

IN THE OHIO SUPREME COURT

STATE OF OHIO,	}	Supreme Court Case No. 2014-0718
	}	
Plaintiff-Appellee,	}	
	}	On Appeal from the Seneca County Court of
v.	}	Appeals, Third Judicial District, Case No. 13-
	}	13-27
ISSA KONA,	}	
	}	
Defendant-Appellant.	}	

**REPLY BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CRIMINAL
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STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

STATEMENT OF THE CASE

Amicus adopts by reference the Statement of the Case and Facts as set forth by Appellant Jeffery C. Arnold.

ARGUMENT

This case is significant, because it presents an issue that often arises in the context of domestic violence cases: the reluctant witness. In this case, that reluctant witness, the alleged victim, was Mr. Arnold's father, Lester.¹ His reluctance could be explained by an unwillingness

¹ To avoid confusion, the defendant and his father will be referred to by their first names.

to see his son convicted of the offense, or, as the dissent below argued, by the fact that he, not Jeffery, was the initiator of the confrontation, and wished to avoid perjuring himself or furnishing the basis for his own prosecution, exactly the dilemma invocation of the Fifth Amendment was intended to prevent. And so, after answering preliminary questions regarding his identity and relationship to Jeffery and the other witnesses, he invoked his right against self-incrimination when the prosecutor began asking him questions about the incident.

Amicus contends that the courts below misapplied Fifth Amendment law and the rules of evidence in resolving this matter. Apart from the particular propositions of law presented here, this Court should address these issues and provide guidance to the courts which will confront them in the future.

1. *The Fifth Amendment issue.* The State’s contention that the trial court properly rejected Lester’s invocation of the Fifth Amendment privilege against self-incrimination is undercut by its own case law. To be sure, a blanket assertion of the privilege is not sufficient; instead, as the State notes, “[w]hen a witness refuses to testify because of concern over self-incrimination, a court must engage in a complex analysis to determine if the witness has a valid claim as to that particular testimony.” State’s Brief at 7.

That issue does indeed require a complex analysis. “Whether there is a sufficient hazard of incrimination is a question for the court which is asked to enforce the privilege.” *Cincinnati v. Bawtenheimer*, 63 Ohio St.3d 260, 266, 586 N.E.2d 1065 (1992). The trial court should conduct an *in camera* hearing to make “a particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-

founded.” *United States v. Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976). In making its determination, the court should err on the side of finding the privilege exists; the witness should only be required to answer if it is “perfectly clear, from a careful consideration of all the circumstance in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency” to incriminate. *Hoffman v. United States*, 340 U.S. 479, 489, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).

The trial court here did not engage in the “complex analysis” even the State acknowledges it was required to make. In fact, the trial court made no analysis whatsoever; it abdicated that role to the *prosecutor*, who was the one who told Lester that “you don’t have the right to refuse to testify.” The trial court made no inquiry into Lester’s reasons for invoking the privilege; the only “analysis” the court made was to inform Lester he could be held in contempt for failing to answer questions.

As the State notes, the courts have held that a third party does not have standing to assert the Fifth Amendment privilege of a third person. Those cases are not applicable here. Obviously, Jeffery would have no standing to complain if Lester was prosecuted for anything he said, or was held in contempt for continuing to refuse to testify. But that is not what happened. Rather than exploring Lester’s reasons for invoking the privilege, and forcing him to testify at the risk of contempt, the trial court permitted the State to have Lester to read his entire statement into the record. The statement was also admitted into evidence.

Jeffery does not claim that he was prejudiced by the court’s refusal to recognize his father’s assertion of the Fifth Amendment privilege; he claims that he was prejudiced by the

court's response -- or rather, non-response -- to the assertion.

Amicus respectfully contends that this case calls for the Court to clarify how a trial court should respond to the assertion of the Fifth Amendment privilege by a witness. At minimum, the court must engage in some inquiry into the witness' reasons for invoking the privilege. That creates problems, too: as the Court noted in *Hoffman, supra* at 486, "if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." The better practice would be to allow the witness to consult with counsel.

