

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
	:	
IN THE MATTER OF	:	Hon. William B. Hoffman, P.J.
	:	Hon. John W. Wise, J.
J.P.	:	Hon. Patricia A. Delaney, J.
	:	
ALLEGED DELINQUENT CHILD	:	Case No. 08-CA-148
	:	
	:	
	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Juvenile Division, Case No. A2008446

JUDGMENT: Affirmed In Part and Reversed In Part; Cause Remanded

DATE OF JUDGMENT ENTRY: September 4, 2009

APPEARANCES:

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Delaney, J.

{¶1} Appellant State of Ohio appeals a mid-trial decision of the Licking County Court of Common Pleas, Juvenile Division, which denied admission of DNA evidence and testimony of the victim's statement to a nurse during a medical examination.

{¶2} On June 16, 2008, the Pataskala Police Department responded to a call from the mother of the five year old victim, M.G. M.G.'s mother reported to the police that her child had been playing at a neighbor's home and when she returned home she was upset and reported to her mother that "[J.P.] was pulling down her underwear" and that she pointed to her vagina and said he touched me there." She told her mother "he put his finger inside of me." She also described J.P. as putting a "Snoopy" blanket over her head during the touching. The victim also reported that J.P. would blame another one of the children who was at the scene, the two year old, if asked. The victim's mother immediately went over to the neighbor's home and confronted J.P. She learned that no adults were home and that J.P. was babysitting the other children in the home, those children being a younger brother, age 6, and two nephews, ages 4 and 2. M.G.'s mother testified that J.P. told her that it was the two year old who touched her daughter and that he had put him in time out.

{¶3} On June 16, 2008, M.G.'s mother took her to "The Kids Place", a medical facility where abused children are seen and examined by trained nurse practitioners. The victim received a medical examination by pediatric nurse practitioner, Leslie Dietrich. During the examination, the victim reported that she was there "because someone touched me." When asked who, she reported "[J.P.]" She was asked who J.P. was and the victim described how she knew him. Then when asked where she was

touched, she responded "[J.P.] touched me on my pee-pee." The nurse asked her what that felt like and she stated "inside, it felt like he was pressing hard with his finger." The nurse asked about where the victim's clothing were when J.P. was touching her and she replied "my clothes were on me but he pulled down my underwear." The nurse asked if anything else had happened and the child responded that "he put his blanket on my head so I couldn't see." The nurse also testified that the child told her who was in the room and who put the blanket over her head. M.G. then told her "it doesn't hurt now - it hurt before." The nurse asked when it hurt and M.G. replied "today when [J.P] touched me." She then said it stopped hurting when J.P. was done touching her. The nurse finished her full examination of the child and did find a redness to the vestibular area from 3-6 o'clock of the hymen, which the nurse testified could be a result of sexual abuse.

{¶4} The nurse completed the rape kit and, pursuant to procedure, turned over the rape kit to Detective Smith for submission to the Bureau of Criminal Investigations. The nurse also gave a diagnosis of sexual abuse based on the history and examination.

{¶5} On June 18, 2008, J.P., a juvenile, date of birth 2/13/93, was charged with one count of Rape, a felony of the first degree pursuant to R.C. §2152.02(F) and R.C. §2907.02(A)(1)(b) as applied to adults. The complaint alleges that Appellant digitally penetrated the vaginal cavity of M.G., date of birth 1/12/02, on or around the date of June 16, 2008, thus constituting the offense of Rape. This complaint was filed in the Licking County Court, Juvenile Division.

{¶6} At a pretrial conference, the trial court expressed its concern about allowing the State to introduce results from the Bureau of Criminal Investigations (hereafter referred to as B.C.I.), which showed a finding of Amylase in the crotch area of the victim's underwear and a finding that Appellee's Deoxyribonucleic acid (hereafter referred to as DNA) was consistent with the DNA found on the underwear sample.

{¶7} On October 14, 2008, the State, in turn, filed a motion in limine describing the evidence the State was in possession of, how it was relevant, and requesting a pre-trial ruling as to the DNA evidence. No ruling was ever made as to the State's motion.

{¶8} On November 24, 2008, this matter proceeded to contested adjudication. At the beginning of the hearing, the trial court conducted a competency hearing with the victim, who was then six years old, and made a determination that she was competent to testify. The State then proceeded to present its case in chief. The State called witnesses, including several Pataskala Police Officers, the victim, the mother of the victim, and several experts such as the examining nurse practitioner, and a scientist from B.C.I. who processed the rape kit.

{¶9} The victim's mother testified that she turned over a photograph she had taken of a "Snoopy" blanket she saw at a neighbor's house, one that matched the description of the blanket M.G. said Appellant used to cover her head.

{¶10} During her testimony, M.G. identified that blanket as the blanket Appellant used to cover her head.

