

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. 2010-1925

STATE OF OHIO :
 :
 Plaintiff-Appellant :
 :
 vs. :
 :
 DANIEL GINLEY :
 :
 Defendant-Appellee :

MERIT BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER

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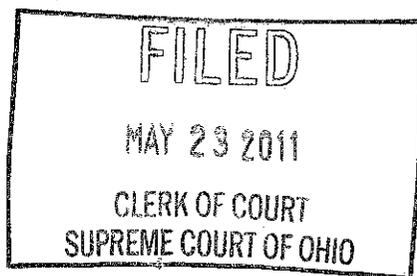


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INTEREST OF AMICUS CURIAE

The Office of the Cuyahoga County Public Defender (“your amicus”) is legal counsel to more than one-third of all indigent persons indicted for felonies in Cuyahoga County. As such the Office is the largest single source of legal representation of criminal defendants in Ohio’s largest county. The instant case is of great importance to your amicus because it calls into question the legality of a practice that is recurring within Cuyahoga County.

SUMMARY OF ARGUMENT

While arguing throughout that the *trial court* abused its discretion in not having agreed in advance of trial to call the alleged victim as a court’s witness, Appellant State of Ohio submits a single proposition of law that never even asks this Court to address the primary question in this case: Did the *Eighth District Court of Appeals* abuse *its* discretion in not granting the State leave to appeal the trial court’s decision? Unless the court of appeals abused its discretion in this regard, there can be no determination by this Court of the State’s proposition of law.

The real issue before this Court is whether (1) the court of appeals abused its discretion in declining to determine whether (2) the trial court abused its discretion in declining the State’s suggestion to rule prior to trial that the trial court would call the alleged victim as a court’s witness. The State’s appeal never directly asks this Court to peel this multi-layered abuse-of-discretion onion.

In light of the State’s failure to present a proposition that addresses the question of how to evaluate the court of appeals decision to deny a discretionary appeal, it is appropriate for this Court to reconsider and dismiss the instant appeal as improvidently allowed.

Alternatively, this Court should hold that the court of appeals did not abuse its discretion

in refusing to allow the State's appeal. The appeal was taken from a ruling in limine – a ruling that was subject to being revisited in the context of a trial that had yet to begin. The trial court was within its discretion to decline the State's suggestion to agree prior to trial to call the alleged victim as its own witness. And the court of appeals was within its discretion to decline to allow an interlocutory appeal in this regard.

One reason that neither the trial court nor the court of appeals abused their respective exercises of discretion lies in the limited nature of the trial court's ruling in limine. The trial court's ruling did not prevent the witness from testifying, nor did it prevent the State from seeking to question the witness as if on cross-examination. What the trial court did accomplish by its ruling was to keep closed the State's attempt to open the door for cross-examining the alleged victim *with her previous out-of-court statement to the police*. That the trial court was not willing to give the State such leeway prior to trial was understandable – introduction of the previous statement would have injected into the case a prior statement that could not be considered for its truth but which the jury may well have confused for substantive evidence.

Under Evid. R. 801, the only statement that would be admissible for the truth of the matter asserted in this case would be the witness' statement from the witness stand at trial – and the alleged victim, through her own retained counsel, has already indicated that she will either (1) refuse to testify on the basis of self-incrimination because she now admits that her prior statement was false, or (2) testify that the defendant did not assault her, which she maintains is the truth. In either event, this witness will not inculcate the defendant.

The trial judge was well within its discretion to decline the State's invitation to require this witness to testify as a court's witness. Indeed, this Court has upheld as a proper exercise of discretion a trial court's outright dismissal of a domestic violence case when the witness did not

want to cooperate with the prosecution. *State v. Busch*, 76 Ohio St.3d 613, 1996-Ohio-82. The trial court's actions in this case were far less drastic and have not prevented the State from calling the witness as its own.

