

[Cite as *State v. Theis*, 2002-Ohio-7465.]

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
SENECA COUNTY**

STATE OF OHIO

CASE NUMBER 13-2000-39

PLAINTIFF-APPELLEE

v.

OPINION

KEITH T. THEIS

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: October 14, 2002.

ATTORNEYS:

**JONATHAN G. STOTZER
Attorney at Law
Reg. #0024868
111 West Center Street
Fostoria, OH 44830**

For Appellant.

KEN EGBERT, JR.
Prosecuting Attorney
Reg. #0042321
Chad T. Mulkey
Reg. #0071983
71 South Washington Street
Tiffin, OH 44883
For Appellee.

SHAW, P.J.

{¶1} This is an appeal from a judgment of conviction and sentence entered in the Common Pleas Court of Seneca County following a jury trial in which the defendant-appellant, Keith T. Theis, was found guilty of one count of Endangering Children in violation of R.C. 2919.22(B)(1), a felony of the second degree, as charged in the indictment. The particular allegation in this case was that appellant recklessly abused Alec VanBeveren, the four-month-old son of his live-in girlfriend, resulting in serious physical harm to the child.

{¶2} The appellant now raises the following three assignments of error:

- I. THE JURY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE**

- II. THE TRIAL COURT ERRED BY SENTENCING THE DEFENDANT TO THE MAXIMUM SENTENCE WITHOUT MAKING A SPECIFIC FINDING ON THE RECORD IN OPEN COURT THAT THE DEFENDANT HAD COMMITTED THE WORST FORMS OF THE CONVICTED OFFENSE AND CAUSED PHYSICAL HARM WHICH CARRIED SUBSTANTIAL RISK OF DEATH TO THE VICTIM**

- III. THE TRIAL COURT ERRED IN DENYING THE DEFENSE THE USE OF THEIR MEDICAL EXPERT, DR. TUCKER, TO TESTIFY TO THE**

**SPECIFICS OF THIS CASE, UNDER EVIDENCE
RULES 602,702, AND 703**

I. The Manifest Weight of the Evidence

{¶3} When evaluating the weight of the evidence, the appellate court acts as a "thirteenth juror" rejecting the jury's resolution of the conflicting testimony and reverses only "where the evidence weighs heavily against conviction." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387 quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. In sum, "The [appellate] court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [factfinder] clearly lost its way * * *." *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, supra at 175; see also *State v. Adkins* (Sept. 24, 1999), Hancock Co. App. No. 5-97-31.

{¶4} The evidence in this case established that Amy VanBeveren met the appellant in May of 1997 and began dating him soon thereafter. At the time she first met appellant, Amy was several months pregnant with her son Alec who was born on August 25, 1997. Although appellant was not Alec's father, his dating relationship with Amy continued from May into the fall of 1997. In the meantime,

between September 4, 1997 and October 30, 1997, Amy took Alec in for five regularly scheduled new infant check ups with a local pediatrician, Dr. Moorjani. On all occasions, except for a minor cold on his last appointment of October 30, 1997, Dr. Moorjani found Alec to be a normal and healthy infant. Alec's next appointment with Dr. Moorjani would not be until January 6, 1998.

{¶5} In October of 1997 Amy and Alec moved into appellant's home in Fostoria. Living in appellant's home was Amy, Alec, appellant and on most weekends appellant's two sons, Cage, age five and Blade, age two. This living arrangement continued from October of 1997 into January of 1998. During this time, appellant worked off and on as an electrician and Amy worked weekend shifts, 11:00 pm to 11:00 am at Whirlpool in Findlay. When Amy was at work, Alec was normally in the sole care of appellant.

{¶6} The first evidence of trouble appears in the record on January 6, 1998, when Amy brought Alec into Dr. Moorjani for Alec's scheduled "four month" appointment. In marked contrast to Alec's prior development through October of 1997, Dr. Moorjani now observed a number of disturbing signs which made her "highly suspicious" of abuse. These signs included: less than normal height and weight gain, significant bruising around Alec's forehead and eye area,

noticeable bruising in Alec's hip and stomach area – evaluated by the doctor to be: (1) several days old and (2) not of a nature to have been caused by a child, but rather by an adult, and an overall “abrupt change” in Alec's “personality” or responsiveness from his prior visits.

