[Cite as *State v. Knight*, 2006-Ohio-6437.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87737

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES KNIGHT

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-469654

BEFORE: Dyke, A.J., Kilbane, J., Corrigan, J.

RELEASED: December 7, 2006

JOURNALIZED:

[Cite as *State v. Knight*, 2006-Ohio-6437.]

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ANN DYKE, A.J.:

{¶ 1} Defendant-appellant, James Knight ("appellant"), appeals from his convictions for various counts of rape, gross sexual imposition and kidnapping. For the reasons set forth below, we reverse and remand for proceedings consistent with this opinion.

{¶ 2} On August 18, 2005, the Cuyahoga County Grand Jury indicted appellant on six counts: counts 1 alleged rape, in violation of R.C. 2907.02; counts 2 and 3 alleged gross sexual imposition, in violation of R.C. 2907.05; counts 4, 5 and 6 alleged kidnapping, in violation of R.C. 2905.01, each count carried with it sexual motivation specifications. Appellant was arraigned and pleaded not guilty to the charges.

{¶ 3} On December 14, 2005, a jury trial of this matter commenced. At the trial, the state presented the testimony of the following individuals: L.S., the victim, Jeremiah Weppelmam, Investigator Patrick Hathaway, B.K., the mother of the victim, Detective Joseph Rini and Lauren McAliley. A summation of the evidence presented follows.

{¶ 4} L.S. testified that in June of 2004, she was living with her mother, two brothers and appellant, her stepfather. One night, while her mother worked the night shift and appellant was watching her and her brothers, appellant entered the bathroom and peered over the shower doors at L.S., who was unclothed at that time. L.S. told appellant to leave, to which appellant laughed and left the room.

{¶ 5} About two weeks later, while she was in the shower, appellant again looked in on L.S. However, on this occasion, appellant also opened the shower door slightly and squirted L.S. with water. She again told him to get out and appellant complied.

{¶ 6} L.S. also recalled another incident that occurred a few weeks later. On that occasion, she was playing video games in the living room when appellant grabbed her into his bedroom. He forced her down with his knees on the upper part of her legs and one hand across her arms. She was able to free herself a number of times and scratch him, but eventually appellant gained control. When he did, appellant pulled down L.S.'s pants and digitally penetrated her. After appellant freed L.S. and she went to her bedroom and cried.

{¶ 7} L.S. also testified that a few weeks later, she was in appellant's bedroom playing a video game when he again forced her down onto the bed. On this occasion, he only rubbed L.S.'s vaginal area and did not penetrate her. Appellant again freed L.S. and told her that he would never do it again.

{¶ 8} The last incident occurred sometime later. L.S. was sitting in a chair in the living room when appellant put his knees on her legs and went under her shirt and bra to feel her breasts. When she screamed at him he promised to never do this again and then he freed her and let her go.

{¶ 9} L.S. further testified that on one of the aforementioned occasions, when she was attempting to flee appellant, she scratched him across his left ear and

appellant went to the bathroom and put neosporin on the scratch.

{¶ 10} L.S. testified that she did not tell anyone about the incidents until June of 2005 when she told her uncle, Jeremiah Wippelman, because she did not want her mother to feel guilty about the incidents. She decided to tell her uncle at this time because appellant had returned home to live with her family two weeks prior. Wippelman then telephoned L.S.'s mother and informed her of the incidents. The following day, L.S. went with her uncle to the New York police station and informed Investigator Hathaway about the alleged incidents with appellant.

{¶ 11} When L.S. returned home, she spoke with Detective Rini and gave him her statement. She also spoke with a social worker, a psychiatrist and a medical person who examined her.

{¶ 12} Upon cross-examination, L.S. admitted that she has always disliked appellant because he did not treat her mother appropriately. She also admitted that she was unhappy with appellant a few weeks prior to telling her uncle about the sexual abuse because appellant told her that she could not get her driver's license until she was 18 years old.

{¶ 13} Additionally, during cross-examination, L.S. testified that on the three occasions that appellant inappropriately touched her, her brothers were home. Even though she screamed, her brothers did not witness the incidents. She further explained that during the incident when she was on the chair in the living room, her little brother ran by but did not see anything.

{¶ 14} B.K., the mother of L.S. and wife of appellant, testified that she was not aware of the alleged abuse until her brother, Weppelmam, phoned her in June of 2005. She also testified to seeing scratch marks on appellant's arm and head one night when they went to the movie theatre. She questioned appellant about the scratch marks and he informed her that they were from wrestling with L.S. and her brother at home. B.K. testified that she was aware that appellant and L.S. would wrestle when she was younger, but not when she got older.

{¶ 15} Joseph Rini, a detective with the Cleveland Police Department, testified that on June 28, 2005 he learned that L.S. complained that her stepfather, the appellant, had sexually assaulted her on previous occasions. Rini testified that he received L.S.'s statement from Investigator Hathaway from New York via facsimile. Then he contacted her mother, B.K., who came to the police department. There, Rini and B.K. discussed the case and Rini obtained background information. After completing the initial police report, he took a statement from B.K.

