[Cite as *In re Atkins*, 2001-Ohio-3194.]

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF JESSICA ATKINS and IN THE MATTER OF THOMAS ATKINS, III	)))))))	CASE NOS. 705 706 O P I N I O N

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas, Juvenile Division Carroll County, Ohio Case Nos. 98-7-217 & 98-7-218
JUDGMENT:	Reversed.

APPEARANCES:

For Appellee State of Ohio:	Atty. Donald R. Burns, Jr. Prosecuting Attorney Atty. Scott Rice Assistant Prosecuting Attorney 49 Public Square Carrollton, Ohio 44615
For Appellant Thomas Atkins, Jr.:	Atty. John S. Campbell 130 Public Square, Box 25 Carrollton, Ohio 44615
For Appellant Cheryl Atkins:	Atty. Gary L. Willen Atty. Christine L. Falconer Gary L. Willen Co., L.P.A. 200 North Main Street Minerva, Ohio 44657

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: March 7, 2001

WAITE, J.

{¶1} This appeal arises out of four judgment entries of the Carroll County Court of Common Pleas, Juvenile Division, resulting from adjudicatory and dispositional hearings which determined that Appellants' two minor children were abused and dependent children. Appellants argue that they were denied their right to counsel and that the trial court permitted improper hearsay and expert testimony at the hearings. For the following reasons, we find that the trial court failed to properly notify Appellants of their statutory right to counsel, and the decision of the trial court is reversed.

{¶2} On July 24, 1998, the Carroll County Department of Human Services filed two complaints in the Carroll County Court of Common Pleas, Juvenile Division, alleging that Appellants' eight-year-old daughter was an abused child as defined in R.C. §2151.031(A) and that their three-year-old son was a dependent child as defined in R.C. §2151.04(D). The complaints arose out of allegations that Thomas Atkins, Jr. ("Appellant father") had sexually abused his daughter. The court issued an emergency custody order placing both children in the custody of their aunt.

{¶3} An initial hearing was held on July 27, 1998. The judgment entry resulting from that hearing stated that the court informed Appellants of their rights, that Appellants informed the court that they wished to retain counsel and that they had seven days to notify the court with the name of their counsel. (Aug. 4, 1998 Judgment Entry). Cheryl Atkins ("Appellant mother") retained counsel for the purpose of filing a Waiver of Time on August 11, 1998, then filed a Waiver of Counsel form on August 12, 1998. Appellant father did not file a Waiver of Counsel form.

{¶4} The adjudicatory hearing took place on September 8, 1998. The court asked Appellants if they wanted to proceed without counsel and both parties answered, "Yep." (September 8, 1998 Tr. p. 3). The children were not represented by counsel, nor had a guardian ad litem been appointed. The state called three witnesses, including investigator Richard Taff who had tape recorded an interview with the daughter. The state also called a nurse and a pediatrician who attempted to examine the child at Tod Children's Hospital. Appellants made almost no attempt to present evidence or to cross-examine witnesses, nor did they raise any objections during the hearing.

{¶5} In two September 14, 1998, judgment entries, the court determined that the daughter was an abused child and that the son was a dependent child. The court ordered the children to

remain temporarily in the custody of their aunt, allowed Appellants visitation rights and appointed a guardian ad litem for both children. The judgments also noted that a case plan had been filed.

{¶6} The dispositional hearing was set for October 19, 1998. Appellants were represented by counsel at the hearing and the hearing was continued until November 16, 1998. On the day of the hearing each Appellant filed a separate Motion to Set Aside the Adjudication. The motions were overruled, and the state and Appellant mother proceeded to present their evidence. Shortly after the hearing had begun, Appellant father, after directing a number of expletives to those around him, walked out. (11/16/98 Tr. p. 11). The court filed its two dispositional rulings on November 18, 1998, ordering that the son be returned to Appellant mother, that the daughter remain with her aunt and that Appellant father have no contact with either child. The court also adopted the September 8, 1998, case plan and ordered Appellant mother to attend counseling. Appellants subsequently filed notices of appeal regarding both of the November 18, 1998, rulings. The cases were designated as Appeal Nos. 705 and 706, and we consolidated the cases on January 29, 1999, for purposes of judicial economy.

