

**IN THE SUPREME COURT OF OHIO
2015**

STATE OF OHIO,

Case No. 2015-1102

Plaintiff-Appellee,

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

-vs-

FRANCISCO ROMERO,

Court of Appeals
Case No. 14AP-440

Defendant-Appellant.

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

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. The defendant raises two claims challenging the admission of certain evidence during his trial, asserting that prejudicial error is demonstrated. He also raises a cumulative error claim. The first issue the defendant presents is a challenge to the admission of certain testimony regarding the 11-year old victim's statements. The second issue the defendant presents is a challenge to the admission of the victim's mother's brief comments regarding the tears and family conversations which occurred after the offense.

Here, the 11-year old child sexual assault victim testified, and her testimony was corroborated in significant respects, while the defendant made differing statements about the offenses, first denying contact with the victim, before eventually admitting to detectives that he was in the bedroom with the victim, and that if he touched her breast and buttocks, it was accidental. The court of appeals thoroughly reviewed the defendant's evidentiary claims and properly determined that no prejudicial error was demonstrated, and that no cumulative error was demonstrated. The defendant presents no compelling reason for this Court to review this case raising claims regarding harmless error review.

The issues in this case involve legal standards that are well settled and fact-laden inquiries into whether error occurred. These fact-intensive inquiries and case-specific issues would be unlikely to provide law of statewide interest that would be helpful to the bench and bar. It is therefore respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

The State relies on the factual and the procedural history set forth in paragraphs one through 18 of the Tenth District Court of Appeals' opinion.

ARGUMENT

RESPONSE TO PROPOSITION OF LAW NO. ONE:

NO PREJUDICIAL ERROR WAS DEMONSTRATED IN THE ADMISSION OF THE VICTIM'S STATEMENTS, WHERE THE VICTIM TESTIFIED AT TRIAL.

The admission or exclusion of evidence, including the determination of whether a hearsay declaration should be admitted as an excited utterance, lies in the trial court's sound discretion. *State v. Holloway*, 10th Dist. No. 02AP-984, 2003-Ohio-3298, ¶¶14, 24. The defendant claims that prejudicial error occurred in the admission of the victim's statements to her friend, to her mother, and to a responding officer. These claims lack merit, and the court of appeals properly rejected them.

The court of appeals correctly concluded that no error occurred in the admission of the victim's statements to her mother and to her friend, because these statements were admissible as excited utterances, under Evid.R. 803(2). The victim's statements to her friend were made immediately after the sexual assault, while the victim was still in a state of nervous excitement, and were related to the assault. *State v. Taylor*, 66 Ohio St.3d 295, 301, 612 N.E.2d 316 (1993). Likewise, the victim's statements to her mother were made while the child victim was in a state of nervous excitement caused by the sexual assault. *Taylor*, 66 Ohio St.3d at 304, citing *State v. Boston*, 46 Ohio St.3d 108, 118, 545 N.E.2d 1220 (1989). This evidence was properly admitted, and there was no error, let alone prejudicial error, in the trial court's admission of the victim's excited utterances to her friend and to her mother.

Additionally, the victim's statements to the officer were admissible and were not hearsay, under Evid.R. 801(C), because they were not offered to prove the truth of the matter asserted. "To constitute hearsay, two elements are needed. First, there must be an out-of-statement.

Second, the statement must be offered to prove the truth of the matter asserted. If either element is not present, the statement is not “hearsay.”” *State v. Maurer*, 15 Ohio St.3d 239, 262, 473 N.E.2d 768 (1984); *State v. Lipsey*, 10th Dist. No. 08AP-822, 2009-Ohio-3956, ¶20. It is well-settled that, where statements are offered into evidence to explain an officer’s conduct during the course of investigating a crime, such statements are generally not hearsay. *State v. Humphrey*, 10th Dist. No. 07AP-837, 2008-Ohio-6302, ¶11, citing *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980). *See also State v. Price*, 80 Ohio App.3d 108, 110, 608 N.E.2d 1088 (1992); *State v. Braxton*, 102 Ohio App.3d 28, 49, 656 N.E.2d 970 (1995). Here, the victim’s statements to Officer Bradford were offered to explain the officer’s conduct in investigating the crime, were not hearsay, were properly admitted, and no abuse of discretion was demonstrated.