{¶ 16} Shortly after meeting with B.K., Weppelmam and L.S. appeared at the Cleveland Police Department and Rini took their statements.

{¶ 17} Next, Rini contacted appellant and requested his presence in order to take his statement. Appellant complied with the request and appeared at the station with an attorney on July 12, 2005. While there, Rini read appellant his constitutional rights. Appellant waived his rights and Rini then took his statement. Rini then read for the jury the statement he obtained from appellant. Essentially, in his statement,

appellant denied any wrongdoing with regards to L.S.

{¶ 18} Lauren McAliley testified that she is an Associate Director of the Center for Pediatric Ethics at Rainbow Babies & Children's Hospital, as well as a nurse practitioner for the Department of Child Advocacy and Protection, "where [her] primary responsibility is medical evaluation of children thought to have been sexually abused."

{¶ 19} McAliley performed a medical examination upon L.S. in August of 2005 regarding an accusation that she had been sexually abused by her stepfather. The exam entailed a general screening exam and a focused anogenital exam. McAliley reported that the medical examinations were unremarkable, which means that she did not find any signs or symptoms suggestive of physical abuse, sexual abuse, or medical conditions that might provide her with findings of sexual or physical abuse. McAliley explained, however, that these results do not necessarily indicate that sexual abuse had not occurred.

{¶ 20} McAliley also testified that she took a history from L.S. as to the alleged sexual assaults. Finally, McAliley testified to a reasonable degree of medical certainty that L.S. was sexually abused in this case. McAliley explained that she based her opinion on the history L.S. provided, the medical examination, laboratory results, and information provided by her family and the referring agents.

{¶ 21} At the close of the state's case, appellant made a motion for acquittal pursuant to Crim.R. 29 only as to the kidnapping charges in counts 4-6, which the

trial court denied. Thereafter, appellant testified on his own behalf.

{¶ 22} Appellant testified that he did not commit any of the crimes that L.S. alleges. He further testified that he has never been convicted of a state or federal offense.

{¶ 23} In regards to L.S., appellant testified that initially the two had a good relationship until L.S. grew older. During that time, L.S. would become angry with appellant because he was the disciplinarian. Additionally, appellant believed L.S. told the story about the sexual abuse because he was divorcing her mother, she had more freedoms in his absence, B.K. promised L.S. a driver's license when he told her she could not have one, and that he fought with her mother frequently.

{¶ 24} Following his testimony, appellant rested his case and renewed his motion for acquittal, which again was denied. After closing statements, the case was presented to the jury for deliberation.

{¶ 25} The jury found appellant guilty of all counts. Subsequently, the trial court imposed an aggregate prison term of five years. Additionally, after a hearing, the trial court classified appellant as a sexually oriented offender.

{¶ 26} Appellant now appeals his convictions and asserts six assignments of error for our review. Appellant's first assignment of error states:

{¶ 27} "The defendant-appellant was denied his constitutional right to due process of law and his constitutional right to a fair trial before an impartial jury when the trial court allowed an expert medical opinion to be rendered without any physical

medical evidence as to the alleged sexual conduct and when said expert testified as to the veracity of the alleged victim."

{¶ 28} Within his first assignment of error, appellant contends that the trial court erred in allowing McAliley to provide an expert medical opinion that the alleged conduct occurred absent any physical medical evidence to serve as a foundation. In so doing, appellant maintains that the trial court essentially permitted McAliley to testify as to the veracity of L.S. For the following reasons, we find appellant's argument with merit.

{¶ 29} In *State v. Boston* (1989), 46 Ohio St.3d 108, 128, 545 N.E.2d 1220, the Supreme Court of Ohio held that "[a]n expert's opinion testimony on whether there was sexual abuse would aid jurors in making their decision and is, therefore, admissible pursuant to Evid.R. 702 and 704." Id. at 129. However, despite the admissibility of such evidence, "an expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." Id. When a trial court permits an expert to render an opinion as the victim's veracity, "the admission of this testimony [is] not only improper – it [is] egregious, prejudicial and constitutes reversible error." Id. at 128. The court reasoned that such an opinion constitutes a litmus test of the victim's credibility, which infringes upon the fact finder's responsibility to make their own assessment of the veracity of witnesses. Id. at 129, relying upon *State v. Eastham* (1988), 29 Ohio St.3d 307, 312, 530 N.E.2d 409 (Brown, J., concurring).

{¶ 30} In *Boston*, supra, the expert relied on a medical examination of the victim, statements made by the victim, and the child's medical history in opining that the child was sexually abused. Id. at 128. The medical examination indicated "probable vaginal penetration and possible rectal penetration." Id.