{¶7} Appellants' first assignment of error alleges:

{¶8} "THE CARROLL COUNTY COURT OF COMMON PLEAS, JUVENILE

DIVISION, ERRED BY FAILING TO AFFORD APPELLANTS THEIR CONSTITUTIONAL RIGHT TO COUNSEL AND / OR BY FAILING TO OBTAIN A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF SAID RIGHT FROM APPELLANTS, IN VIOLATION OF THEIR RIGHTS PURSUANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION SIXTEEN OF THE OHIO CONSTITUTION."

{¶9} Appellants argue that the Juvenile Rules of Procedure are t followed in all proceedings coming under the jurisdiction of Ohio's juvenile courts. Juv.R. 1(A). Appellants maintain that the federal Ohio constitutions, the Juvenile Rules and R.C.§2151.352 give parents right to legal representation at all stages of juvenile proceedings. Appellants argue that they were not properly afforded their right to representation, that they did not knowingly, intelligently and voluntarily waive their right, and that they should be afforded a new hearing. We find Appellants' argument persuasive.

{¶10} Appellants incorrectly designate their right to counsel as constitutional right. They cite the watershed case of *In re Gault* (1967), 387 U.S. 1, in which the United States Supreme Court granted *juveniles facing possible commitment* many of the constitutional right enjoyed by adult criminal defendants, including the right to counsel the right to appointed counsel if indigent. *Id.* at 13. The instant involves the rights of parents and does not involve possible juvenile commitment. No caselaw has established a constitutional right to cou for parents at a juvenile dependency or abuse hearing.

{¶11} In Ohio, a parent's right to counsel at a dependency or abuse hearing is predicated upon Juv.R. 4, Juv.R. 29 and R.C.

§2151.352. Juv.R. 4 states, in pertinent part:

{¶12} *Every party shall have the right to be represented by counsel* and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. *These rights shall arise when a person becomes a party to a juvenile court proceeding*. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute." (emphasis added).

{¶13} R.C.§2151.352 also establishes a parent's right to counsel at juvenile proceedings, and expands upon that right:

{¶14} "A child, his *parents*, custodian, or other person in loco parentis of such child is *entitled to representation by legal counsel at all stages of the proceedings* and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120. of the Revised Code. *If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and of his right to be provided with counsel* if he is an indigent person. The court may continue the case to enable a party to obtain counsel or to be represented by the county public defender or the joint county public defender and shall provide counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them." (emphasis added).

{¶15} These provisions establish not only a parent's right to counsel, but also establish a requirement that the court inform the parents of that right.

{¶16} Juv.R. 29(B) provides for a more detailed inquiry by the juvenile court when a parent attempts to waive the right to

counsel at a juvenile adjudicatory hearing:

{¶17} "(B) Advisement and findings at the commencement of the hearing

{¶18} "*At the beginning of the hearing, the court shall do all of the following*:

{¶19} "* * *

{¶20} "(3) Inform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel;

{¶21} "(4) Appoint counsel for any unrepresented party under Juv. R. 4(A) who does not waive the right to counsel;

{¶22} "(5) *Inform any unrepresented party who waives the right to counsel of the right: to obtain counsel at any stage of the proceedings*, to remain silent, to offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent." (emphasis added).

{¶23} Although parents are entitled to be represented by counsel at all stages of the proceedings, the court is only required to inform them of the consequences of waiving that right, "[a]t the beginning of the [adjudicatory] hearing." Juv.R. 29(B); *In re East* (1995), 105 Ohio App.3d 221, 225. At a minimum, this means that the juvenile court should inform a party of the consequences of his or her waiver at the beginning of the hearing at which the waiver occurs. A waiver of counsel also must affirmatively appear on the record, and will not be

presumed from a silent record. *Id.* at 224; *Garfield Heights, supra,* 17 Ohio App.3d at 217.

