

IN THE SUPREME COURT OF OHIO
2008

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MICHAEL ARNOLD,

Defendant-Appellant.

Case No. 2008-1693

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 07AP-789

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
614/462-3555

And

KIMBERLY BOND 0076203
(Counsel of Record)
Assistant Prosecuting Attorney
kmbond@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLEE

YEURA R. VENTERS 0014879
Franklin County Public Defender
373 South High Street-12th Fl.
Columbus, Ohio 43215
614/462-3960

and

DAVID L. STRAIT 0024103
(Counsel of Record)
Assistant Public Defender

COUNSEL FOR DEFENDANT-
APPELLANT

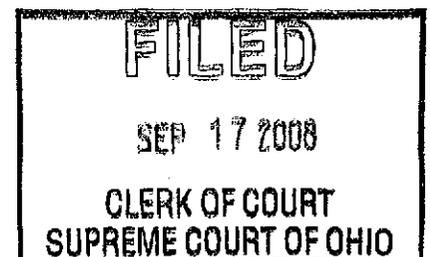


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The Tenth District Court of Appeals properly found that a trial court acts within its discretion by admitting a child-victim's statements to a social worker when those statements were made for the purposes of medical treatment and diagnosis and that, because such statements are not testimonial, they do not violate *Crawford v. Washington* (2004), 541 U.S. 36. These issues were addressed by this Court in *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267. In addressing the admissibility of a child-victim's statements under Evid.R. 803(4), this Court noted that "[s]tatements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford*, because they are not even remotely related to the evils which the Confrontation Clause was designed to avoid." *Id.* at ¶ 18.

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

On December 15, 2005, defendant was indicted on two counts of rape, both first-degree felonies. Count one alleged that defendant engaged in vaginal intercourse and count two alleged cunnilingus. The victim of these offenses was defendant's four year old daughter, hereafter referred to as "M.A." A jury acquitted on count two, but found defendant guilty on count one.

The facts presented at trial established that on December 7, 2005, defendant's then wife, Wendy Otto, was sleeping on the couch and was awoken by thumping noises. When she went to investigate, she found the door to the bedroom she shared with defendant locked. When defendant responded to Otto's calls and knocking, Otto noted defendant's boxers were not on all the way. Otto saw her daughter M.A. in the bed "stiff as a board" with the comforter balled up on her mid-section. Otto then noticed her daughter's underwear was bunched around her ankles and, when Otto lifted the comforter off her daughter, she saw that her daughter was not wearing underpants.

Defendant stated that he "wasn't doing anything," and defendant directed M.A. to say the same thing. However, when Otto called the police, defendant left the premises.

Officer Fritz, a firefighter/paramedic with the Columbus Fire Department, responded to the scene. Fritz observed that the child was very anxious and withdrawn. When Fritz attempted to discover what was wrong with M.A., the child put her hand to her privates.

M.A. was interviewed and examined at the Children's Advocacy Center (CAC) the next morning. Kerri Marshall, a medical forensic interviewer and licensed social worker at the CAC, conducted the interview. At trial, Marshall described the purpose of the CAC and detailed her training. Marshall explained that the purpose of the interview was for medical diagnosis and treatment of the child.

M.A. told Marshall that she and her father (defendant) were “playing pee-pees.” M.A. stated she was not wearing underwear. The child stated that defendant put his pee-pee inside her pee-pee. M.A. also stated that defendant touched her pee-pee with his hand and his mouth. M.A. did not testify.

Gail Horner, a nurse practitioner at the CAC, examined M.A. after the interview. Horner also described her experience and training. Horner was found to be an expert in the sexual assault field. In the genital examination of M.A., Horner found two abrasions to M.A.’s hymen. The abrasions were red but not bleeding. Horner testified that these abrasions were caused by acute trauma to the hymen and that these abrasions were the result of a penetration injury.

Although defendant sought to show that a “straddling” injury could mimic sexual abuse trauma, Dr. Christine Baker confirmed that a straddle injury would not cause injury to the hymen.

Based on the CAC procedures, the Tenth District Court of Appeals found that the child’s statements were properly admitted and those statements did not violate the Sixth Amendment. *State v. Arnold*, 10th Dist. No. 07AP-789, 2008-Ohio-3471.