{¶7} As a result of these observations, Dr. Moorjani ordered CT and skeletal scans to check for any broken bones or brain hemorrhage, and tested for Leukemia, all of which came back negative. In addition, the bruising around Alec's eye and forehead was explained to Dr. Moorjani by Amy as the result of a doll being dropped on Alec's head by a young niece during the family Christmas, which apparently happened in Amy's presence. Amy did not indicate any personal knowledge of the hip and stomach bruises, but related that appellant had told her they had likely been caused by his two-year old son Blade, “tickling” Alec. With the foregoing information, a still suspicious Dr. Moorjani apparently notified social services but took no further action.

{¶8} The incident leading to the trial and conviction of appellant occurred on the weekend of January 9-11, 1998. The evidence indicates that during the evening of Friday January 9, 1998 Amy was present with Alec in appellant's home with his two boys and that prior to leaving Alec in appellant's

care to work her 11:00 pm shift at Whirlpool, Alec was fine. Upon returning home from work late Saturday morning, Amy was told by appellant that earlier that morning, while Alec was in his walker, appellant's two-year old son Blade had thrown a toy train at Alec, striking Alec in the back of the head and causing Alec's face to go down onto the tray of the walker. Appellant stated that this had resulted in a red mark or bruise on the back of Alec's head and a red spot on Alec's nose. Appellant further told Amy that after settling Alec down, appellant had put Alec to bed.

{¶¶} Upon hearing of this incident, Amy proceeded to get Alec up and from about 12:00 noon to approximately 2:00 pm, Amy held Alec and played with him. At around 2:00 pm, feeling that Alec seemed fine, Amy went to bed leaving Alec in the care of appellant for the rest of the day. Amy slept from approximately 2:00 pm Saturday until after 10:00 pm when she got up and left the house to again work her 11:00 pm shift at Whirlpool, leaving Alec once again in appellant's care as per the usual practice. However, when Amy had awakened at 10:00 pm, Alec was already in his bedroom for the night, and because she was running late for work she did not check in on him before leaving the house. Thus,

Amy did not see Alec from approximately 2:00 pm on Saturday January 10, 1998 until approximately 9:30 am Sunday morning, January 11, 1998.

{¶10} At approximately 9:00 am on Sunday, January 11, 1998, appellant called Amy at work to inform her that something was seriously wrong with Alec and that she should come home immediately, which Amy did. Upon arriving home at approximately 9:30 am, Amy observed Alec to appear basically “lifeless” with a noticeable raw spot or abrasion on his nose. Upon determining Alec to be unresponsive, Amy and appellant immediately prepared to drive Alec to the Fostoria hospital and after stopping to drop off appellant’s oldest son with his mother on the way, they brought Alec into the emergency room sometime before 11:00 am.

{¶11} None of the foregoing facts are in dispute. Nor is there any dispute in this case that the physical damage to Alec as of 9:30 am January 11, 1998 was, and continues to be, massive, permanent, life threatening and well within the most conservative statutory definition of serious physical harm. The only question before this court is whether the jury’s determination that appellant caused these injuries is against the manifest weight of the evidence. The determination of appellant’s culpability is based primarily on circumstantial evidence and expert

medical testimony. However, the jury also heard testimony from the appellant, Amy VanBeveren and Josh Egbert, the only three adults to have any contact with Alec during the relevant time period in this case.