{¶24} Appellants contend that the only inquiry made by the trial court at the September 8, 1998, adjudicatory hearing was the following:

{¶25} "Court: So you want to go forward without counsel?

{¶26} "Cheryl Atkins: Yep.

{¶27} "Court: And Mr. Atkins, it's also your wish to proceed in this matter without a lawyer? Well, you're here without one and you were directed at the time of your initial appearance to secure an attorney and have that attorney enter an appearance within seven days or the Court would presume that you elect to proceed without. So, I assume Mr. Atkins, it's your intent today to proceed without a lawyer."

{¶28} "Tom Atkins: Yep."

{¶29} (September 8, 1998 Tr. p. 3). Appellants argue that this brief exchange between themselves and the judge was not sufficient to effect a valid waiver of their right to counsel. Based on the law and the state of the record here, we agree.

{¶30} The brief colloquy conducted by the trial court at the September 8, 1998, adjudicatory hearing did not satisfy the requirements of Juv.R. 29(B). See *In re Royal* (1999), 132 Ohio App.3d 496, 505. The court did not inform Appellants of the consequences of waiving their right to counsel, of their right

to appointed counsel, of their right to present evidence and call witnesses, or of their right to obtain counsel at any stage of the proceedings. The court essentially told Appellant father that his right to counsel was being denied because he had not retained counsel within seven days of the court's previous order. (September 8, 1998 Tr. p. 3).

{¶31} The initial adjudicatory hearing took place on July 27, 1998. The court was required to carry out all applicable requirements of Juv.R. 29(B) at that hearing. There is no transcript of that hearing in the record. The August 4, 1998, judgment entry resulting from that hearing indicates that the court, "informed the parents of their Constitutional Rights and the possible consequences should the allegations contained in the complaint be found true." It is questionable whether such a statement in a judgment entry is sufficient to show that Appellants were informed of their Juv.R. 29(B) rights prior to waiving their right to counsel. *In re Royal, supra,* at 506. Nevertheless, the court was also required to inform Appellants of the rights listed in Juv.R. 29(B)(5) at the time they *first attempted to waive their right to counsel*, which was at the September 8, 1998, hearing.

{¶32} Appellee argues that Appellants were only attempting to exercise their right of self-representation, citing *Faretta*

v. California (1976), 422 U.S. 806, in support. Even if we accept Appellee's argument that Appellants were asserting their right to self-representation, a trial court must hold a hearing to determine whether the party fully understands that right and the consequences of asserting such right. *State v. Gibson* (1976), 45 Ohio St.2d 366, paragraph two of syllabus. Additionally, the right of self-representation described in *Faretta*, which derives from the Sixth and Fourteenth Amendments, applies to defendants in criminal trials and not to juvenile civil proceedings. *Id.* at 378.

{¶33} The procedural errors committed by the trial court are not grounds for reversal unless the errors materially prejudiced Appellants. "[M]ere proof of a procedural violation by itself is insufficient to warrant judicial relief. Pursuant to Civ.R. 61 and R.C. 2309.59, the courts of this state will ignore 'harmless' errors which do not affect the substantial rights of parties." *Rickel v. Cloverleaf Local School Dist. Bd. Of Edn.* (1992), 79 Ohio App.3d 810, 815, citing *Leichtamer v. Am. Motors Corp.* (1981), 67 Ohio St.2d 456, 474-475.

{¶34} The record indicates that Appellants made very little attempt to provide a defense or undermine the evidence presented against them at the September 8, 1998, hearing. Had the trial court timely informed them of their rights as required by Juv.R.

29(B)(5), Appellants could have requested a continuance to obtain counsel or seek court-appointed counsel. There is reasonable likelihood that the outcome of the proceeding would have been different had Appellants obtained counsel.

{¶35} The record indicates that the court did not inform Appellants of their rights under Juv.R. 29(B) prior to accepting their waiver of the right to counsel and that they were prejudiced thereby. Therefore, Appellants' first assignment of error is meritorious.

