[Cite as *State v. Cocherl*, 2003-Ohio-3239.]

IN THE COURT OF APPEALS FOR DARKE COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellant : C.A. CASE NO. 1594

vs. : T.C. CASE NO. 01CR12470

DAVID A. COCHERL : (Criminal Appeal from Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 20th day of June, 2003.

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GRADY, J.

{¶1} This appeal is brought by the State pursuant to Crim.R. 12(K) from a pretrial order of the court of common pleas, which ruled that hearsay evidence of out-of-court declarations of a child-victim that the State would introduce pursuant to Evid.R. 807 in a case alleging sexual abuse were inadmissible to prove the abuse alleged.

{¶2} Defendant was indicted on one count of rape, R.C. 2907.02(A)(1)(b), based upon allegations that he had forced his

five year old daughter, B.C., to perform fellatio on him. The court interviewed B.C. prior to trial to determine her competence to testify as a witness. Evid.R. 601(A). Following a hearing, the trial court found that B.C. was incompetent, and would therefore not be permitted to testify, because she does not understand the responsibility and importance of testifying truthfully and that there would be consequences for not doing so. The State did not appeal from that ruling.

{¶3} Subsequently, the State indicated that it intended to offer evidence pursuant to Evid.R. 807 concerning statements the child-victim had made to two employees of Darke County Children's Services during their separate interviews of her, on the same day, twenty-seven days after the alleged criminal conduct had last occurred. In those statements, B.C. allegedly described in some detail the events involved in the fellatio charged in the indictment.

{¶4} The court conducted a hearing at which the two Children's Services employees, Kim Posey and Teresa Maples, testified concerning their interviews of B.C. The court held their evidence inadmissible on a finding that the requirements of Evid.R. 807(A)(1) were not satisfied. The State filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶5} "THE COURT ERRED IN RULING THAT THE STATEMENTS MADE BY THE FIVE YEAR OLD VICTIM OF SEXUAL ABUSE TO ADULTS, DESCRIBING THE ABUSE AND IDENTIFYING HER FATHER AS THE PERPETRATOR, ARE INADMISSIBLE AS EVIDENCE IN ANY FUTURE TRIAL."

{¶6} Hearsay evidence, which is evidence of an out-of-court statement made by a person other than the witness who testifies concerning the statement, is inadmissible to prove the truth of the matter the statement involves. Evid.R. 802. Such evidence is inadmissible because the out-of-court declaration cannot be subject to the accepted standards of reliability that apply to trial testimony: cross- examination, oath, and an opportunity to observe the declarent's demeanor when the statements were made. Evid.R. 802 nevertheless permits hearsay evidence when it satisfies one or more of the exceptions to its inadmissibility in Evid.R. 803 and Evid.R. 804, the particular circumstances of which create a presumption of reliability. The presumption may be rebutted, by evidence attacking the credibility of the hearsay declarant. See Evid.R. 806.

{¶7} In response to the Ohio Supreme Court's decision in *State v. Boston* (1989), 46 Ohio St.3d 108, the Ohio Rules of Evidence were amended in 1991 to create a new exception for certain hearsay statements made by children under the age of twelve in abuse cases. Evid.R. 807 now provides for admission of out of court statements offered to prove their truth that allegedly were made by a child under twelve and that describe any sexual act performed by, with, or on the child, or describe any act of physical violence against the child. Weissenberger, Ohio Evidence (2003), Section 807.1.

{¶8} Four exacting conditions must be satisfied before statements within the purview of Evid.R. 807 may be admitted. *Id*. In that regard Evid.R. 807 provides:

{¶9} "(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply:

{¶10} "(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of

{¶11} motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

{¶12} "(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

{¶13} "(3) There is independent proof of the sexual act or act of physical violence.

{¶14} "(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness."

{¶15} The out-of-court statements that Evid.R. 807 involves are not, either because of the subject or the circumstances in which they were made, inherently reliable. Therefore, Evid.R. 807(A) requires the court to determine whether the particular statement or statements concerned are sufficiently reliable to permit their admission in evidence. The court's reliability inquiry is in two phases. First, the court must determine whether the totality of the circumstances surrounding the making of the statement reveal particularized guarantees of trustworthiness. Examples of those circumstances are identified in the rule. If such circumstances are found, in the second phase the court must determine that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." See *Idaho v. Wright* (1990), 497 U.S. 805, 820. Stated another way, the court must find that the statement is so free from the risk of inaccuracy and untrustworthiness . . . that the test of cross-examination would be superfluous, a work of "supererogation." *Id.* at 809, citing Wigmore, Evidence (1975),

Section 1420, p. 251.