{¶12} The critical testimony in this case involves the time period between 2:00pm Saturday, January 10, 1998 and 9:00am Sunday, January 11, 1998. The appellant testified that after Amy went to bed on Saturday afternoon, appellant watched Alec and played with his two boys without incident until about 5:00pm when appellant's friend Josh Egbert came to the house to visit. While Josh was there, appellant related the incident to Josh about the toy train striking Alec earlier in the day and at some point Josh held Alec and played with him while appellant performed various household chores. Appellant testified that during the visit, Josh was alone with Alec for approximately 20 minutes, that Alec suddenly became fussy and when appellant returned to the area of the house Josh and Alec were in, Josh handed Alec back to appellant and abruptly left the residence.

{¶13} The appellant testified that after Josh left, he calmed Alec down and put him to bed for the night around 7:30pm. Alec apparently slept in a downstairs bedroom shared with appellant's two year old son Blade while appellant and his five-year old son, Cage slept in bedrooms upstairs in the house. After Alec went to

bed, Blade and Cage were also put to bed at their respective times later in the evening without incident according to appellant. At approximately 5:00am Sunday morning, appellant testified he was awakened by his youngest son which caused him to look in on Alec who he described as appearing to sleep normally.

Apparently getting up with Blade and leaving Alec to sleep, appellant did not look in on Alec again until around 9:00am when he stated he observed that Alec could only open one eye and would not respond or wake up. Upon being unable to rouse Alec, appellant then called Amy at work.

{¶14} The only explanations offered by appellant to account for Alec's injuries include the toy train thrown by Blade at around 10:00am Saturday morning, January 10, tickling by relatives or his sons to explain torso and hip bruises, Alec rubbing his own runny nose with a blanket to cause an abrasion on his nose and the possibility that his friend Josh could have shaken or otherwise harmed Alec sometime around 7:00pm Saturday night while alone with him causing a delayed reaction not apparent until Sunday morning.

{¶15} Appellant brought the toy train into the emergency room. Detectives later video-taped appellant's son Blade throwing the train and it was played to the jury. Although appellant talked to detectives, he apparently did not mention Josh

Egbert being alone with Alec until appellant testified at trial. However, at trial, Josh Egbert testified that he stopped by to visit Saturday afternoon from about 5:00pm until 7:00pm; that he had held Alec and observed the mark on the back of his head from the train; but that contrary to the appellant's version, Josh was at no time alone with Alec or out of sight of appellant while at the house and that other than Alec getting a little fussy for a brief period, everyone had seemed fine to him at the time of his departure at around 7:00 pm.

{¶16} Expert medical testimony from forensic and pediatric specialists established that when Alec arrived at the emergency room Sunday morning, January 11, 1998, he “appeared to be dead.” Further examination revealed severe bruising about the head, chest and collar bone consistent with trauma. Bleeding was observed in Alec's eye associated with retinal hemorrhage and significant head trauma. A CT scan showed a large area of bleeding on the left side of his brain underlying a left side skull fracture. Broken blood vessels in Alec's forehead indicated severe pressure from vomiting or seizure. The final emergency room diagnosis was the “classic triad of shaken baby” being (1) retinal hemorrhage, (2)subdural hematoma and (3) bruising to the collarbone.

{¶17} The testimony of emergency room physician, Dr. Snyder, who was also qualified as an expert in child abuse and neglect in forensic medicine, ruled out various explanations of the injuries offered by appellant. Specifically, Dr. Snyder testified that the particular skull fracture and hematoma from “shearing off of blood vessels to the brain” suffered by Alec was usually indicative of a broad force or flat impact such as from the acceleration of the head striking the floor or wall as opposed to a sharper object striking the head; that the “carpet burn” abrasion on Alec’s nose was consistent with this type of impact; that there was “no way” any of these injuries could have been self-inflicted such as from a mere fall; that a similar case treated by Dr. Snyder had been from swinging the infant by both feet against a wall; that it would be an “incredible leap” to assume the toy train had anything to do with these injuries – both as to the force of impact and because the massive nature of the damage could not have occurred to Alec 24 hours prior to entering the emergency room without noticing almost immediately obvious signs of injury or death; that for Alec to still be alive at 11:00am Sunday morning, it would be “extremely unusual” if these injuries occurred any longer than 12 hours prior to that time and that it was likely much sooner; that a previous case seen by the physician with Alec’s level of damage had died within 3 hours of

occurring; and that in Dr. Snyder's opinion, Alec's injuries were not consistent with the history provided by appellant at the emergency room and instead were consistent with being shaken and then thrown onto a flat surface.