{¶11} Detective Gary Smith, of the Pataskala Police Department, testified that he interviewed J.P. During this interview, J.P. admitted to the Detective that the victim entered a bedroom naked and he attempted to assist her in putting her dress back on

her. Detective Smith interviewed the victim, along with a caseworker from Children Services, according to protocol. The victim gave the same reports to the Detective and social worker about the incident, what occurred and who penetrated her. Detective Smith testified to the collection of the Rape Kit and his execution of a warrant to attempt to retrieve a "Snoopy" blanket at J. P.'s home. The warrant was issued a day later than originally requested, and the blanket was not retrieved. Detective Smith collected the rape kit from Nurse Deitrich and then gave it to Pataskala Officer Massero, who testified he drove it to B.C.I. and logged it in with them.

{¶12} During testimony of the nurse practitioner, the trial court ruled that she was not allowed to repeat the child's statement in full and further prohibited her from testifying about who the victim had identified as the perpetrator of abuse.

{¶13} When the State called B.C.I. scientist Adam Garver to the stand, the trial court refused to allow the admission of DNA evidence, holding that such evidence was not relevant and had no probative value in a rape case based on digital penetration.

{¶14} The State of Ohio claims the rulings made by the trial court rendered the State's case so weak it was unable to effectively prosecute. The State then rested its case without offering its exhibits, as the trial court moved on to address the defense attorney's motion for a Rule 29 dismissal. The trial court entered into an immediate recess and stated that it would reconvene to hear any arguments as to Appellee's motion for a Rule 29 dismissal.

{¶15} When the trial court reconvened, the State made a motion for a mid-trial appeal. The matter was continued for purposes of appeal and the State proffered

testimony from the two B.C.I. scientists to preserve their testimony for purposes of appeal.

{¶16} Scientist Adam Garver testified he then processed the rape kit. His findings included a finding of Amylase on the victim's underwear. He then prepared and retained a cutting of the underwear and stored the evidence so that another B.C.I. scientist, Mark Losko, could conduct further testing on the sample.

{¶17} Scientist Mark Losko stated he then performed DNA analysis on the sample from the victim's underwear and compared that to an oral swab to which Appellee had previously consented. His result was that the DNA profile from the underwear was a mixture consistent with contributions from M.G. and Appellee. The conclusion he reached was that Appellee could not be excluded as a contributor to the DNA from the underwear. He then provided a statistic to show how rare of an occurrence this was and provided that the portion of the population that could not be excluded as possible contributors was 1 in 561 individuals.

{¶18} Appellant State of Ohio now prosecutes this mid-trial appeal, assigning the following three Assignments of Error for review.

{¶19} "I. THE TRIAL COURT DID ABUSE ITS DISCRETION BY EXCLUDING RELEVANT [SIC] D.N.A. EVIDENCE.

{¶20} "II. STATEMENTS OF A CHILD/PATIENT, MADE DURING A MEDICAL EXAMINATION, WHICH IDENTIFIED THE PERPETRATOR [SIC] OF ABUSE ARE ADMISSIBLE [SIC] AND THE TRIAL COURT'S EXCLUSION OF THOSE STATEMENTS, IN THEIR ENTIRETY, WAS ERROR.

{¶21} "III. THIS MATTER SHOULD BE REMANDED TO ALLOW THE STATE'S CASE TO BE RE-OPENED FOR THE INTRODUCTION OF THE FURTHER TESTIMONY FROM THE STATE'S WITNESSES REGARDING APPELLEE'S ISSUES I AND II AND TO ALSO HAVE EACH PARTY SPECIFICALLY ADDRESS ANY ISSUES WITH THE STATE'S EXHIBITS AND DETERMINE THE COURT'S RULING AS TO THEIR ADMISSABILITY [SIC]."

I.

{¶22} In its first assignment of error, the State of Ohio argues that the trial court's exclusion of DNA evidence was error. We agree.

{¶23} The trial court in this case refused to allow the B.C.I. agent to testify as to his findings concerning DNA found on the victim's underwear. The trial court reasoned that such evidence was irrelevant because the charge in this case was rape based on digital penetration, not oral, vaginal or anal intercourse.

{¶24} Evid.R. 401 defines "relevant evidence" as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

{¶25} Further, "[a]n exception to the general rule is that relevant evidence is inadmissible if its probative value is 'substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.' Evid.R. 403(A)." *Id.* at 32.

{¶26} The admission or exclusion of evidence lies in the discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343. In order to find an abuse of that discretion, we must determine that the trial court's decision was

unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶27} Upon review, we find that the trial court did abuse its discretion in refusing to admit evidence pertaining to finding Appellee's D.N.A. in the crotch of the victim's underwear.