{¶ 31} In the instant matter, McAliley's expert opinion that L.S. was sexually abused was based upon a medical examination, laboratory results, the child's statements and information provided by family and referring agents. However, unlike *Boston*, supra, no medical evidence exists revealing L.S. had been sexually abused. The medical examination results and laboratory results were unremarkable. Accordingly, McAliley's opinion that, to a reasonable degree of medical certainty, L.S. was sexually abused was based solely upon the child's statements. The information provided by her family and referring agents relied solely upon the L.S.'s statements.

{¶ 32} Permitting the introduction of an expert's opinion which relies solely on the child's statements is tantamount to permitting the expert to testify as to the child's veracity. See *State v. Burrell* (1993), 89 Ohio App.3d 737, 627 N.E.2d 605. Thus, McAliley's opinion that L.S. had been sexually abused constitutes an opinion as to the child's veracity, and thus, is impermissible under *Boston*, supra.

{¶ 33} In *State v. Burrell* (1993), 89 Ohio App.3d 737, 627 N.E.2d 605, a case nearly factually identical to the instant matter, the Ninth District reached the same

decision we reach here today. In *Burrell*, the court held that an expert's opinion stating that the victim had been sexually abused lacked an appropriate foundation under *Boston* where the opinion was based solely upon the expert's belief that the victim was being truthful. Id. at 746. In that case, the state presented the testimony of Dr. Powell, who interviewed and examined the victim. Id. at 741. During his testimony, Powell opined that, based upon a reasonable medical certainty, the victim had been sexually abused. Id. at 744. Powell testified that his conclusion was based upon "her physical examination and the history that she told me." Id. The medical examination of the child victim, however, provided no evidence of the alleged sexual abuse. Id. at 741. After reviewing the state's evidence, the court found that admission of the expert's opinion constituted reversible error because the case was a "credibility contest" between the victim and the defendant with an absence of independent evidence of the abuse, including no medical evidence of abuse. Id. at 746.

{¶ 34} Because this case also constitutes a "credibility contest" between the victim and appellant, we find that appellant was not afforded a fair trial when McAliley testified as to L.S.'s veracity. As the Supreme Court in *Boston*, supra, noted, "the admission of [such] testimony was not only improper – it was egregious, prejudicial, and constitutes reversible error." *Boston*, supra, at 125. Consequently, we reverse and remand this case to the trial court for further proceedings consistent with this opinion.

{¶ 35} Our determination as to appellant's first assignment of error is dispositive of this appeal. Thus, we decline to address his remaining assignments of error[1] as moot. App.R. 12(A)(1)(c).

{¶ 36} Judgment reversed and remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, ADMINISTRATIVE JUDGE

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[1] "II. The defendant-appellant was denied his constitutional right to due process of law and his constitutional right to a fair trial before an impartial jury when the trial court allowed the investigating officer to comment on the alleged victim's credibility."

"III. It was plain error for the court to allow the defendant-appellant to be charged multiple times under generalized counts in the indictment. Such error deprived the defendant-appellant of his constitutional right to due process as he was unable to prepare a defense to specific charges."

"IV. The State of Ohio failed to introduce sufficient evidence to sustain a conviction and as such defendant-appellant's conviction violated his right to due process of law as guaranteed by Article I, Section 10 of the Ohio State Constitution and the Fourteenth Amendment to the United States Constitution."

"V. Defendant-appellant's convictions were against the manifest weight of the evidence. Therefore his convictions were in violation of the Ohio State Constitution and the Sixth and Fourteenth Amendments to the United States Constitution."

"VI. Defendant-appellant was denied his fundamental right to a fair trial due to ineffective assistance of counsel which unfairly prejudiced his defense."

MARY EILEEN KILBANE, J., CONCURS
MICHAEL J. CORRIGAN, J.,* CONCURS
(SEE ATTACHED CONCURRING OPINION)

*(Sitting by Assignment: Judge Michael J. Corrigan, Retired, of the Eighth District Court of Appeals.)

MICHAEL J. CORRIGAN, J., CONCURRING:

{¶ 37} My issue with the admission of this particular testimony is that the expert based her opinion on nothing more than the consistency of the victim's story — this had the sublime effect of saying that the nurse believed the victim's story, and hence her "opinion" acted as a comment on the victim's veracity. Unlike a case where physical evidence is presented and permits no other conclusion but that it had been caused by an outside agency (for example, a damaged hymen in a four-year-old), the expert only relied on the victim's statements and her emotional state in making those statements, and whether they were consistent with statements made by similarly situated victims of abuse. These are not objectively verifiable and ultimately rest on whether the expert believed the victim.

{¶ 38} I wish to stress my belief that our decision today should not be read as prohibiting all forms of expert testimony of the kind used in this case. Surely, an "expert" in the field of "child advocacy" can muster objectively verifiable, scientifically supported data as a foundation for expressing an opinion that goes beyond mere agreement with the consistency of a victim's story. If not, then the

"expert" is no expert at all and has no business giving any opinion at trial.

{¶ 39} With these reservations, I concur with the majority opinion.