true; and (3) corroborating circumstances clearly indicated the trustworthiness of the confession.

The State has never contested that the first two requirements were met, and only argues that the defense did not show sufficient corroborating circumstances to warrant the proffered testimony to be admitted.

The issue on appeal, therefore, was whether the trial court abused its discretion in finding that corroborating circumstances failed to clearly indicate the trustworthiness of the confessions. In *State v. Durant*, 2004-Ohio-6224, the Court discussed what "corroborating circumstances" may be relied upon to establish the trustworthiness of a statement under Evid. R. 804(B)(3). The Court looked to Due Process cases in deciding what evidence should be considered in deciding "corroborating circumstances", and determined that the court could consider circumstances beyond those immediately surrounding the making of a statement when assessing its trustworthiness under Evid.R. 804(B)(3).

The *Durant* Court cited *Chambers v. Mississippi* (1973), 410 U.S. 284, 300, in which the U.S. Supreme Court held that due process "affords criminal defendants the right to introduce into evidence third parties' declarations against penal interest-*their confessions*-when the circumstances surrounding the statements `provid[e] considerable assurance of their reliability.'". In the due process context, the Ohio Supreme Court has recognized that relevant corroborating circumstances include not only those surrounding the actual making of the statement but also any other corroborating evidence. *State v. Yarbrough*, (2002), 95 Ohio St.3d, 227, 238, fn. 2 The Court stated, "Although `the fact that other evidence corroborates the statement is irrelevant' to the Confrontation Clause analysis when the state attempts to introduce a statement against interest * * *, the same is not true when the defense attempts to introduce such a statement as a

matter of due process." See also *Chambers,* supra, 300 (relying in part on the fact that third-party confessions were corroborated by "some other evidence in the case" to find that the defendant had a due process right to introduce the confessions).

In *State v. Landrum* (1990), 53 Ohio St.3d 107, the defendant invoked Evid.R. 804(B)(3) to introduce a third-party's out-of-court statement confessing to a crime. The Ohio Supreme Court held that the confession was sufficiently reliable to be admissible under the evidence rule. Important factors in that case were that the statement was made spontaneously shortly after the crime, and that declarant had no motive to lie. The Court also considered evidence other than the circumstances surrounding the making of the statement, including a lack of blood on the defendant's clothing, to corroborate the confession. Further the Court held that the credibility of the witness does not effect the statement's admissibility, as Evid. R. 804(B)(3) refers to trustworthiness of the statement not the witness. Credibility of the witness is a decision for the jury.

In *State v. Sumlin*, 1994-Ohio-508, the defendant sought to use Evid. R. 804(B)(3) to introduce written notes that were against the penal interest of an unavailable witness. Upon review, the Ohio Supreme Court found no abuse of discretion in the trial court's ruling that the notes were not sufficiently corroborated to be trustworthy. However, the Court considered evidence other than the circumstances immediately surrounding the writing of the notes to make this determination. The Court found statements made on the day of trial to people aligned with appellant, and where declarant was accepting all instead of part of the responsibility for the crime, having already been also charged, was not sufficient corroboration. However, having determined that the trial court did not abuse its discretion in declining to allow the statements into evidence pursuant to Evid. R. 804(B)(3), the court also considered whether fundamental principles of due process required the trial court to admit the statements.

The court in this case also looked to *Chambers*, supra, for guidance. The United States Supreme Court had considered whether a defendant's right to a fair trial was violated when the accused was not allowed to enter into evidence hearsay statements made by a declarant admitting responsibility for commission of a murder and exonerating the accused. Mississippi rules of evidence at the time did not allow a declarant's statement against penal interest to be admitted into evidence as an exception to the hearsay rule, regardless of the reliability of the statement *Chambers*, supra, at 299. The court found that the defendant's due process right to a fair trial was violated under the facts and circumstances of the case (in that defendant was not allowed to present reliable evidence) and reversed the murder conviction. Id., at 302-303. In *Green v. Georgia* (1979), 442 U.S. 95, 97, the Supreme Court, citing Chambers, stated that "the hearsay rule may not be applied mechanistically to defeat the ends of justice."' See *Landrum*, supra, at 114, quoting *Chambers* and *Green* for the same proposition.

Through Evid.R. 804(B)(3), Ohio has addressed one of the principal concerns of cases such as *Chambers*; which is that a criminal defendant's reliable evidence should not be excluded through application of hearsay rules that do not adequately protect due process rights. Evid.R. 804(B)(3) strikes a balance between hearsay statements against penal interest which are sufficiently trustworthy to be admissible and those which are not.

It is well settled law that statements to close family members have "particularized guarantees of trustworthiness" *United States v. Westmoreland* (C.A.7, 2001), 240 F.3d 618, 628, quoting *United States v. Tocco* (C.A.6, 2000), 200 F.3d 401, 416. "Even to people we trust completely, we are not likely to admit serious fault of which we are innocent * * *." 4 Mueller & Kirkpatrick, Federal Evidence (2d Ed.1994) 822-823, Section 496. Thus, where a declarant makes a statement to someone with whom he has a close personal relationship, such as a spouse, child, or friend, courts usually hold that the relationship is a corroborating circumstance supporting the statement's trustworthiness. *Green*, supra, at 97, 99.

C. Discussion

In the case at bar, the statements were made shortly after the shooting, not close to the trial date. Lisa Hughes testified that Carlisle confessed to her in July of 2005, not even a month after the shooting. Her daughters, Cierra and Tiffany, confirmed that date. Tia Holland testified that she and Mr. Swann took care of Carlisle and considered him a little brother. He confessed to her at least ten times over the year since the shooting. The first time was "within a couple days of the shooting". Tia Holland indicates that she did notify Detective Carney of the statement. The victim, John Stith, also reported to detectives during an interview, that he had heard that Marty, or Carlisle, was the shooter. Clearly, the statements were not recently fabricated to assist Mr. Swann at trial. The statements were completely voluntary and made to close friends, who he considered to be family. He had no motive to lie when confessing to this shooting, and confessed to at least four people, one of them on many occasions. He was not with Mr. Swann at the time of any of the statements, indicating a lack of coercion. The statement is further corroborated by witness statements that Carlisle was present in the area at the time of the shooting. Detective Carney testified that Mr. Stith told him Mr. Swann was with two other individuals, one of whom was Marty, or Carlisle. It was dark, and the shooter was at least partially obstructed by a bush. His version of events in his confessions matches the descriptions given by the prosecution witnesses. Finally, Mr. Swann offered an alibi through four witnesses, indicating he was with several friends at a party at the time of the incident. All of these factors provide corroboration to the confession of Delmar Carlisle, and verify the trustworthiness of those statements. The Court of Appeals correctly found that the trial court clearly abused it's discretion in its ruling precluding testimony concerning Carlisle's confession.

CONCLUSION

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.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum of Appellee was served upon the Franklin County Prosecutor, 373 South High St., Columbus, Ohio 43215, by hand delivery this 10th day of July, 2007.

Dianne Worthington (0005518)