{¶18} Approximately two hours after entering the emergency room, Alec was life-flighted to Toledo Hospital where he was treated by Dr. Stephen Snedden who testified as an expert in child abuse via video deposition that he first saw Alec in the Pediatric Intensive Care Unit of Toledo Hospital midday on January 11, 1998. Physical examination and new CT scans conducted at Toledo Hospital revealed subdural hematoma, retinal hemorrhage and significant bruising leading to a diagnosis of Shaken Impaction Syndrome referring to a combination of shaken baby and blunt force trauma. Subsequent surgery at Toledo Hospital to remove parts of Alec's brain most affected by the bleeding confirmed this diagnosis.

{¶19} Dr. Snedden confirmed that the alleged incident with the toy train "absolutely" could not have caused any of Alec's injuries other than perhaps an isolated minor bruise, and in particular could not have caused the retinal hemorrhaging. Dr. Snedden further testified that a 2 year old child could not have exerted the force sufficient to cause Alec's head injuries and that it was doubtful

even a four or six year child could do so; that other than deliberate trauma only an extreme force such as perhaps a fall from a two-story window could possibly account for some of the head injury; that there was a high degree of certainty that these injuries had occurred within 12 hours or less prior to the time Alec arrived at Toledo Hospital – likely between midnight or after on January 10, and 10:00am January 11; that the injuries were such that Alec would not have survived for 24 hours after the injury without medical assistance; that the usual delay between the injury and the damage observed to Alec would be only a few hours or even “a couple of hours”; that Alec was at significant risk of death upon his arrival at Toledo Hospital, being in respiratory arrest needing immediate resuscitation and a ventilator to save his life; that there was a 100 percent certainty that Alec was the victim a Shaken Baby Impaction Syndrome; and that the most serious of Alec’s injuries would have required adult force. Dr. Snedden also reiterated that the various abrasions and bruises on Alec’s nose and face could not have been self-inflicted.

{¶20} Finally, Dr. Moorjani, Alec’s original pediatrician testified that she continued to treat Alec at the time of trial, that Alec is “spastic/microcephalic” suffering from seizures with a small brain which will never grow, that he is non-

verbal, on anti-seizure medication, will be severely and permanently developmentally delayed, vision and hearing impaired, will never walk, crawl, speak or read, that he suffers from post-traumatic epilepsy from brain injury and that overall, his condition can be expected to worsen over time not improve. Dr. Moorjani also testified consistently with Dr. Snyder that in her opinion, the abrasion to Alec's nose could not have been caused by Alec rubbing his own nose on a blanket but was far more consistent with something purposefully rubbed in his face or being thrown to the floor.

{¶21} Upon consideration of our standard of review, all of the foregoing evidence and additionally, the fact that the jury in this case had before it the testimony of Amy VanBeveren, Josh Egbert, the defendant and several character witnesses for the defendant, we cannot say the verdict was against the manifest weight of the evidence. The first assignment of error is overruled.

II. The Sentencing

{¶22} In his second assignment of error, the defendant asserts that the trial court did not comply with R.C. 2929.14 when sentencing him to the maximum term of incarceration.

{¶23} In reviewing a felony sentence, an appellate court is to review the propriety of the trial court's sentencing decisions and substitute its judgment only upon finding clear and convincing evidence that the record does not support the sentencing court's findings or is otherwise contrary to law; R.C. 2953.08(G). *State v. Martin* (1999), 136 Ohio App.3d 355, 361. Moreover, the trial court is in the best position to make the fact-intensive evaluations required by the sentencing statutes as the trial court has the best opportunity to examine the demeanor of the defendant and evaluate the impact of the crime on the victim and society. *Martin, supra*.