The State's proposition of law draws great attention to the trial court's mention on the record that there was no evidence that the defendant had intimidated the alleged victim. There are two problems with the State's proposition: First, as the State acknowledges, the trial court did not establish a rule of law that required there to be a threat before the trial court would ever call the witness as a court's witness. Second, contrary to the State's argument, the trial court's concern about the lack of a threat is indicative of a trial judge that *is* exercising discretion. The trial court was noting that there was no evidence in this case that the defendant had forfeited his Sixth Amendment rights by his own wrongdoing. It was in keeping with good judicial decision making that the trial court, in deciding the equities of the State's request, determined whether such a forfeiture by wrongdoing had taken place in the instant case.

STATEMENT OF THE CASE AND FACTS

Amicus defers to the Statement of the Appellee, which has in turn partially deferred to the Statement of Appellant.

ARGUMENT

Introduction

In Cuyahoga County, prosecutors routinely suggest that trial courts call what would otherwise be a prosecution witness as a court's witnesses when the prosecution knows in advance that the witness will not incriminate the defendant and the prosecutor is in possession of a prior statement (particularly a statement given to the police) that, contrary to the anticipated testimony, does incriminate the defendant. When a trial court agrees with the prosecution's suggestion, the

witness becomes the “court’s witness” under Evid. R. 614, even though prosecutors almost invariably conduct the bulk of the initial examination of the witness.

The court-witness gambit allows the prosecution to avoid the prohibition imposed by Evid. R. 607 on a party’s impeaching one’s own witness in the absence of surprise. Typically, the jury hears the sworn testimony of the witness, which is exculpatory, and then hears the witness questioned by the prosecutor about the prior out-of-court incriminatory statement that is inconsistent with the exculpatory testimony given under oath.

As an evidentiary matter, the two statements are not on equal footing – nor should they be. The exculpatory statement given under oath at trial (the “viva voce” testimony) is substantive evidence that the defendant is not guilty. Conversely, the prior statement given to the police is not substantive evidence at all – it can merely be used to impeach the credibility of the witness’ sworn testimony from the witness stand.

Juries have difficulty comprehending this distinction. Even if given a limiting instruction that the prior statement should not be considered for the truth of the matter asserted, juries tend to consider the out-of-court statement as substantive evidence. Confounding the problem are two additional factors: (1) Limiting instructions are often not given to the jury, and (2) prosecutors are not adverse to making closing arguments that encourage jurors to consider the out-of-court statement as the best evidence of what really happened because the witness was more likely to tell the truth when not confronted by the defendant at trial. Your amicus would be remiss not to acknowledge that much of the fault for these two complications lies at the feet of defense counsel who fail to ask for limiting instructions and/or fail to object during closing arguments – which then places appellate courts in the difficult position of having to evaluate the deficient trial procedure for plain error or as part of a claim that trial counsel was ineffective.

The result is that Evid. R. 614 does not become an engine for achieving a fair trial. To the contrary, there is a distinct danger that Evid. R. 614 can be transformed into a vehicle that circumvents the guarantee that guilt must be proven by sworn, viva voce, testimony at trial – not by prior statements made outside the defendant’s presence.

At the same time, the framers of the Rules of Evidence recognized that parties need to have tools to combat witnesses who have become hostile. Evid. R. 611 allows the trial court discretion to allow the prosecution to examine its own witness via leading questions when the witness is hostile.

In Support of Appellee’s Propostion

A court of appeals does not abuse its discretion in declining to hear a State’s discretionary appeal from a ruling in limine that denies the State’s suggestion that a trial court make the alleged crime victim a court’s witness.

The Appellee has presented this Court with the above proposition in order to place before the Court the threshold question of whether the court of appeals abused its discretion in not allowing the State’s discretionary appeal. This threshold question is really the only question that has been decided by the Eighth District.

If this Court agrees with Appellee’s proposition, then this Court should affirm the court of appeals’ dismissal of the appeal. If this Court disagrees and holds that the court of appeals abused its discretion, then a remand to the court of appeals is necessary to determine the merits of the State’s appeal – because the merits of the State’s appeal have yet to percolate through the Eighth District Court of Appeals.

In light of the State’s failure to squarely place the threshold issue before the Court, the Court should consider dismissing the instant case as having been an appeal that was improvidently allowed.

