

**ORIGINAL**

NO. 2009-2208

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 91324

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STATE OF OHIO,

Plaintiff-Appellant

-vs-

WILLIAM DAVIS,

Defendant-Appellee

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**REPLY BRIEF OF APPELLANT**

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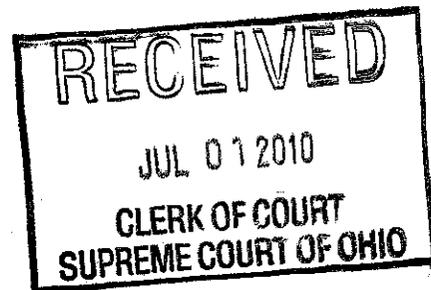
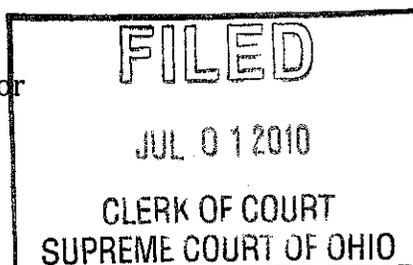
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## I. Summary of Appellant's Arguments

Appellee William Davis was convicted of multiple sexual crimes against two young girls. He is serving a life sentence. The victims, their family, and police officers testified as to the rapes and other acts of molestation against Davis's victims. In addition to those witnesses, the State called Appellee's wife to testify. Her testimony was used primarily to address the content of taped conversations she had with Davis. Because the trial court did not determine her competency to testify under Evid.R. 601(B), and where Appellee did not object to the trial court's error, the appellate court sua sponte noted the error, stated it to be plain error, and reversed the matter for new trial.

However, the appellate court did not perform any substantive analysis of the evidence to determine the impact her testimony had on the verdicts, nor does it determine whether the testimony would have changed the outcome at trial. Rather, the opinion creates a per se rule of reversal when a trial court fails to determine a testifying spouse's competency; regardless of whether a defendant objected to the lack of procedure. By failing to engage in any substantive analysis of the spousal testimony, the Eighth District Court of Appeals created a new standard of law that equates plain error as to testimonial privilege under Evid.R. 601(B) to structural error requiring reversal. Because this Court has applied a plain error analysis where a court fails to determine the competency of a testifying spouse under Evid.R. 601(B), the appellate court has failed to follow precedent and has created a new per se rule of law.

The effect of this change is troublesome; the appellate court not only disregarded this Court's precedence, but it has ignored Crim.R. 52's requirements that have long been interpreted to require a two-part analysis if error is noted for the first time on appeal. That analysis requires that the error be noticed, and then, the effect of the error upon the outcome is to be determined. The Eighth District truncated and altered the analysis in this matter. This Court accepted jurisdiction of this matter to address the following propositions of law:

#### Proposition of Law I

Where no objection is made to spousal testimony, a court's failure to inform the spouse of competency under Evid.R. 601 is not structural error requiring reversal but may be noticed as plain error.

#### Proposition of Law II

The plain error standard of review requires a reviewing court to 1) notice unobjected to and unrecognized error at trial, and 2) determine that, but for the error the outcome at trial would be different.

#### II. Plain Error Analysis Applies to the Error in This Case

Appellee does not disagree with Appellant's First Proposition of Law within his Merit Brief, noting that this Court has applied a plain error standard of review in *State v. Adamson*, 72 Ohio St.3d 431, 1995-Ohio-199 and *State v. Brown*, 115 Ohio St.3d 55, 67, 2007-Ohio-4837. *Appellee's Merit Brief*, at p. 12 ("Mr. Davis does not dispute the legal standard that this Court formulated over ten years ago in *State v. Adamson*, and subsequently affirmed in *State v. Brown*.") However, Appellee does not address the necessity of adopting Appellant's First Proposition of Law in its Merit Brief.