{¶24} The trial court may only sentence the offender to the longest term if it finds that the defendant is a person who "committed the worst forms of the offense [or] *** who pose[s] the greatest likelihood of committing future crimes." R.C.2929.14(C). See, also, *State v. Cosgrove* (May 8, 2001), Auglaize App. No. 2-2000-33, unreported (allowing sentence to stand when record supports "the greatest likelihood of the committing future crimes" but fails to support the "worst form of the offense."). Moreover, the court must also give reasons for its findings on the record for sentencing an offender to the maximum term as listed in R.C. 2929.14(C). R.C. 2929.19(B)(2)(d); see, also, *State v. Edmondson* (1999), 86

Ohio St.3d 324 (finding that R.C. 2929.14[C] and 2929.19[B][2][d] prevents a court from imposing a maximum sentence unless the court records findings that gives its reasons for selecting the maximum sentence.). In evaluating whether R.C. 2929.14 has been satisfied, the trial court should look to the factors laid out in R.C. 2929.12(B), (C), (D) and (E). *Martin*, 136 Ohio App.3d at 362 . R.C. 2929.12(B) and (C) relate to the "seriousness of the conduct" which include in relevant part whether the victim of the offense suffered serious physical or psychological harm as a result of the offense. R.C. 2929.12(D) and (E) relates to the "likelihood of the offender's recidivism." Accordingly, the sentencing court may use its discretion, utilizing its own personal judgment, to assign the weight given to each particular statutory factor. *State v. Arnett* (2000), 88 Ohio St.3d 208, 215-216.

{¶25} In this case, while the trial court stated that it considered the factors in R.C. 2929.12, it did not make any specific factual findings relating to R.C. 2929.12(C),(D) and (E). However, the trial court did recite on the record and rely heavily on the severity and permanency of the injuries inflicted Alec as listed in R.C. 2929.12(B)(2). As the trial court found on the record that the offense was "the worst form of the offense of child endangering" and described in detail the

seriousness of the injuries to Alec, the trial court satisfactorily complied with R.C. 2929.14. As such, Appellant's second assignment of error is overruled.

III. The Deposition of Dr. Tucker

{¶26} In his third assignment of error, appellant claims the trial court erroneously excluded the deposition testimony of Dr. Tucker. The deposition was offered by the defense in an effort to establish that some of appellant's explanations regarding incidents occurring within the prior twenty-four hour period, such as the impact of the toy train on Saturday morning or the alleged exposure of Alec to Josh Egbert early Saturday evening, were not necessarily inconsistent with the injuries Alec exhibited on Sunday morning. Dr. Tucker did not personally examine Alec. Nor did he consult with any physician or other medical personnel who had examined Alec. Dr. Tucker did receive certain medical records from defense counsel prior to the deposition which he recalled to be Alec's. However, at the time of the deposition, Dr. Tucker did not have those records before him. As a result, all of the deposition testimony was based upon Dr. Tucker's memory of reviewing those records.

{¶27} At trial, in response to a motion in limine filed by the state, the trial court excluded the bulk of Dr. Tucker's deposition testimony. The court cited the

fact that the testimony was based exclusively upon a review of certain medical records which Dr. Tucker had been unable to adequately identify and which had not otherwise been admitted into evidence. The trial court did admit very limited testimony from the deposition regarding Alec's nose injury as demonstrated by a photograph displayed to Dr. Tucker during the deposition.

{¶28} The admission or exclusion of expert testimony is a matter within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *State v. Biros* (1997), 78 Ohio St.3d 426, 452. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. We believe a trial court has considerable latitude in the circumstance before us. However, we are not willing to say it is an abuse of discretion for a trial court to exclude from trial a deposition containing expert medical testimony based solely upon the witness' memory of reviewing unspecified medical records which cannot be identified by the witness, counsel or court in conjunction with the offered testimony and which have not been otherwise admitted into evidence.