{¶28} DNA evidence is not a new concept to Ohio courts. In *State v. Pierce* (1992), 64 Ohio St.3d 490, 597 N.E.2d 107, at paragraph one of the syllabus, the Ohio Supreme Court held that "DNA evidence may be relevant evidence which will assist the trier of fact in determining a fact in issue, and may be admissible." In *Pierce*, the court stated that "the theory and procedures used in DNA typing are generally accepted within the scientific community." 64 Ohio St.3d at 497, 597 N.E.2d 107. Additionally, in *Pierce*, the Court held that "questions regarding the reliability of DNA evidence in a given case go to the weight of the evidence rather than its admissibility. No pretrial evidentiary hearing is necessary to determine the reliability of the DNA evidence. The trier of fact * * * can determine whether DNA evidence is reliable." *Pierce*, 64 Ohio St.3d at 501, 597 N.E.2d 107. (Emphasis added.) Accord *State v. Nicholas* (1993), 66 Ohio St.3d 431, 437, 613 N.E.2d 225 ("DNA results constitute reliable evidence").

{¶29} At trial, defense counsel repeatedly objected to the admissibility of DNA evidence, arguing that there was no claim that Appellee orally or vaginally raped this child victim. While this is a novel argument, it is not a legally sound one. The arguments proposed by Appellee, and accepted by the trial court "go to the weight of the evidence rather than its admissibility." *Pierce*, 64 Ohio St.3d 490, 597 N.E.2d 107, paragraph two of the syllabus. In *Pierce*, the Court found that the trial court properly

admitted calculations as to the frequency probability of DNA samples. *Id.* at 501. Additionally, “[t]he jury was free to reject the DNA evidence if it concluded that the evidence was unreliable or misleading.” *Id.* at 501.

{¶30} The DNA evidence that the State seeks to admit in this case is relevant and moreover, is more probative than it is prejudicial. Clearly, all evidence that the prosecution seeks to admit in a trial against a suspect is prejudicial, and the balancing test that the courts must apply is to determine whether the evidence admitted is more prejudicial than probative. Evid. R. 403. We reject Appellee’s argument that this evidence was more prejudicial than probative. To the contrary, this evidence is the most probative type that we can have in a rape case. It is physical evidence that corroborates the child victim’s testimony.

{¶31} The presence of Appellee’s DNA on the victim’s underwear is consistent with M.G.’s testimony that Appellee pulled her underpants down repeatedly, that he put a Snoopy blanket over her head, and that he placed his finger inside her vagina. M.G. testified that she knew it was Appellee that did this, as it felt like a “big finger” and a “big person’s hand” and that the other people who were in the room were ages one, four, and six. M.G. also heard Appellee state, while he was raping her, that they were “almost done with that game.”

{¶32} Leslie Dedrick, a pediatric nurse practitioner who examined M.G. less than 24 hours after the assault, corroborated that there was localized redness in the tissue surrounding M.G.’s hymen and that given the history presented by M.G. and the physical examination, she concluded that M.G. was a victim of sexual assault. Nurse Dedrick testified that she believed it was not a hygiene issue because the redness was

focused in one area. Nurse Dedrick also testified that M.G. knew who her perpetrator was, that M.G. told her that she saw the perpetrator put the blanket over her head and that it hurt when he put his finger in her vagina.

{¶33} The Supreme Court has held that DNA evidence that may not be conclusive, is still admissible as corroboration. In *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, the Court rejected a defendant's argument that inconclusive DNA evidence was not probative of his guilt. In *Williams*, the court found that the presence of the defendant's DNA on his victim's underwear was admissible evidence that Appellant was the perpetrator. Moreover, the court rejected the defendant's claim that because DNA evidence involves "statistics and probabilities", it is not actual evidence. The court also rejected the defendant's claim that because the DNA evidence was inconclusive, it did not support a finding of guilt. The Court, in rejecting the inconclusiveness assertion, stated, "That is only true with respect to the cervical swab taken during the autopsy, which could only narrow the suspect field down to 25 percent of the male population. But the DNA extracted from Catrise's underwear was consistent with Williams's DNA, and that particular DNA pattern would be consistent with only 1 in 250,000 African-Americans, 1 in 12.4 million Hispanics, and 1 in 33.4 million Caucasians." *Id.* at ¶53.

{¶34} Though the trial court refused to admit the testimony of BCI forensic scientist, Adam Garver, the State proffered what his testimony would have been. Mr. Garver would have testified that he examined M.G.'s underpants and discovered that they were positive for Amylase, which is a component of saliva that is also present in

other bodily fluids. Mr. Garver then procured a portion of the underwear to submit for DNA analysis and comparison.

{¶35} The State then proffered the testimony of Mark Lasko, also a forensic scientist for BCI. Mr. Lasko performed a DNA analysis on the portion of the underwear procured by Mr. Garver and also performed a DNA analysis on an oral swab from Appellee's mouth. His results from the underwear testing revealed a mixture of DNA contributions from both M.G. and Appellee. He determined that Appellee could not be excluded as a contributor to the DNA from the cutting from the underwear.