The per se reversal of the verdicts in this case convicting Davis is one that is akin to structural error. Without any substantive analysis under the two-part plain error standard of review, the appellate opinion has seemingly confused the error in this case to that of structural error requiring automatic reversal of the convictions. This confusion is even more apparent in the appellate court's apology for vacating the convictions in this case. After vacating Davis's convictions, the appellate court wrote, "While we are aware of the sensitive and traumatic nature of child sex abuse allegations, we are compelled to remand this case for a new trial, given the mandates in *Brown* and *Adamson*, supra." *State v. Davis*, Cuyahoga App. No. 91324, 2009-Ohio-5217, at ¶30 (Citing, *State v. Brown*, 115 Ohio St.3d 55, 67, 2007-Ohio-4837; *State v. Adamson*, 72 Ohio St.3d 431, 1995-Ohio-199.)

The appellate court was not "compelled" or "mandated" to reverse this matter after sua sponte noticing that the trial court failed to determine Mrs. Davis's competency. It was "compelled" to conduct a substantive analysis of the effect the testimony had on the outcome of the proceedings by conducting a review of the error under the proper standard, a task it did not undertake. As such, Appellant asks that this Court adopt as law its first Proposition of Law that reads, "Where no objection is made to spousal testimony, a court's failure to inform the spouse of competency under Evid.R. 601 is not structural error requiring reversal but may be noticed as plain error. "

III. Appellee's Analysis of the Effect of the Testimony is Conclusory, As Was The Appellate Opinion

Appellee's response to the Second Proposition of Law accepted in this case is to present in detail Mrs. Davis's testimony and summarily conclude that it affected

the outcome of the proceedings. The detail of the victims' testimony is ignored, the corroborating testimony of the victims' testimony is ignored, and most importantly, Appellee's brief ignores the fact that the most damaging evidence presented to the jury through Mrs. Davis's testimony is otherwise admissible evidence.

In his Merit Brief, Appellee devotes three paragraphs to describe the detailed and substantive testimony of Davis's crimes, yet devotes five pages to a recitation of Mrs. Davis's testimony. Appellee's Merit Brief, at pps. 4-8. This presentation of the facts by Appellee is designed to focus this Court's attention not on reviewing the totality of the evidence presented in this case, but to inflate the importance of Mrs. Davis's testimony. At trial, Mrs. Davis's testimony was not the crucial evidence, the proverbial "smoking gun," used to prove any element of the crimes charged. Davis was convicted of 8 counts of rape of child under the age of thirteen in violation of R.C. 2907.02(A)(1)(b), nineteen counts of rape with force in violation of R.C. 2907.02(A)(2), one count of rape under age of ten with force in violation of R.C. 2907.02(A)(2), and three counts of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4). Mrs. Davis's testimony denied that any of these crimes occurred (Tr. 630-634.)

When looking to the evidence at trial that was presented to obtain the convictions, Mrs. Davis's testimony pales in importance when compared to Davis's primary victim's, D.S., testimony that he began raping her at age 9. D.S. testified that the first time Davis abused her was when, "He went inside my pants and began to play with my vagina." (Tr. 302.) She described the second act as "painful and tight." (Tr. 304) She further testified that as a result of being touched by Davis, there was

blood in her underwear. (Tr. 305) She testified to specific sexual acts Davis performed on her. When she was ten or eleven, "He pulled my pant down and began to put his penis in my vagina," describing it as "painful," and testifying the encounter lasted five to ten minutes. (Tr. 308) She testified that on a later occasion, "I was sitting on the love seat, [Davis] came and told me to pull my pants down and he inserted his penis inside my vagina," with that incident lasting ten minutes. (Tr. 310, 312) She stated Davis ejaculated on the floor. (Tr. 312) Two to three weeks later, Davis again raped her. (Tr. 313-15) Davis ordered her to pull her pants down and then she testified that he, "stuck his fingers inside my vagina." (Tr. 315) When D.S. was twelve, Davis and his wife moved to a new location. (Tr. 316) She testified that Davis, "got on top and inserted his penis inside my vagina." (Tr. 318) She then stated that she didn't, "want it to happen anymore," and "I said that I couldn't take it no more and I wanted this to stop." (Tr. 318, 319) D.S. detailed the next rape, stating that it lasted only five minutes, (Tr. 323) And the next. (Tr. 324-26) And the next, when she was 13 or 14 years old. (Tr. 330-33) And the next. (Tr. 333-36.) And the next. (Tr. 337-38.) And the next. (Tr. 345) And the next. (Tr. 349-50) And the next. (Tr. 350-55) And the next, an attempt where Davis hurried in and "rubbed up against my butt and then he left out." (Tr. 358.)