{¶29} In a cause taken up by the dissent herein, the appellant further argues that the late filing of the state’s motion in limine, coupled with the state’s failure to specifically object to the absence of the medical records during the deposition itself, should have precluded the state and/or trial court from excluding the deposition at trial. We recognize that the avoidance of “sandbagging” in the trial strategy of either party in a criminal case is an important concern. However, we respectfully disagree that it is necessarily the responsibility of the state to assure a proper foundation is established for expert testimony proffered by defense counsel. On the contrary, in this instance, we believe the primary responsibility for assuring the proper foundation was established for the medical opinions of Dr. Tucker rested with defense counsel. Upon examination of the record it is our belief that this responsibility was not adequately met, despite a number of opportunities to do so.

{¶30} At the outset, the subpoena duces tecum issued by defense counsel for the deposition of Dr. Tucker does not specify he is to bring any records to the deposition, despite the fact that records were apparently sent to him prior to that time – and despite the fact that it was clear the deposition testimony would rely entirely upon his review of those records. Additionally, the deposition, which was

taken at Dr. Tucker's own office, reveals that during direct examination by defense counsel, Dr. Tucker offered on at least two occasions to "go into the other room" to get his papers and/or notes in order to assist his recollection, but was never requested to do so by defense counsel.

{¶31} Finally, in response to a direct question by the state about the identity of the medical records he had reviewed, Dr. Tucker stated that "[w]e just moved into this office and they are in boxes and the secretaries couldn't find them." This was at least the third time the issue of Dr. Tucker's recollection of the records had come up during the deposition and was similarly the third time there was an indication that notes or the records themselves were likely on the premises. Yet there was no request by anyone to recess the deposition to obtain the notes or records.

{¶32} It is perhaps true that either counsel could have requested the witness to stop the deposition and obtain these records. However, as between any competing obligations here, we believe it is defense counsel who must be charged with the greater responsibility for appreciating and acting in accordance with the importance of these records to the testimony of his own witness. Moreover, we do not believe state's counsel necessarily had any obligation to protect the record for

defense counsel at the time of the deposition. For all the state knew, defense counsel may have planned to admit the records into evidence or otherwise establish the identity of these records at time of trial. When it became apparent defense counsel did not intend to do so, the state was entitled to file its motion in limine raising the issue.

{¶33} Finally, we note that even if Dr. Tucker had better identified or produced the medical records at his deposition, the trial court in this case could have properly excluded the deposition testimony because those records were never introduced into evidence at trial. Under Evid. R. 703, an expert must base his testimony on facts within his personal knowledge or upon facts shown by other evidence. See, also, *State v. Chapin* (1981), 67 Ohio St.2d 437, paragraph two of the syllabus. In *State v. Jones* (1984), 9 Ohio St.3d 123, three experts gave opinion testimony that the defendant was mentally ill based partly upon reports and medical histories prepared by others which were never admitted into evidence. *Id.* In that case, the Ohio Supreme Court held that “it was error to admit the expert

opinion testimony based upon medical reports and records which were not prepared by the expert witnesses and not admitted in evidence.” *Id.* at 125.¹

{¶34} In this case, Dr. Tucker never examined Alec, did not prepare any of the medical reports and records, and the records upon which he relied were neither identified in the deposition nor admitted into evidence. Under these circumstances, we cannot find that the trial court abused its discretion in refusing to allow the introduction of his testimony. Accordingly, the third assignment of error is overruled and the judgment and sentence of the Common Pleas Court of Seneca County is affirmed.

Judgment affirmed.

BRYANT, J., concurs.

WALTERS, J., dissents

Walters, J., dissenting.

{¶35} I must respectfully dissent herein because I find that, in light of the State's failure to submit objections to issues that could have been addressed at a

¹ In *State v. Solomon* (1991), 59 Ohio St.3d 124, the Court distinguished its holding in *State v. Jones* stating that even if an expert relies on medical reports not prepared by him, he may still testify, if his opinion is based in whole or in major part on facts or data perceived by him. However, in this case, Dr. Tucker never

deposition and the mandates of Crim.R. 15(G) and Civ.R. 32(D)(3), the trial court abused its discretion in failing to either admit the deposition of Theis' expert witness or permit Theis the opportunity to procure the witness for trial.