{¶16} These two tests are interrelated. However, their logic is made somewhat obscure because the second element is stated in the negative.

{¶17} The first element, the existence of some particularized guarantee or guarantees of trustworthiness in the totality of the circumstances in which the statement was made, is an objective determination. Because such hearsay statements are not in their substance inherently trustworthy, unlike the hearsay exceptions in Evid.R. 803 and Evid.R. 804, guarantees particular to the surrounding circumstances which serve a like purpose must be found to exist.

{¶18} The second element, that cross-examination of the declarant would be of marginal utility, is more subjective in nature. It weighs the reliability of the declarations, in their substance, and permits introduction of that evidence only if the court finds that the declarations are so reliable that a hypothetical cross-examination of the declarant, were she to testify, would be of marginal utility. The standard is stated in the negative, but it nevertheless imposes a positive test of reliability.

{¶19} When it ruled that B.C.'s statements to Ms. Posey and Ms. Maples were not admissible pursuant to Evid.R. 807 the trial court found that the State had failed to satisfy the first requirement or condition in Evid.R. 807(A)(1): that the hearsay evidence is sufficiently reliable. Having made that finding, the trial court did not address the further requirements for

admissibility set out in Evid.R. 807(A)(2)-(4), which are cumulative.

{¶20} The State argues that the trial court erred and abused its discretion in concluding that the reliability requirements of Evid.R. 807(A)(1) were not satisfied with respect to B.C.'s statements to either Ms. Posey and Ms. Maples. We disagree.

{¶21} When B.C. related allegations of sexual abuse at the hands of Defendant to Ms. Maples, B.C. added many additional facts that were patently untrue. Among those were that her mother had also sexually abused her, that other children were also victims, and that her father, the Defendant, slept in a toy closet. From the totality of those circumstances, the court found the statements B.C. made to Ms. Maples were not trustworthy. Therefore, no further inquiry or finding concerning the value of cross-examination was necessary. The court properly excluded the child's out-of-court statements to Ms. Maples for the reasons it found.

{¶22} The court found that there were particularized guarantees of trustworthiness in the circumstances surrounding the child's statements to Ms. Posey, based on some of the specific circumstances identified in Evid.R. 807(A)(1). The evidence supports that finding. The court then went on to find, however, that cross-examination would have challenged the reliability of the child's statements, and on that basis the court excluded evidence concerning them. That finding is supported by evidence that B.C. provided inaccurate, false information to Ms. Posey concerning B.C.'s own name, her

siblings, where she lived and where her father, the Defendant, lived.

{¶23} The State argues that the trial court applied the second prong of the Evid.R. 807(A) reliability test improperly to exclude the testimony of Ms. Posey. We see no error or abuse of discretion in the trial court's ruling. The court merely found that the particularized guarantees of trustworthiness which it had found did not make the child's truthfulness so clear that cross-examination would be of marginal utility. The court found that cross-examination would have a greater than marginal utility in challenging the reliability of the child's statements. On that finding, the trial court properly excluded the child's out-of-court statements to Ms. Posey.

{¶24} Defendant-Appellee raises other grounds to exclude the hearsay evidence that both witnesses would offer in their testimony, relying on the rule of *State v. Said*, 71 Ohio St.3d 473, 1994-Ohio-473. The argument relies on the trial court's previous finding that B.C. was incompetent to testify as a witness because she failed to appreciate the need to testify truthfully. The court did not find that B.C. was unable to either receive accurate impressions from her perceptions or to recollect them. *Said* held that when the child is found incompetent for one or both of those reasons, her out-of-court statement is necessarily inadmissible per Evid.R. 807(A). The basis of the trial court's declaration of B.C.'s incompetence was its finding that she lacked the capacity to testify truthfully at trial, which presents a different issue, one with which Evid.R.

807 is not concerned. However, having affirmed the trial court's order on other grounds, we are not required to determine the applicability of *Said* on the record before us.

{¶25} The State's assignment of error is overruled. The judgment of the trial court will be affirmed.

FAIN, P.J. and YOUNG, J., concur.

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