ARGUMENT

RESPONSE TO DEFENDANT'S PROPOSITION OF LAW

A CHILD-VICTIM'S STATEMENTS TO A SOCIAL WORKER MADE FOR THE PURPOSE OF DIAGNOSIS AND TREATMENT ARE PROPERLY ADMITTED UNDER EVID. R. 803(4) AND SUCH STATEMENTS DO NOT IMPLICATE THE SIXTH AMENDMENT.

Defendant's complaints regarding the admission of the victim's statements through the testimony of the CAC social worker have been rejected by this Court in *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267. The *Muttart* Court concluded that a child-victim's statements to a social worker, made for the purpose of diagnosis and treatment, were properly admitted under Evid. R. 803(4). *Id.* at ¶ 46; see also, *State v. D.H.*, 10th Dist. No. 07AP-73, 2007-Ohio-5970; *State v. Edinger*, 10th Dist. No. 05AP-31, 2006-Ohio-1527. And, because the statements are not "testimonial," the admission of such statements does not implicate defendant's Sixth Amendment rights. *Muttart*, *supra* at ¶ 61; see also, *D.H.*, *supra* at ¶ 48.

Defendant's reliance on this Court's decision in *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, is misplaced. *Siler* dealt with the admission of a child-victim's statements to a detective during the course of a police interrogation. *Id.* at ¶ 2. The analysis in *Siler* is inapposite because there was no police interrogation in this case.

1. Statements were admissible under Evid. R. 803(4)

Evid.R. 803(4) excepts from the hearsay rule any out-of-court statement "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." In the specific context of child sexual abuse cases, this Court has stated that a trial court is within its discretion when it admits a

child declarant's statements made for the purpose of medical diagnosis or treatment pursuant to Evid.R. 803(4). *State v. Dever* (1992), 64 Ohio St.3d 401, 412.

Marshall testified that the purpose of the CAC interview is to obtain information about the alleged assault so that the physician or nurse practitioner can determine what treatment or testing is required. The doctor or nurse relies on the information obtained in this interview in making their diagnosis and determining treatment. Law enforcement personnel, as well as other medical personnel, are permitted to watch from another room on close-circuit television so that they do not have to subject the child to repeated interviews.

Horner also testified about the CAC "one-interview" process. Horner confirmed that the information obtained during the interview "guides" the physical examination. Horner explained that when a child indicates that a penis touched her vagina, as in this case, then she knows that she will need to order tests for sexually transmitted diseases. According to Horner, the history obtained by the forensic interviewer is important for her to make an accurate diagnosis and to determine the appropriate treatment for a specific case. Horner conducted her examination of M.A. based on the information Marshall obtained.

Courts have previously reviewed the CAC process and repeatedly found that statements made during a CAC interview are properly admitted under Evid. R.803(4). *D.H.*, supra at ¶ 39; *Edinger*, supra ¶¶ 63-64; *State v. Dumas* (Feb. 18, 1999), 10th Dist. No. 98AP-581. And, in *D.H.*, the Tenth District Court of Appeals rejected the *Butcher* decision, cited by defendant, where the Eleventh District found the interview was designed to gather evidence against the defendant. *D.H.*, supra at ¶ 40. The distinction noted by the Tenth District in *D.H.* is well founded. See *Id.* at ¶¶ 40-41. Like *D.H.*, the record here confirms that the CAC is part of Children's Hospital rather than a government or law enforcement agency. Both Marshall and

Horner are employees of Children's Hospital. The interview procedure is not directed by law enforcement, but rather has been designed to limit the trauma to the child by having one interview. In that interview, the social worker attempts to determine what, if anything, happened to the child so that the treating physician or nurse practitioner can make an informed diagnosis of the child, order appropriate tests and establish treatment protocol.

Given this case law and the record below, M.A.'s statements were properly admitted under Evid. R.803(4).

2. Statements are non-testimonial

In *Crawford v. Washington* (2004), 541 U.S. 36, 53, the United States Supreme Court made it clear that the primary focus of the Confrontation Clause is testimonial hearsay. The clause is less concerned with well-established hearsay exceptions, and the states are free to develop evidentiary jurisprudence so long as it does not violate the Confrontation Clause. *Id.* at 55, 68. The admissibility of statements made for the purpose of medical diagnosis or treatment is a "firmly rooted" hearsay exception. *White v. Illinois* (1992), 502 U.S. 346, 355 n.8; *Dever*, 64 Ohio St.3d at 418. The Court has since clarified that testimonial statements mark out not merely the "core" of the Confrontation Clause, but its perimeter. *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 2274.