{¶36} Given the fact that Appellee's DNA was found in M.G.'s underwear and that such evidence strongly corroborates M.G.'s testimony, the probativeness of this evidence far outweighs any potential prejudice. His DNA in her underwear corroborates his presence at the scene of the crime. He could have lubricated his fingers to insert his finger into the child's vagina. What is relevant is that his DNA was found in the victim's underwear within 24 hours of her allegation that he raped her. Accordingly, the trial court abused its discretion in excluding this highly relevant, probative evidence.

{¶37} Appellant's first assignment of error is sustained.

II.

{¶38} In its second assignment of error, the State of Ohio argues that the trial court erred in not allowing into evidence certain statements made by the victim identifying the perpetrator to the nurse practitioner.

{¶39} In excluding such statements, the trial court relied on *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177. In *Crawford*, the United States Supreme Court held statements made out-of-court that are testimonial in

nature are barred by the Confrontation Clause, unless the witness is available to testify or the defendant had an opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. at 68. Therefore, in order to rule on the defendant's motion, the court must answer the threshold question of whether the statements made by the alleged victims were testimonial.

{¶40} "For Confrontation Clause purposes, a testimonial statement includes one made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, paragraph one of the syllabus, quoting *Crawford v. Washington*, 541 U.S. at 52, 124 S.Ct. 1354, 158 L.Ed.2d 177. "In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of the questioner is relevant only if it could affect a reasonable declarant's expectations." *Id.* at paragraph two of the syllabus.

{¶41} The State argues that the statements were not testimonial in nature; rather, the statements made by the alleged victim were made for purposes of medical diagnosis or treatment under Evid.R. 803(4) and, therefore, do not violate the Confrontation Clause.

{¶42} The Supreme Court of Ohio has held that a child's statements may be admitted pursuant to Evid.R. 803(4) if they were made for purposes of medical diagnosis or treatment rather than for some other purpose, regardless of the child's competency to testify. *State v. Muttart*, 116 Ohio St.3d 5, 875 N.E.2d 944, 2007-Ohio-5267, syllabus.

{¶43} In determining whether the child's statements were made for purposes of medical diagnosis or treatment rather than for some other purpose, the Supreme Court of Ohio has identified key factors for a court to consider. *Muttart*, at ¶ 49; see also *State v. Ferguson*, 10th Dist. No. 07AP-999, 2008-Ohio-6677, at ¶ 40. These factors include (1) whether the interviewer questioned the child in a leading or suggestive manner, (2) whether the child had a motive to fabricate, and (3) whether the child understood the need to tell the truth. *Muttart*. The court may consider the consistency of the child's declarations. *Id.* The court may also consider the age of the child, "which might suggest the absence or presence of an ability to fabricate." *Id.*

{¶44} Further, Ohio courts have determined that statements made by a child that identify the perpetrator of sexual abuse may be pertinent to diagnosis and treatment since they assist medical personnel in treating actual injury and assessing the emotional and psychological well-being of the child. *State v. Vance*, 10th Dist. No. 06AP-1016, 2007-Ohio-4407, 2007 WL 2421822, ¶ 70.

{¶45} Upon review, I would find the statements of the victim to the nurse practitioner identifying J.P. as the perpetrator to be admissible under Evid.R. 803(4) as statements made for the purpose of medical diagnosis or treatment.

{¶46} Moreover, I would find the trial court abused its discretion when it excluded the victim's identification to Nurse Dedrick of Appellee as the perpetrator on the basis that M.G. could not know who assaulted her because she had a blanket on her head while she was being assaulted.

{¶47} M.G. testified that Appellee was babysitting her and three other young children that day. She stated that Appellee had repeatedly pulled her underpants down

that day and that immediately prior to the sexual assault, Appellee was on the bed with her and the other children and that he put a Snoopy blanket (which was owned by one of the other children at the residence) over her head. M.G. testified that it felt like a big person's finger and hand that assaulted her, that Appellee stated they were "almost done with that game" while the blanket was covering her and that when she removed the blanket, Appellee was still beside her and that the other kids were at the other end of the bed.

{¶48} M.G. also testified repeatedly that she was sure that Appellee was the one who assaulted her.

{¶49} Given this evidence, it is apparent that the trial court abused its discretion in excluding the evidence. Stating that the evidence is inadmissible because the victim could not see who raped her because the assailant put a blanket over her head is a green light for defendants to simply obscure their victims' vision and then have carte blanche to commit whatever crimes they want. Under such an analysis, the State could never procure a conviction if the victim could not see the defendant actually committing the crime.