If this Court does not dismiss the appeal as improvidently allowed, then this Court should sustain the Appellee's proposition. In this case as in others in Cuyahoga County, the prosecution wants more than the opportunity to control the witness via leading questions – the prosecution wants to question the witness about prior, unsworn statements that are hearsay under the rules. As discussed above, such a practice is fraught with perverting the integrity of the trial process. See generally, *United States v. Peterman* (C.A. 10, 1988), 841 F.2d 1474, 1479 n. 3, cert. denied, 488 U.S. 1004 (collecting cases and noting that every federal circuit recognized the danger of allowing witnesses to testify simply as a means of having non-substantive impeachment evidence presented to the jury).

In light of these concerns, the court of appeals was well within its discretion in declining to hear the State's discretionary appeal in this regard. "The decision to grant or deny a motion for leave to appeal by the state in a criminal case is solely within the discretion of the court of appeals." *State v. Fisher* (1988), 35 Ohio St.3d 22, 26.

R.C. 2945.67 allows for both appeals of right and discretionary appeals. When a ruling on a motion in limine is, de facto, a ruling excluding "evidence," the State enjoys an appeal of right. *State v. Davidson* (1985), 17 Ohio St.3d 132, 135. When an appeal of right is not available, the State is limited to discretionary appeals with respect to "other" decisions of a trial court, i.e., decisions that do not involve the exclusion of evidence or one of the other permissible categories for appeals of right.

Here, the State employed a belt-and-suspenders approach and took its appeal from the decision not to call the alleged victim as a court witness as both an appeal of right and a discretionary appeal. The court of appeals characterized its dismissal as of the discretionary appeal as being based on mootness – because the court of appeals had also dismissed the State's

claimed appeal of right that arose from the same trial court ruling in limine. The court of appeals' characterization in this regard is understandable. While the term "moot" is not being used in its most literal sense, the court of appeals clearly evinced its determination that it did not desire to hear the State's appeal as to the trial court's declination of the State's suggestion to call the alleged victim as a court witness.

Finally, in declining to hear the State's appeal, the court of appeals was undoubtedly aware of this Court's decision in *Busch*, which held that a trial court did not abuse its discretion in dismissing a domestic violence case where the alleged victim did not want to go forward. If, as *Busch* provides, a trial court has the discretion to regulate and ensure the integrity of its proceedings by dismissing a case, then a trial court certainly has the discretion to choose not to make an alleged victim a court's witness so as to allow her impeachment with a non-substantive statement. The court of appeals did not abuse its discretion in refusing to hear this appeal.

In opposition to Appellant's Proposition of Law

When a domestic violence victim recants his or her statement to police prior trial, Evid R. 614(A) does not require specific proof of a threat in order for the trial court to call the victim as a court's witness.

The State's proposition does not address what the trial court did in this case. As the State acknowledges, the trial court stated that it did not employ a pre-determined litmus for Evid. R. 614 suggestions; rather the trial court stated it decided each case on its individual circumstances.

The fact that the trial court noted the lack of a threat does not mean that a threat was a prerequisite to granting the motion. In *Giles v. California* (2008), 554 U.S. 353, the United States Supreme Court recognized that a defendant who makes a witness unavailable through the defendant's own wrongdoing forfeits his Sixth Amendment right to confrontation. While the issue presented by the State's suggestion under Evid. R. 614 is different than that presented in

Giles, the trial court was well within its proper exercise of discretion to recognize that a defendant's wrongdoing may well be a factor in determining whether to call the alleged victims as a court's witness – just as a defendant's wrongdoing is a factor in deciding whether the defendant still has a right to confront a witness at trial..

CONCLUSION

Wherefore, the appeal should be dismissed as improvidently allowed, or else the decision of the court of appeals should be affirmed.

Respectfully submitted,


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Cuyahoga County Public Defender

SERVICE

A copy of the foregoing Amicus Curiae Brief was hand delivered upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 23 day of May, 2011.

Respectfully Submitted,


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