The *Muttart* Court held that statements made by a minor child to a social worker and clinical counselor are not testimonial as that term is used in *Crawford*. The statements in *Muttart* were not made in the context of courtroom testimony or its equivalent. They were not elicited for the purpose of a police investigation, and the hospital visit was not a façade for such an investigation. The primary concern of the mother was the well-being of her children.

Statements made for the purpose of medical diagnosis or treatment are presumptively reliable. *Muttart*, supra, at ¶39, citing *Dever*, 64 Ohio St.3d at 410-411.

In a similar case, the Tenth District properly found that an objective examination of the child-victim's out-of-court statements and the surroundings in which the victim made those statements establishes that one could reasonably conclude that the interview was for medical diagnosis and treatment, rather than for a criminal trial. *D.H.*, supra at ¶53, citing *Muttart*.

The underlying rationale for the reliability of statements made for medical diagnosis or treatment stems not just from the "selfish interest" of the patient, but also upon the fact that physicians themselves rely on the statements in treatment and diagnosis. *Dever*, supra at 411. In *Muttart*, supra at ¶37-41, this Court again relied on both the selfish interest and professional reliance underpinnings of Evid.R. 803(4) statements when it distinguished its admissibility requirements with those of an Evid.R. 807 statement.

The reliability of the statements admitted below, like the statements approved in *Muttart*, was grounded both in the patient's selfish interest and in the professional reliance to which they were entitled. The professional reliance aspect of the properly admitted Evid.R. 803(4) statements is found in the testimony below. The *Muttart* Court set forth the practical value of professional reliance as a factor in admitting an Evid.R. 803(4) statement:

The general reliance upon subjective facts by the medical profession and the ability of its members to evaluate the accuracy of statements made to them is considered sufficient protection against contrived symptoms. *** We believe that the secondary rationale of professional reliance is of great import in abuse cases.

Muttart, supra at ¶41 (citations, internal quotations omitted).

A child's appreciation of the responsibility to tell the truth is recognized as more pronounced in the medical context than in the courtroom. In cases in which the patient-declarant is of tender years, the probability of understanding the significance of the visit to the doctor's

office is heightened once the child is at the doctor's office, and "the motivation for diagnosis and treatment will normally be present." *Dever*, supra at 410.

In *State v. Miller* (1988), 43 Ohio App.3d 44, 46-47, the court stated:

The cornerstone of admissibility under Evid.R. 803(4) is whether the statements are reasonably pertinent to diagnosis or treatment. ***

The statements made by [the child victim] were clearly related to diagnosis and treatment. A fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription.

(citations omitted).

Like the above cited cases, this case involved statements by a child-victim to a social worker. The interview was conducted at the CAC, and was recorded to a DVD. M.A. did not testify at the trial. Marshall, explaining the CAC interview process, stated that the purpose of the interview was for diagnosis and treatment. Marshall further noted that the doctors rely on the information she obtains in her interview. Nurse Practitioner Horner confirmed the purpose of the interview and stated that she relies on the information obtained during the interview for diagnosis and treatment.

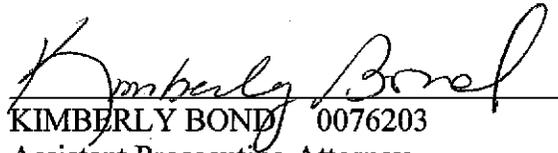
Based on the foregoing, defendant's proposition of law should be overruled.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney

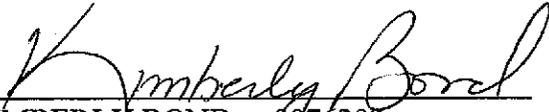


KIMBERLY BOND 0076203
Assistant Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
614/462-3555
kmbond@franklincountyohio.gov

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand-delivered this day, September 17th, 2008, to DAVID L. STRAIT, 373 South High Street-12th Fl., Columbus, Ohio 43215; Counsel for Defendant-Appellant.


KIMBERLY BOND 0076203
Assistant Prosecuting Attorney