{¶50} The evidence was not hearsay, as the trial court suggested, nor was it impossible for M.G. to know who assaulted her merely because her assailant placed a blanket over her head immediately before assaulting her.

{¶51} Therefore, I would sustain Appellant's second assignment of error.

III.

{¶52} In its third and final assignment of error, the State of Ohio states that this matter should be remanded for further testimony pursuant to its arguments as set forth

in Assignments of Error I and II and further, that it should be allowed to reopen its case for the purpose of introducing the State's exhibits.

{¶53} It is implicit that in a midtrial appeal such as this where the court has suppressed admissible evidence that effectively destroys the State's ability to prosecute the case, a reversal also merits a reopening of the State's case in chief for admission of such excluded evidence. A reopening would be the only remedy the State could seek in such a scenario.

{¶54} Crim.R. 12(K) (formerly Crim.R. 12(J)) provides:

{¶55} "When the state takes an appeal as provided by law from an order suppressing or excluding evidence, the prosecuting attorney shall certify that both of the following apply:

{¶56} "(1) the appeal is not taken for the purpose of delay;

{¶57} "(2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

{¶58} "The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently."

{¶59} Moreover, R.C. 2945.67 provides a similar right to appeal:

{¶60} "(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a

criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case.”

{¶61} The Ohio Supreme Court has addressed this issue as well, stating that a prosecutor may appeal at any time after the commencement of trial prior to a judgment of acquittal being entered. *State v. Fraternal Order of Eagles Aerie 0337 Buckeye* (1991), 58 Ohio St.3d 166, 569 N.E.2d 478.

{¶62} In *State v. Davidson* (1985), 17 Ohio St.3d 132, 477 N.E.2d 1141, at the syllabus, the Supreme Court defined “motion to suppress as used in Crim.R. 12(J) to include “[a]ny motion, however labeled, which, if granted, restricts the state in the presentation of certain evidence and, thereby, renders the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed * * *.”

{¶63} As the Supreme Court noted in *State v. Malinovsky* (1991), 60 Ohio St.3d 20, 573 N.E.2d 22, prior to the adoption of then Crim.R. 12(J), the State lacked a remedy comparable to a criminal defendant who was adversely affected by an evidentiary ruling that impacted their ability to effectively present their case. If a criminal defendant was adversely impacted by an evidentiary ruling, the defendant had a remedy through direct appeal. If the state was prejudiced by an adverse evidentiary

ruling resulting in an acquittal, however, the state had no meaningful recourse, as the Double Jeopardy Clause barred retrial. In response, the adoption of Crim.R. 12(J) and enactment of R.C. 2945.67 were designed to preclude the loss of a worthy criminal case solely due to an erroneous ruling by a trial court.

{¶64} “Crim.R. 12(J) does not provide the state with an unfettered right of appeal. The certification element of Crim.R. 12(J) provides the defendant with protection from prosecutorial abuse and harmonizes the appeal with the final order requirement of the Ohio Constitution. Under Crim.R. 12(J) the state must certify that the appeal is not taken for the purpose of delay and that the complained-of ruling destroys the state’s case. Because the state certifies that the ruling destroys its case, the ruling is, in essence, a final order.” *Malinovsky*, supra, at 25.

{¶65} Once that motion to suppress has been granted, a trial court cannot proceed to enter a judgment of acquittal so as to defeat the State’s right of appeal pursuant to Crim. R. 12(K) (formerly 12(J)). Where the motion to suppress has been granted, “it is not for the trial court to determine the sufficiency of the state’s evidence to proceed with the prosecution and hence enter a judgment of acquittal. Rather, the state must be permitted to determine whether it will seek a stay of proceedings in order to exercise its right of appeal pursuant to Crim.R. 12(J), or alternatively to proceed to a final verdict or judgment. The choice is that of the prosecution.” *State v. FOE Aerie 0337*, supra, at 481. In *FOE Aerie 0337*, the trial court had actually proceeded to enter a judgment of acquittal prior to the State’s appeal. The Supreme Court, while declining to set aside the judgment of acquittal, addressed the issue because it was of “extreme importance and capable of repetition, since by its actions the trial court has for all

intents and purposes denied the state its appeal as of right from the grant of a motion to suppress. Indeed, we reach the issue concerning the state's right to appeal because 'these provisions [R.C. 2945.67 and Crim.R. 12(J)] were enacted to facilitate the effective prosecution of crime and to promote fairness between the accuser and the accused.' *State v. Davidson* (1985), 17 Ohio St.3d 132, 135, 17 OBR 277, 280, 477 N.E.2d 1141, 1144." Id.

{¶66} The prosecutor certified in her motion for leave to appeal that without the excluded evidence, her case was effectively rendered so weak that any reasonable possibility of prosecution was destroyed. She then effectuated her appeal prior to a judgment of acquittal being entered. Having complied with the proper procedures as set forth by the Supreme Court and by statute, I find that a reversal and remand for reopening so that the State may present its remaining testimony and evidence is appropriate.