However, even if the trial court erroneously admitted the victim’s statements to Officer Bradford, which the State does not concede, there was no prejudice, as there is no probability that the defendant would not have been convicted had this testimony been excluded. The child victim testified about the sexual assaults, and she testified about the statements she made. Opinion, ¶37. Her testimony was corroborated in significant respects. For example, her friend testified that she stayed in the bathroom after their bath to clean up and was not in the bedroom with the defendant and the victim. Also, the victim’s testimony regarding text messages the defendant sent to her later that night was corroborated by cell phone records. Further, there was no dispute about much of the victim’s testimony, as the defendant admitted that he was at his daughter’s house on the night of the sexual assaults, that he told the victim and his daughter to get out of the bathtub and that he interacted with the girls. Opinion, ¶15. When the defendant spoke with investigating detectives, he first denied any interaction with the victim that night, before he eventually admitted that he may have touched the victim’s buttocks and breast, and

that if he did so, it was an accident. Opinion, ¶11, 12. There was no prejudicial error in the admission of evidence regarding the victim's statements. *See* Opinion, ¶37 (citing cases). And the court of appeals properly rejected these claims. As there is no merit to the defendant's claims, the Court should decline to review this proposition of law.

RESPONSE TO PROPOSITION OF LAW NO. TWO:

NO PREJUDICIAL ERROR OCCURRED IN THE ADMISSION OF EVIDENCE.

“The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, [an appellate] court should be slow to interfere.” *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). An abuse of discretion connotes more than an error of law or judgment; it connotes a decision that was arbitrary, unconscionable, or unreasonable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

This Court has stated that the “circumstances of the victims are relevant to the crime as a whole. The victims cannot be separated from the crime.” *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, ¶43, quoting *State v. Lorraine*, 66 Ohio St.3d 414, 420, 613 N.E.2d 212 (1993). Thus, evidence regarding the effect of the crime on the victim or her family may be admissible. *See State v. Lee*, 10th Dist. No. 03AP-436, 2004-Ohio-5540, ¶¶37-38; *State v. Fautenberry*, 72 Ohio St.3d 435, 650 N.E.2d 878 (1995); *State v. Eads*, 8th Dist. No. 87636, 2007-Ohio-539, ¶56. Here, no prejudicial error or abuse of discretion was demonstrated in the admission of the victim's mother's brief testimony that the defendant's crimes caused family conversations and tears. The defendant's claim to the contrary lacked merit.

Even if the trial court erroneously admitted this evidence, which the State does not concede, its admission was not prejudicial, as there is no probability that the defendant would not

have been convicted had this testimony been excluded, as the court of appeals correctly determined. The challenged testimony was brief, and the prosecutor did not dwell on it. Additionally, the defendant raised no claim that the evidence was insufficient or that his convictions were against the manifest weight of the evidence. *See State v. Wade*, 8th Dist. No. 90145, 2008-Ohio-4870, ¶20. And the evidence presented at trial weighed heavily against the defendant, as the victim testified and persuasively described what the defendant did to her, and her testimony was corroborated in significant respects. In contrast, the defendant made differing statements about what happened, eventually admitting to detectives that he was in the bedroom that night, and that if he touched the 11-year old victim's breast and buttocks, it was an accident. The victim's mother's very limited testimony in this regard made no difference, and if any error occurred, it was harmless. This Court should decline to review this proposition of law.

RESPONSE TO PROPOSITION OF LAW NO. THREE:

NO CUMULATIVE ERROR IS DEMONSTRATED.

Although a particular error might not constitute prejudicial error in and of itself, a conviction may be reversed if the cumulative effect of the errors deprives the defendant of a fair trial. *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus; *State v. Moore*, 81 Ohio St.3d 22, 689 N.E.2d 1 (1998). “However, ‘errors cannot become prejudicial by sheer weight of numbers.’” *State v. Norman*, 10th Dist. No. 12AP-505, 2013-Ohio-1908, ¶61 (citations omitted).

Here, there were not multiple instances of error. Hearsay evidence was not erroneously admitted, nor was improper “victim impact” evidence erroneously admitted. However, even if some of this testimony was erroneously admitted, the defendant was certainly not deprived of a fair trial. *DeMarco*, 31 Ohio St.3d 191, paragraph two of the syllabus; *Moore*, 81 Ohio St.3d 22.

As explained, the 11-year old victim testified and identified the defendant as the perpetrator, and her testimony was corroborated by her friend's testimony and by cell phone records, and was largely undisputed. In contrast, the defendant made differing statements regarding the offense, first denying that he interacted with the victim that night, before eventually admitting to detectives that he was in the bedroom with the 11-year old victim, and that if he touched her breast and buttocks, it was an accident. The cumulation of the defendant's claims, challenging the admission of testimony regarding the victim's statements to the officer and very limited testimony regarding resultant family conversations and tears, does not warrant reversal. Thus, the court of appeals properly rejected the defendant's cumulative error claim, and this Court should decline to review of this proposition of law.

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,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, July 27th, 2015, to Francisco Romero, #705-855, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601.

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