D.S. wanted to end the abuse and not go to Davis's home, but was afraid it would hurt Mrs. Davis as D.S. was providing help to her. (Tr. 360) But the abuse continued as D.S. was again raped in Davis's home. (Tr. 363-64) By this point, D.S. pretended to be asleep, and felt "sad and abused." (Tr. 364) She wanted to go home, but feared Davis. (Tr. 366) The abuse continued, and she was raped again.

(Tr. 371-73. And raped again. (Tr. 376-79) And again. (Tr. 385-86.) And again. (Tr. 398-99) And again. (Tr. 406-08) And again, over D.S.'s protestations. (Tr. 417-18.) She testified the Davis' moved away. A year later, she disclosed this pattern of abuse to her mother. (Tr. 435) D.S.'s younger sister D.T. was in fifth grade when she testified at trial. (Tr. 507) She testified that before the Davis's moved to Columbus, Davis would touch her on her chest, rubbing it. (Tr. 517) She recalled this specifically happened two times. (Id.)

The victims' testimony was the direct evidence used and relied upon by the State in securing the convictions in this case. Appellee's hyperbolic recitation of the record within his Merit Brief and his claim of significant reliance by the State on Mrs. Davis's testimony to secure the convictions is not supported by a reading of the entire record. Moreover, Appellee fails to address the fact that the testimony that he claims most damaging from Mrs. Davis would have otherwise been admissible. Because of that, confidence in the verdicts in this case has not been undermined when the record is considered as if Mrs. Davis had been informed of privilege and decided not to testify at trial.

In his Merit Brief, Appellee claims that the appellate opinion reveals that a plain error analysis was done, albeit realizing that the analysis was done "implicitly." "\*\*\*[T]he prejudicial nature of the trial court's error is *implicit* within that analysis." Appellee's Merit Brief, at p. 13 (Emphasis added.) Appellee then attempts to divine that implicit finding of prejudice, noting that the appellate court stated that the State was permitted to treat Mrs. Davis as an adverse witness. *Id.*, at p. 17. Appellee then quotes the entirety of the appellate opinion's alleged plain

error analysis, which consists of one paragraph stating law and one paragraph discussing the manner and content of Mrs. Davis's testimony. *Id.*, at p. 18. (Block quoting, *Davis*, 2009-Ohio-5217, at ¶ 28-29.) By citing these paragraphs, Appellee has highlighted the lack of substantive analysis. The appellate court did not examine the context of Mrs. Davis's testimony in securing the verdicts; it merely noted that Mrs. Davis did not have direct knowledge of the crimes alleged and that she made inconsistent statements as to her own belief of whether Appellee committed the crimes. *Davis*, 2009-Ohio-5217, at ¶ 29. It noted that the State was permitted to treat Mrs. Davis as a hostile witness and that the trial court admonished Mrs. Davis to testify without directing her attention to Appellee. *Id.* It finally noted that counsel did not object to the testimony and that the trial court had failed to determine Mrs. Davis' competency to testify. *Id.* Appellee concludes from that paragraph, the plain error analysis is demonstrated. It clearly was not demonstrated.

There is no determination that had Mrs. Davis not testified, Appellee would not have been convicted. In *Adamson* and *Brown*, this Court was concerned with the prejudicial effect the spousal testimony had on the outcome of the case. In *Adamson*, this Court determined that the testimony was crucial to the conviction, negating the defense presented. *Adamson*, 71 Ohio St.3d, at 434-45. In *Brown*, this Court determined that the spouse's testimony was critical to proving an element of aggravated murder and that absent that testimony; the verdict upon aggravated murder was called into question. *Brown*, 2007-Ohio-4837, at ¶64.