None of that happened here. The State contends that the trial court "must have come to the conclusion that Lester was being obstinate -- possibly to avoid convicting his son." State's Brief at 7. That poses the precise problem: we are left to guess what the trial court "must have" concluded. This Court should hold that the assertion of the privilege against self-incrimination requires the court to engage in the limited inquiry necessary to determine whether the assertion is appropriate, and not leave that determination to the prosecutor.

2. *The evidentiary issue.* This raises the additional issue: was the reading of the statement was permitted by the rules of evidence?

The State's use of Lester's statement to the police, and the admission of the statement into evidence as substantive evidence of Jeffery's guilt, was clearly improper. Admission would have required the statement, being an out-of-court declaration admitted for its truth, to fall within one of the recognized exceptions to the hearsay rule. None of the exceptions under Evid.R. 803

fit; this was not an excited utterance, a statement made to a doctor or nurse for medical purposes, or a statement of present sense impression, a business record, or the like.

Nor would the statement be admissible if Lester was deemed unavailable because of his invocation of the Fifth Amendment privilege.² The hearsay exceptions in that case, under Evid.R. 804, are similarly inapplicable: this was not former testimony or a statement against interest, nor was any evidence presented to support a claim that Jeffery had engaged in wrongdoing in inducing Lester to invoke the privilege, and therefore forfeited his objection to admission.³

The State's use of the statement was also not permissible as impeachment by proof of prior inconsistent statement, under Evid.R. 613. Lester was the State's witness, and Evid.R. 607 prohibits a party from impeaching its own witness absent a showing of surprise and affirmative damage. Whatever may be said about surprise, the State was not affirmatively damaged, within the meaning of the rule. As the Staff Notes explain, "[R]equiring a showing of affirmative damage is intended to eliminate an 'I don't remember' answer or a neutral answer by the witness as a basis for impeachment by a prior inconsistent statement." Thus, "[t]he party's own witness must testify to facts that contradict, deny, or harm that party's trial position before the calling party can use the witness' prior inconsistent statement to impeach." *State v. Lewis*, 75 Ohio App.

² A claim of privilege can make a witness "unavailable" within the meaning of the rule. See Evid.R. 804(A)(1). The discussion of Evid.R. 804 assumes that Lester was excused from testifying on the basis of the privilege. This, of course, was not the case.

³ A claim of forfeiture by wrongdoing would also require the State to have given advance written notice of intention to use the statement, which it did not do.

3d 689, 697, 600 N.E.2d 764 (4th Dist. 1991) (co-defendant called by State denied he was present at scene of robbery; court held that this wasn't affirmative damage allowing impeachment by prior statement implicating defendant). Here, Lester did not "contradict or deny" the State's position; he simply invoked his Fifth Amendment privilege and refused to testify.

Even if Lester's statement could have been used to impeach him, the admission of the statement as substantive evidence was clearly error. As the court noted in *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶¶182-183, substantive use of a prior inconsistent statement is governed by Evid.R. 801(D)(1)(a): to qualify, the statement must be "given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Lester's statement met none of those criteria.

CONCLUSION

This case is not insignificant in its consequences; while it involves only bench trial for a misdemeanor, Jeffery's conviction of domestic violence has substantial ramifications: it can never be expunged, it prohibits him from ever owning a weapon, and a subsequent charge can result in felony prosecution.

Far more consequential is the proper resolution of the constitutional and evidentiary issues raised here. The courts below did not give due deference to the Fifth Amendment and the rules regarding impeachment. This Court should clarify how a trial court should properly handle

those issues, and should reverse Jeffery's conviction and remand the case for new trial.

Respectfully submitted,

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SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Amicus Ohio Association of Criminal Defense Lawyers was sent by U.S. Mail, postage pre-paid, to Gene P. Murray, Attorney for Defendant-Appellant Jeffery C. Arnold, 227 West Center St., Fostoria, OH 44830, and to Timothy J. Hoover, Attorney for Plaintiff-Appellee State of Ohio, c/o Hoover Law Office, 125 South Main Street, Suite 201, P.O. Box 822, Fostoria, OH 44830, this 5th day of January, 2015.

/s/Russell S. Bensing
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