{¶36} Appellants' second and third assignments of error allege:

{¶37} "THE CARROLL COUNTY COURT OF COMMON PLEAS, JUVENILE DIVISION, ERRED BY FAILING TO FOLLOW THE REQUIREMENTS OF OHIO RULES OF EVIDENCE, EVIDENCE RULE 807, SECTIONS 1, 2, 3 AND 4 RELATING TO THE ADMISSIBILITY OF HERESAY [SIC] TESTIMONY FROM A CHILD IN SEX ABUSE CASES."

{¶38} "THE CARROLL COUNTY COURT OF COMMON PLEAS, JUVENILE DIVISION, ERRED BY ALLOWING THE USE OF EXPERT TESTIMONY PURSUANT TO EVIDENCE RULE 704, OHIO RULES OF EVIDENCE, OPINION ON THE ULTIMATE TESTIMONY ON THE ULTIMATE ISSUE OF CHILD ABUSE."

{¶39} Evid.R. 807 provides an exception to the hearsay rule for out of court statements of children under twelve years of age which relate to sexual or other physical attacks on children. Appellants argue that the state failed to give them proper notice, as required by Evid.R. 807(A)(4), of its intent

to use their daughter's out of court statements describing sexual acts committed by Appellant father. Appellants argue that they were denied their right to a hearing on the matter as required by Evid.R. 807(C). Appellants contend that the court was required to find from the totality of the circumstances that their daughter's statements, as introduced by all three witnesses at the September 8, 1998, adjudicatory hearing, had particularized guarantees of trustworthiness, citing *State v. Said* (1994), 71 Ohio St.3d 473, in support. Appellants maintain that the court also failed to find independent proof of the alleged sexual acts as required by Evid.R. 807(A)(3).

{¶40} Appellants further contend that the testimony of Dr. Stephanie Duvor did not qualify as expert testimony under Evid.R. 702 and 704.

{¶41} Appellants' arguments are without merit. Appellants did not object to the errors at the time they occurred. Absent plain error, the failure to object to errors and improprieties by the trial court constitutes a waiver of those issues on appeal. *Reichert v. Ingersoll* (1985), 18 Ohio St.3d 220, 223. The plain error doctrine provides for the correction of errors clearly apparent on their face and prejudicial to the complaining party even though the complaining party failed to object to the error at trial. *Id.* The Supreme Court of Ohio,

however, has limited the application of the plain-error doctrine in civil cases to extremely rare cases involving exceptional circumstances that seriously affect the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself. *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, at syllabus.

{¶42} The inclusion of the testimony of Dr. Duvor and the statements made by the daughter do not undermine the basic fairness of the adjudicatory hearing. Appellants have not specified what parts of Dr. Duvor's testimony were objectionable. The daughter's statements may qualify as hearsay exceptions under Evid.R. 803(4) as statements made for the purpose of medical diagnosis or treatment. It is not absolutely clear on its face that the daughter's statements or Dr. Duvor's testimony should have been excluded, and therefore, Appellants' second and third assignments of error are without merit.

{¶43} We must note, here, that Appellants' arguments do provide further indications that they were prejudiced by not having counsel present at the September 8, 1998, adjudicatory hearing. Competent counsel would likely have objected to the alleged hearsay and expert testimony, therefore preserving the errors on appeal.

CONCLUSION

{¶44} When Appellants attempted to waive their right to be represented by counsel at the September 8, 1998, adjudicatory hearing, the juvenile court was required to notify them of certain rights and consequences of that waiver as set forth in Juv.R. 29(B). The record does not reflect that such notification took place. Therefore Appellants' first assignment of error has merit and both causes are reversed and remanded for a new adjudication on the issue as to whether the parties' daughter is an abused child and whether their son is a dependent child. Appellants' second and third assignments of error are without merit.

Vukovich, P.J., concurs.

Donofrio, J., concurs.