There is no similar analysis in the appellate opinion, or in Appellee's brief. This court cannot conclude based upon inference that the appellate court found prejudice in the testimony. Such a finding is reading beyond the words of the Eighth District's opinion; a better inference flowing from the words of the opinion comes from reading the apologetic tone in the Court's statement that it was "compelled" to reverse the case.

Appellee attempts to discredit Appellant's argument by claiming that it seeks to invoke "magic words" and require such to be present to validate a plain error analysis. Specifically, Appellee writes, "However, this Court has never mandated that a reviewing court's plain-error analysis contain magic phrases that, without being present, call into question a court of appeals' opinion." Appellee's Merit Brief, at p. 19. Appellant does not seek, nor did it ask within its brief that this Court mandate specific language. On the contrary, Appellant cited this Court's standard of law as to what constitutes plain error, quoting this Court as follows:

Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise.

*Adamson*, 71 Ohio St.3d, at 434-45.

The appellate court did state some of the substance of Mrs. Davis's testimony in its opinion and it described the manner of that testimony, but nowhere did the court evaluate the impact of that testimony on the verdicts. Those statements of the record facts by the appellate court do not amount to analysis. The absence of analysis is contrasted by an examination of the cases Appellee cites at pps. 20-21 in its Merit Brief. Those 7 appellate opinions definitely demonstrate an application of a plain error analysis, where each of those opinions find a specific nexus between

the error noticed and the effect the error had upon the outcome of proceedings. There is no similar analysis in the Eighth District's opinion.

As an example of the analysis to be conducted, this Court need look no further than its opinions in *Adamson* and *Brown*. The proper standard of review where error is detected in the admission or exclusion of evidence is to determine the impact of the error upon the verdict; such analysis necessarily includes a review of the entirety of the evidence and the import the errant evidence played with the verdict. That review cannot be *implicit*; an appellate court must examine the impact the testimony had on the verdicts where an error occurs in the admission or exclusion of evidence. Here, the appellate court failed in its duty to do so, not in the recitation of "magic words" as Appellee alleges the State seeks to be mandated.

Finally, Appellee argues that even if this Court determines that the appellate court did not in fact apply the proper standard of review, the appellate court's opinion should be affirmed because Mrs. Davis's testimony was unfairly prejudicial. However, Appellee does not address the fact that the substantive testimony he cites as being the most prejudicial would otherwise be before the jury. Mrs. Davis's conversations regarding her interaction with the victims and the fact that she would keep Davis away from children would otherwise have been admissible. Despite the fact that the jury would have heard the evidence Appellee has highlighted as most prejudicial, Appellee's claim that without Mrs. Davis's testimony there would be no conviction is belied by the record. The convictions were the result of the detailed accounts of the crimes contained within the victims' testimony, testimony corroborated by other evidence presented and admitted at trial. It cannot

reasonably be said that Davis would not have been convicted had Mrs. Davis been notified of her privilege not to testify.

### III. Conclusion

In this case, the appellate court has truncated long-standing rules of conducting a plain error analysis. There is no explicit analysis of the effect Mrs. Davis's testimony had on the verdicts within the opinion; nor can an evaluation of that testimony in relation to the entirety of the evidence be presented be implicit in the opinion. The error committed by the trial court in this case was harmless error, not prejudicial and did not merit reversal of the jury's verdicts. Additionally, the State of Ohio asks that this Court adopt its Propositions of Law in order to stem any further deterioration of the analysis that needs to be conducted by appellate courts where unobjected to error is noticed upon appeal. Accordingly, the State respectfully asks this Court to reverse the decision of the Eighth District Court of Appeals and remand this case to that court for resolution of Appellee's assignments of error found to be moot.

Respectfully submitted,

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SERVICE

A copy of the foregoing Reply Brief of Appellant has been mailed this 30<sup>th</sup> day of June, 2010, to Katherine Szudy, 250 East Broad Street #1400, Columbus, Ohio 43215.

  
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