{¶67} Therefore, I would sustain Appellant's Assignment of Error III in total.

{¶68} Based on the facts of this case, I find that the trial court abused its discretion in excluding both the DNA evidence as well as the statement made by M.G. to Nurse Dedrick. Accordingly, I would sustain all of Appellant's assignments of error and reverse and remand this matter to the trial court to reopen the case to allow for the testimony of both BCI employees Adam Garver and Mark Lasko, the excluded testimony of Nurse Dedrick, as well as to allow the State to submit its exhibits.

HON. PATRICIA A. DELANEY

Hoffman, P.J., concurring in part and dissenting in part

{¶69} I disagree with Judges Delaney's and Wise's conclusion the State of Ohio has a right to appeal in this case. I find Judge Delaney's reliance on *State v. Malinovsky* (1991), 60 Ohio St.3d 20, unpersuasive.

{¶70} In *Malinovsky*, the State filed its notice of appeal immediately following the trial court's exclusion of the offered evidence. Unlike *Malinovsky*, in the case sub judice the State took its appeal after resting its case.

{¶71} I find the timing of the State's notice of appeal to be significant.¹ Because of this distinction, I do not find *Malinovsky* applies. Having determined the State is not entitled to an appeal as of right, I would dismiss the discretionary appeal as having been improvidently granted.² However, because of the lack of consensus between my colleagues on the two evidentiary issues presented, I find it necessary to address the merits of the State's argument. However, I do so as a discretionary appeal, not as an appeal as of right under Crim.R. 12(K).

{¶72} Before doing so, I elect to comment briefly on the State's certification of the necessity of the evidence at issue. I am aware the Ohio Supreme Court in *State v. Bertram* (1997), 80 Ohio St.3d 281, held the appellate court lacks authority to question a prosecutor's certification the trial court's granting of a motion to suppress or exclude evidence has destroyed the State's case. However, this case causes me to question whether such holding ought to be reconsidered.

¹ I find it noteworthy the State's proffer of the excluded evidence likewise was not made until after it rested its case.

² The State "out of an abundance of caution" also requested, in the alternative, leave to appeal.

{¶73} Typical review of claimed error regarding admission or exclusion of evidence involves a two-step process. First this Court determines if the trial court's decision constituted an abuse of discretion. If no abuse is found, our analysis ends.

{¶74} However, if we find the trial court did abuse its discretion in admitting or excluding evidence, we must then determine if prejudice resulted. If no prejudice occurred, the error is harmless and does not result in reversal.

{¶75} Because under Crim.R. 12(K) further prosecution is barred in the absence of newly discovered evidence, if this court finds no prejudicial error exists because of the exclusion of either of the two challenged pieces of evidence, the prosecutor's certification results in an acquittal. I believe the only way to remedy this dilemma is to allow the appellate court the opportunity to review the prosecutor's certification in the context of its review of the merits of the legal issue presented. If the prosecutor's certification is determined to be unwarranted, the reviewing appellate court could choose to dismiss the "appeal as of right", treat the appeal as a discretionary appeal which would not necessarily bar further prosecution, or dismiss the appeal altogether.

{¶76} I agree with Judge Delaney the DNA evidence at issue is relevant. While recognizing it is always within the trier of the facts province to determine the weight and credibility to be given to any evidence once admitted, I find the trial court's exclusion of the DNA evidence on the basis of irrelevancy was an abuse of discretion. Whether the exclusion was prejudicial or merely harmless is debatable. While I find it to be prejudicial in this case, I am not convinced, let alone persuaded, any reasonable possibility of effective prosecution has been destroyed by its exclusion. The testimony

of the child victim, if believed by the trial court, together with all reasonable inferences based thereon, alone is sufficient to support a conviction.

{¶177} Accordingly, I concur with Judge Delaney's decision to sustain Appellant's Assignment of Error I.

{¶178} Even more problematic is the State's certification the exclusion of Nurse Dedrick's testimony concerning the child victim's identification of Appellee destroyed any reasonable possibility of effective prosecution in its Assignment of Error II.³ In light of the direct testimony of the child victim concerning Appellee putting a blanket over her head before and during the sexual abuse, it seems apparent any statement by the child victim to the nurse positively identifying Appellee as the perpetrator is necessarily an assumption on the child victim's part. The child victim's positive identification of Appellee to the nurse must be considered in light of her direct testimony. Although I believe this testimony was arguably admissible under Evid.R. 803(4), albeit of little value, I would not find the trial court abused its discretion in excluding it given the victim's direct testimony. And because I find the child victim's direct testimony, together with all reasonable inferences based thereon, is more than sufficient to support a conviction, I again question whether any reasonable possibility of effective prosecution was destroyed by its exclusion.