Furthermore, having reviewed the records and photographs of the child and being apprised of the nature of the child's injuries and medical history, Theis' expert witness would have had a sufficient foundation upon which to render an opinion, based upon his knowledge, training, and experience, as to potential causation of the trauma, to address hypothetical scenarios related thereto, and to refute or challenge the foundation or conclusions of the State's expert testimony and evidence.

{¶36} Crim.R.15 provides the procedural and substantive rules regarding the taking and admission of depositions in criminal proceedings. With respect to objections to admissibility, however, Crim.R.15(G) states that "[o]bjections to receiving in evidence a deposition or part thereof shall be made as provided in civil actions." Accordingly, objections to depositions in criminal proceedings are subject to Civ.R. 32, which provides:

examined Alec. As such, Solomon is distinguishable from the present case. See, also, *State v. Berenyi* (Sept. 19, 2000), Allen App. No. 1-99-87, unreported.

{¶37} "(B) Objections to admissibility

{¶38} "Subject to the provisions of subdivision (D)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. Upon the motion of a party, or upon its own initiative, the court shall decide such objections before the deposition is read in evidence."

{¶39} Although objections are generally permitted either at the time of taking the deposition or at the time of receiving the deposition in evidence at trial, the ability to object at trial is expressly limited by the reference to subdivision (D)(3), which provides, in pertinent part:

{¶40} "(D) Effect of errors and irregularities in depositions

{¶41} "* * *

{¶42} "(3) As to taking of deposition.

{¶43} "(a) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the

objection is one which might have been obviated or removed if presented at that time.

{¶44} "(b) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition."

{¶45} The purpose of these provisions was succinctly summarized in *Serednesky v. Miller*, wherein the court stated: "The basic thrust of Civ.R. 32(D)(3) is to remove 'gamesmanship' from the taking of depositions so that one party cannot 'sandbag' the other by failing to object during the deposition when the other party could easily correct the matter by phrasing the questions differently or asking additional questions. When such 'gamesmanship' or 'sandbagging' are attempted, the objection will be deemed to be waived."² The rationale and salience of the application of this rule is no more apparent than in criminal proceedings, where such conduct may prejudice fundamental rights of the criminally accused to present a complete defense.

{¶46} Theis' expert witness, Dr. Howard J. Tucker, M.D., testified by way of videotaped deposition concerning the nature, extent, and causation of Alec's injuries. The State made no objections to the foundation or admissibility of Dr. Tucker's testimony at the time of the deposition. Nevertheless, on the third and final day of trial, the State filed a motion in limine objecting to the admission of the deposition, asserting that Dr. Tucker had not examined the victim, did not consult with the treating physicians, did not reveal what portions of Alec's medical records he relied upon, and that such records had not been admitted into evidence at either the deposition or at trial during the State's examination of its expert witnesses. Though Theis objected to the "deceptive" timing of the State's motion and the resulting prejudice occasioned by the inability to procure the witness for direct examination, the court excluded nearly the entirety of Dr. Tucker's testimony, referencing the grounds cited by the State. Therefore, the trial court, in effect, applied Civ.R. 32(B) without reference to or consideration of the mandates and principles of Civ.R. 32(D)(3).

{¶47} Though the trial court found that Dr. Tucker never stated what he reviewed in formulating his opinions, Dr. Tucker testified that he had examined

² *Serednesky v. Miller* (Sept. 3, 1992), Franklin App. No. 91AP-1273.