{¶179} Accordingly, I agree with Judge Wise's decision to overrule Appellant's Assignment of Error II.

³ I concur in Judge Delaney's analysis Appellant's right to confrontation was not denied with regards to Nurse Dedrick's testimony.

{¶80} Finally, I concur in part, with Judge Delaney's disposition of Appellant's Assignment of Error III as it relates to the DNA evidence. But I do so under review as a discretionary appeal, not one as of right, as noted supra.

HON. WILLIAM B. HOFFMAN

Wise, J., dissenting

{¶81} I begin my analysis in this case by agreeing with Judge Delaney that this mid-trial appeal was brought by the State as an appeal as of right pursuant to R.C. §2945.67(A) and Crim.R. 12(K). I do not find, as Judge Hoffman does, that the State can bring a discretionary appeal, mid-trial, from an evidentiary ruling.

{¶82} R.C. §2945.67(A) confers a limited right of appeal upon the State of Ohio. It states, in pertinent part:

{¶83} “(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case * * *.”

{¶84} R.C. §2945.67(A) applies only to criminal cases, dealing with procedural issues that occur only in criminal cases. It draws a distinction between an appeal as of right and an appeal by leave of court. This statute establishes a tripartite scheme for state appeals. *State v. Perroni* (June 26, 1998), Lake App. No. 96-L-107. The first part of the statute identifies four trial court orders the State may appeal as a matter of right: (1) a motion to dismiss all or part of an indictment, complaint, or information; (2) a motion to suppress evidence; (3) a motion for the return of seized property; or (4) postconviction relief. *State v. Fisher* (1988), 35 Ohio St.3d 22, 24-25. A trial court order

other than one of those four may be appealed only if the order is final under Section 2505.02 and the appellate court grants leave.

{¶85} In the case sub judice, the State is appealing a ruling excluding evidence which is akin to a motion to suppress evidence. I therefore find that the State's appeal is one as of right.

{¶86} The Ohio Supreme Court has held:

{¶87} "Any motion which seeks to obtain a judgment suppressing evidence is a 'motion to suppress' for purposes of statute and rule governing appeals, where that motion, if granted, effectively destroys the ability of the state to prosecute; fact that the motion is not labeled 'motion to suppress' is not controlling." *State v. Davidson* (1985), 17 Ohio St.3d 132.

{¶88} "In the normal course of criminal proceedings, the defendant will make a motion to suppress evidence prior to trial. Both R.C. 2945.67 and Crim.R. 12(J) give the state an absolute right to appeal from the grant of a pretrial motion to suppress. However, neither R.C. 2945.67 nor Crim.R. 12 contains a mandatory time element as to when a motion to suppress must be granted. While Crim.R. 12(E) states that when such motions are made before trial they are to be decided before trial, it is not an uncommon practice for a court to either reserve ruling on the motion, or to initially deny the motion and then upon reconsideration subsequently grant the motion after trial has begun. We can discern no reason to permit the state an absolute appeal as of right from a pretrial grant of a motion to suppress, but deny the state an appeal from a grant of a motion to suppress that is entered after trial has begun. Hence, R.C. 2945.67(A) and Crim.R. 12(J) provide the state with an absolute right to appeal the grant of a motion to

suppress...” *State v. Fraternal Order of Eagles Aerie 0337 Buckeye* (1991), 58 Ohio St.3d 166, 168-169.

{¶89} As such, I find that the trial court’s ruling in this matter falls squarely within one of the four limited types of rulings the State may appeal as of right.

{¶90} While the statute also provides that the State may also appeal “any other decision” of the trial court, I find that pursuant to the long-standing principle of statutory construction, styled in the Latin: *expressio unius est exclusio alterius*, i.e. “that to express or include one thing implies the exclusion of the other” such language means that the State may not take a discretionary appeal from any of those four enumerated types of rulings specifically set forth in the statute. Furthermore, the State may only appeal such other decisions if it first obtains leave to do so from the court of appeals. “If the State wishes to appeal a judgment of the trial court not expressly provided for in R.C. 2945.67(A), it must seek leave to appeal under App.R. 5(C) and its motion must be filed concurrently with the notice of appeal.” See *State v. Fisher* (1988), 35 Ohio St.3d 22, 25.

{¶91} Therefore, even if the State could pursue a discretionary appeal in this matter, which I do not find that it could, it failed to perfect same. A motion for leave to appeal by the State in a criminal case is governed by the procedural and temporal requirements set forth in App.R. 5(C), which states in pertinent part:

{¶92} “(C) Motion by prosecution for leave to appeal

{¶93} “When leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order

sought to be appealed and shall set forth the errors that the movant claims occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by the parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the motion and a copy of the notice of appeal to the clerk of the court of appeals who shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the defendant who, within thirty days from the filing of the motion, may file affidavits, parts of the record, and brief or memorandum of law to refute the claims of the movant.”