Alec's extensive medical records, including the treating physicians' reports and the child's medical history as provided by his mother and Theis, and that he was familiar with Alec's injuries. Having previously offered to retrieve his notes regarding the records, the State did not challenge his assertion that he had examined the records, chose not to object to the absence of the documents or any purported deficiency in the competency or admissibility of Dr. Tucker's testimony, never requested that he specify what records were relied upon for the opinions he rendered, and, when a single inquiry was made as to what records had been "tendered" by Theis' counsel, indicated that "* * * if you don't know that's fine[.]" Had the State objected to the foundation of the testimony or the failure to admit the records at the deposition, Theis could have corrected any potential issues by asking additional questions, moving to submit copies of the records into evidence, and allowing his witness to refresh his recollection where necessary. Whether an intentional case of sandbagging or an instance of inadvertent neglect, the prejudicial effect remains the same.

{¶48} Furthermore, there is absolutely no restriction in the law that only treating physicians can testify as to causation.³ Evid.R. 703 specifically provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing." When an expert's opinion is based, in whole or in significant part, on facts or data perceived by him, then the requirements of Evid.R. 703 are satisfied.⁴ "Expert opinion testimony based on data in medical records, as opposed to recorded physician opinions in medical records, is valid. Evid.R. 703. Moreover, aside from Evid.R. 703, where medical records are not admitted into evidence by an agreement of the parties, the business record exception to the hearsay rule would allow such records in. Evid.R. 803(6)."⁵

{¶49} The impressions of qualified hospital personnel recorded in hospital records are evidence typically relied upon by experts in the medical field and are considered a "learned statement of an observable condition falling under the

³ Cf. *Lambert v. Shearer* (1992), 84 Ohio App.3d 266, 278.

⁴ *State v. Solomon* (1991), 59 Ohio St.3d 124, syllabus; *Farkas v. Detar* (1998), 126 Ohio App.3d 795, 798.

⁵ *Bishop v. Munson Transp., Inc.* (1996), 109 Ohio App.3d 573, 578, citing *Wells v. Miami Valley Hosp.* (1993), 90 Ohio App.3d 840, 858. See, also, *Lambert*, 84 Ohio App.3d at 278; *Ohio Dept. of Mental Health v. Milligan* (1988), 39 Ohio App.3d 178, 180.

definition of 'data' or organized information."⁶ The dates of physical examinations and consultation with other physicians or lack thereof goes to the weight and not the admissibility of an expert opinion, so long as the opinion is supported by sufficient other evidence.⁷ Medical testimony on the proximate cause of an injury or condition is not speculative or devoid of foundation where the expert has reviewed available depositions, medical records and medical evidence, and is able to conclude based upon those sources and his or her knowledge, training, and experience as a physician, that there was either a proximate causal relationship or a lack thereof.⁸

{¶50} Dr. Tucker was retained to review Alec's medical records and provide an opinion as to the potential origin of Alec's injuries and whether the manifestation of symptoms associated with the injuries was consistent with Theis' version of events. Dr. Tucker indicated that he knew how the child would appear and that had he examined him he could only identify the extent of the trauma and would be unable to identify the source of those injuries from an examination. Dr.

⁶ *Jewett v. Our Lady of Mercy Hosp. of Mariemont* (1992), 82 Ohio App.3d 428, motion allowed by, 64 Ohio St.3d 1408, appeal dismissed as improvidently allowed in 66 Ohio St.3d 1217, citing *Blakeman v. Condorodis* (1991), 75 Ohio App.3d 393.

⁷ *Wells*, 90 Ohio App.3d at 858; *Condorosis*, 75 Ohio App.3d at 396.

⁸ *Jewett*, 82 Ohio App.3d at 433.

Tucker further testified that the medical records available obviated the need confer with other physicians. Having reviewed the records and photographs of the child and being apprised of the nature of Alec's injuries and medical history, Dr. Tucker would have had a sufficient foundation upon which to render an opinion, based upon his knowledge, training, and experience, as to potential causation of the trauma, to address hypothetical scenarios related thereto, and to refute or challenge the foundation or conclusions of the State's expert testimony and evidence.

{¶51} Accordingly, based upon the foregoing, I would sustain the third assignment of error and would reverse the judgment of the trial court.