{¶194} In the instant case, in its Notice of Appeal, the State of Ohio asserted that it was filing an Appeal as of Right pursuant to Crim.R. 12(K) but that “out of an abundance of caution” it moved this Court for leave to file a discretionary appeal.

{¶195} The State did not set forth the errors it claimed occurred below, nor did it file a separate motion by an affidavit or any part of the trial record. The State also did not file a brief or memorandum of law in support its claims.

{¶196} “A motion for leave to appeal is a necessary prerequisite under R.C. 2945.67(A) for the state's right of appeal to attach. Any failure to follow this directive deprives the appellate court of jurisdiction and requires that such appeal be dismissed.” *State v. Wallace* (1975), 43 Ohio St.2d 1.

{¶197} Having found that this appeal before us is one as of right pursuant to the above statute, I next turn to Crim.R. 12(K), which provides:

{¶198} “When the state takes an appeal as provided by law from an order suppressing or excluding evidence, the prosecuting attorney shall certify that both of the following apply:

{¶199} “(1) the appeal is not taken for the purpose of delay;

{¶100} “(2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.”

{¶101} ****

{¶102} “If an appeal pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.”

{¶103} The State certified that the exclusion of both the DNA evidence and the nurse practitioner's testimony as to the statements made to her by the child victim rendered its case so weak that it was unable to effectively prosecute.

{¶104} With regard to the DNA evidence, while I find that such evidence may have been relevant, I would not find that the trial court abused its discretion in excluding such evidence. The trial court is the gatekeeper on issues of admissibility. While I agree that the DNA evidence in this case was corroborative, I disagree with Judge Delaney that “this evidence is the most probative type that we can have in a rape

case". I find the most probative evidence in this case was the testimony of the child. I would therefore overrule Assignment of Error I.

{¶105} As to Assignment of Error II, concerning the nurse practitioner's testimony, I again would not find that the trial court erred in excluding same. The victim testified that her attacker placed a blanket over her head before he assaulted her. The nurse practitioner's repetition of the child's account would not add anything as far as identifying the person who assaulted the victim.

{¶106} I agree with Judge Hoffman in his dissent as to Judge Delaney's disposition of Assignment of Error II, the child victim's direct testimony, taken together with the other testimony and evidence presented, was sufficient to support a conviction.

{¶107} Having found that the trial court did not err in excluding either the DNA evidence or the nurse practitioner's testimony, I would find that the State of Ohio is barred from prosecuting the defendant for this offense based on its certification that the exclusion of both destroyed its ability to effectively prosecute. I believe that a finding supporting the exclusion of just one of these rulings would suffice. I would therefore overrule Appellant's Assignment of Error III.

{¶108} An order sustaining a motion to suppress evidence is not a final order and appealable absent the required Crim.R. 12(K) certification. The order becomes a final order when certified because the prosecutor has no reasonable possibility of effective prosecution without the evidence which has been suppressed.

{¶109} Where, as here, the record reflects the fact that the suppressed evidence is not critical to the prosecutor's case, I would conclude that the evidentiary

ruling excluding the evidence is not a final order. Under these circumstances I would find that this Court lacks jurisdiction and would dismiss the appeal.

{¶110} In conclusion, there is no majority opinion in this case. This case has been determined based upon a plurality of opinions. Therefore, I find based upon those opinions, this case must be resolved as follows:

{¶111} First, a majority of this Court, Judge Delaney and myself, has determined that this is an appeal as of right pursuant to R.C. §2945.67. Therefore, this Court's ruling on the assignments of error must be applied as such and not as a discretionary appeal. This is significant because the State's certification pursuant to Crim.R. 12(K) bars the State from pursuing further prosecution of this case if either of the assignments of error is overruled and the trial court's ruling is affirmed.

{¶112} Judge Delaney and Judge Hoffman form the majority on Assignment of Error I, sustaining the assignment of error and reversing the trial court as to the exclusion of DNA evidence. Judge Hoffman and I form the majority on Assignment of Error II, overruling the same and affirming the trial court's exclusion of the nurse practitioner's statements. Because a majority of this Court has affirmed the trial court's decision that the State could not present evidence which it certified had "rendered its proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed", pursuant to Crim.R.12(K), the State should be barred from further prosecution of the Appellee in this case.

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
	:	
IN THE MATTER OF	:	Hon. William B. Hoffman, P.J.
	:	Hon. John W. Wise, J.
J.P.	:	Hon. Patricia A. Delaney, J.
	:	
ALLEGED DELINQUENT CHILD	:	Case No. 08-CA-148
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For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed in part and reversed in part. This cause is remanded for further proceedings consistent with our Opinions. Costs are split and assessed equally to Appellant and Appellee.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE