[Cite as *State v. Church*, 2010-Ohio-1142.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-68
DONNY R. CHURCH	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas Case No. 2008-CR-809H
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	March 12, 2010

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
KIRSTEN PSCHOLKA-GARTNER 0077792 Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	R. JOSHUA BROWN 0008452 32 Lutz Avenue Lexington, Ohio 44904

Delaney, J.

{¶1} Defendant-Appellant, Donny Church, appeals his conviction of one count of rape of a child under thirteen, a violation of R.C. 2907.02(A)(1)(b), a felony of the first degree, and one count of gross sexual imposition, a violation of R.C. 2907.05(A)(4), a felony of the third degree. The State of Ohio is Plaintiff-Appellee.

{¶2} The facts underlying the current appeal are as follows.

{¶3} In the evening hours of September 24, 2008, Victoria Kilby and her live-in boyfriend, Appellant, were bathing Victoria's three-year old daughter, I.K. Victoria observed I.K. begin masturbating in the bathtub. When Victoria asked I.K. what she was doing, I.K. responded that "Mamaw" had done it to her. Victoria stated that Mamaw was her grandmother, Betty Church, who lived in North Carolina. According to Victoria, Mamaw had visited the family the previous May, and that they had stayed with her in her hotel room.

{¶4} After hearing this, Victoria took I.K. to the hospital emergency room that night to be examined. Because the event occurred outside of the initial 72-hour period wherein an immediate sexual assault examination is conducted, the hospital scheduled the sexual assault examination for the following Tuesday. At the sexual assault exam, the S.A.N.E. nurse did not find any trauma consistent with penetration, and I.K. did not provide a history of sexual abuse.

{¶5} Subsequent to the sexual assault examination, I.K. was interviewed by Children's Services investigator, Kristin Galownia on October 9, 2008. During the interview, Ms. Galownia showed I.K. a male anatomical drawing. I.K. identified the drawing as "daddy." When Ms. Galownia asked I.K. who "daddy" is, I.K. stated that

daddy is “Donny.” Ms. Galownia had I.K. identify various body parts, such as ear, nose, and body. When Ms. Galownia pointed to the male genitals, I.K. stated “Donny – daddy stuck that in my mouth.” I.K. also indicated that Donny offered her jelly beans and ice cream, and that her mother was out of the house when it happened. Ms. Galownia was able to determine that I.K. was capable of distinguishing between her biological father, Michael, and her mother’s boyfriend, Appellant.

{¶6} Based upon I.K.’s disclosures, Ms. Galownia referred the case to the Mansfield Police Department. Detective Jeff Shook contacted Appellant at the Richland County Jail, where he was being held on unrelated charges. Detective Shook informed Appellant of the allegations and read Appellant his Miranda rights. Appellant waived his rights and agreed to speak with Detective Shook.

{¶7} During the interview, Appellant denied the allegations at first. Eventually, however, Appellant admitted that on one occasion when Victoria was gone, he had I.K. put her hand on his penis and that he also stuck his penis in her mouth. He stated that he stopped when he got an erection because he knew it was wrong. When Detective Shook attempted to take a taped statement from Appellant, he refused to give a second statement and stated that he was too upset to talk anymore.

{¶8} Detective Shook then concluded the interview and contacted the Prosecutor’s office to have Appellant charged with rape. He learned that Appellant had spoken with I.K.’s mother and that he stated that he had been coerced into giving a confession.

{¶9} Detective Shook then took Officer William Bushong with him to interview Appellant a second time. During the second interview, Detective Shook asked

Appellant whether he had stated that he had been coerced into confessing. Appellant stated that he did not know what Detective Shook was talking about and that he had not spoken with anyone. Appellant then again agreed that he made the admissions regarding having I.K. put her hand on his penis and that he put his penis in her mouth.

{¶10} Appellant was indicted by the Richland County Grand Jury on one count of rape of a child under thirteen and one count of gross sexual imposition.

{¶11} Prior to trial, Appellant's attorney filed a motion to suppress his statements to Detective Shook and Officer Bushong on the grounds that his *Miranda* rights were violated. The trial court overruled that motion.

{¶12} Trial counsel also filed a motion in limine to exclude any evidence of any investigation of other crimes that may be pending, of any out of court statements of the victim, and any taped conversations due to the fact that the defense did not receive notice of them until January 29, 2009.

{¶13} The State filed a response to the motion and requested a hearing to determine the child-victim's competency and the admissibility of her out of court statements.

{¶14} On March 4, 2009, a competency hearing was held wherein the victim was interviewed by the court. During the interview, I.K. was sitting on the lap of her great aunt. I.K. refused to cooperate and answer the questions, despite repeated requests from the court, her aunt, and the prosecutor. As a result, the court declared her incompetent to testify at trial.

{¶15} After hearing legal arguments, the trial court determined that I.K.'s statements to the Children's Services investigator were admissible as an excited

utterance. In so doing, the trial court relied upon several Ohio cases: *In re D.M.*, 158 Ohio App.3d 780, 2004-Ohio-5858, 822 N.E.2d 433, *State v. Hohman* (March 23, 1990), 5th Dist. No. CA-89-9, and *State v. Duncan* (1978), 53 Ohio St.2d 215.

{¶16} Thereafter, Appellant's case proceeded to jury trial on April 20, 2009. The State presented testimony from Victoria Kilby, S.A.N.E. nurse Renee Metcalf, Children's Services investigator, Kristin Galownia, Detective Jeff Shook, and Officer William Bushong. Appellant testified on his own behalf.

{¶17} At the conclusion of the trial, the jury found Appellant guilty as charged. Appellant was sentenced to the maximum term of ten years to life on the rape charge and a term of three years on the gross sexual imposition charge, to be run concurrently to the sentence on the rape change.

{¶18} It is from this conviction that Appellant now appeals.

{¶19} Appellant raises one Assignment of Error:

{¶20} "I. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE HEARSAY STATEMENTS OF THE ALLEGED VICTIM, AS THE ADMISSION OF THE SAME DENIED DEFENDANT HIS RIGHTS OF CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION."

I.

{¶21} In his sole assignment of error, Appellant argues that the trial court erred in admitting statements at his jury trial which were made by the victim pursuant to the excited utterance exception in Evid. R. 803(2).

{¶22} The admission of evidence lies in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. A statement which is

otherwise considered hearsay may be admissible as an excited utterance when the following four criteria are met: "(1) an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while still under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have personally observed the startling event." *In re C.C.,* 8th Dist. Nos. 88320, 88321, 2007-Ohio-2226, ¶50, citing *State v. Brown* (1996), 112 Ohio App.3d 583, 601, 679 N.E.2d 361.

{¶23} In *State v. Taylor* (1993), 66 Ohio St.3d 295, 304, 612 N.E.2d 316, the Supreme Court recognized that children are likely to remain in a state of nervous excitement longer than an adult would, and therefore held that "admission of statements of a child regarding sexual assault may be proper under the excited utterance exception even when they are made after a substantial lapse of time." The Court also determined that there is no per se amount of time after which a statement can no longer be considered to be an excited utterance; the central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may not be a result of reflective thought.

{¶24} The Eighth District, in *C.C.*, supra, determined that although roughly twenty-seven days had elapsed since the day that defendant babysat for the child victims, the utterance by the boys regarding what had happened to them was spontaneously uttered, the statement regarded a subject matter ordinarily foreign to a young child, and the children were both clearly under nervous excitement of the event. *C.C.*, supra, at ¶53.

{¶25} Similarly, in *State v. Dukes* (Aug. 25, 1988), Cuyahoga App. No. 52604, the Eighth District found that the spontaneous statement of a three-year-old child, ten days after the incident, constituted an excited utterance. While the child was being bathed, the child stated, “My daddy sucks my body.” The court found that the child's spontaneous statement regarding a subject matter ordinarily foreign to a three-year-old child constituted an excited utterance.

{¶26} Moreover, the Twelfth District, in *State v. Ames* (June 11, 2001), 12th Dist No. CA2000-02-024, held that the controlling factor is whether the declarant made the statement under circumstances that would reasonably show that it resulted from impulse rather than reason and reflection. *Ames*, supra, citing *State v. Smith* (1986), 34 Ohio App.3d 180, 190. In *Ames*, the six-year old victim’s mother was permitted to testify about the statements the victim made on October 25, 1998, concerning a sexual assault by the defendant. Although the actual date of the incident could not be identified, testimony of different individuals narrowed the time frame to within approximately two months of the October 25th date. After the victim’s mother was notified by the baby-sitter about what had occurred, the victim’s mother asked the victim why she had not told her. While the victim was talking about the incident involving defendant with her mother, the victim's mother testified that the victim began to cry, hyperventilate, perspire and shake as she related what had happened.

{¶27} In *In re Michael* (1997), 119 Ohio App.3d 112, 694 N.E.2d 538, there was a time delay of two weeks between the time of the incident and the statements made. *In re Michael* cited additional authority that approved admission of excited utterances where a significant period of time had elapsed between the conduct and the statement.

Those cases involved a seven month delay from incident to statements, *State v. List* (May 1, 1996), 9th Dist. No. 17295, unreported, and a four-to-six week delay. *State v. Stipek* (Mar. 30, 1995), 7th Dist. No. 92-B-59.

{¶28} The *Ames* court determined that it is in the sound discretion of the trial court to determine whether or not a declaration should be admissible under the excited utterance exception to the hearsay rule and that if the decision of the court appears to be a reasonable one, even though the reviewing court, if sitting as a trial court, would have made a different decision, then that decision must stand. Id., citing *Potter v. Baker* (1955), 162 Ohio St. 488, 500, 124 N.E.2d 140.

{¶29} As the Supreme Court in *Taylor* held, "[t]his trend of liberalizing the requirements for an excited utterance when applied to young children who are the victims of sexual assault is also based on the recognition of their limited reflective powers. Inability to fully reflect makes it likely that the statements are trustworthy." *State v. Taylor*, supra, at 304, citing *State v. Wallace* (1988), 37 Ohio St.3d 87, 88, 524 N.E.2d 466, 468; *State v. Wagner* (1986), 30 Ohio App.3d 261, 30 OBR 458, 508 N.E.2d 164.

{¶30} Appellant argues that the statements were not made under the stress of the event in the present case. We disagree. The statements were made first spontaneously to her mother while being bathed. While in the bathtub, I.K. began masturbating. When her mother asked what she was doing, I.K. stated that Mamaw had done it to her. Obviously concerned about the statement, Victoria took I.K. to the emergency room to be examined. She was referred to have a sexual assault examination conducted the following week. The second time I.K. made a statement

was to Children's Services investigator, Kristin Galownia, two weeks after the initial statement. When Ms. Galownia showed I.K. a male anatomical drawing, I.K. identified the drawing as "daddy." Ms. Galownia asked I.K. who daddy was and I.K. responded, "Donny." At that time, she had I.K. identify various body parts such as ear, nose, and body. When Ms. Galownia pointed to the male genitals, I.K. stated, "Donny – daddy stuck that in my mouth." Upon further questioning, I.K. indicated that Donny offered her jelly beans and ice cream and that her mother was out of the house when it happened.

{¶31} The excited utterance hearsay exception is treated differently when the declarant is an alleged sexually abused child; as we have already established, the test is extremely liberal. *In re D.M.* (2004), 158 Ohio App.3d 780, 822 N.E.2d 433 at ¶13 citing *State v. Shoop* (1993), 87 Ohio App.3d 462, 472, 622 N.E.2d 665. See, also, *Taylor*, supra, 66 Ohio St.3d at 304, 612 N.E.2d 316. "The scrutiny for the child declarant is less than that for an adult. The liberal scrutiny is based on the court's recognition that young children are more trustworthy because of their limited reflective powers." Id., citing *Taylor*, supra, 66 Ohio St.3d at 304, 612 N.E.2d 316; *State v. Wagner* (1986), 30 Ohio App.3d 261, 264, 30 OBR 458, 508 N.E.2d 164. With this in mind, cases involving very young children focus on the spontaneity of the statement, not the progression of a startling event or occurrence.

{¶32} "The limited reflective powers of a three-year-old, coupled with his inability to understand the enormity or ramifications of the attack upon him, sustain the trustworthiness of his communications. As a three-year-old, truly in the age of innocence, he lacked the motive or reflective capacities to prevaricate [about] the circumstances of the attack. Furthermore, the immediacy of each communication,

considered in light of the available opportunities to express himself, satisfies the requirement of spontaneity." *D.M.*, supra, citing *State v. Wagner*, (1986), 30 Ohio App.3d 261, 30 OBR 458, 508 N.E.2d 164.

{¶33} Each excited utterance must be reviewed on a case by case basis. We conclude, based on the circumstances of this case, that because the statement was spontaneous, because the victim was of such a young age, and because her statements did not indicate a reflective process, the statement constituted an excited utterance. We further find that the trial court's judgment that I.K.'s statements qualify as an excited utterance under Evid. R. 803(2) was reasonable. The record does not reveal any evidence that I.K.'s statements were fabricated, distorted or reflective. Thus, we find that the trial court did not abuse its discretion in admitting the testimony regarding I.K.'s statements.

{¶34} Appellant also argues that the trial court's decision not to allow the victim to testify due to incompetence makes her statement unreliable. We disagree.

{¶35} The statement was admitted pursuant to the excited-utterance exception to the hearsay rule, not Evid.R. 807. A prior finding of availability or competency is not necessary when the victim's statement is an excited utterance. *State v. Said* (1994), 71 Ohio St.3d 473, 644 N.E.2d 337; *State v. Boston* (1989), 46 Ohio St.3d 108, 114, 545 N.E.2d 1220; *State v. Street* (1997), 122 Ohio App.3d 79, 85, 701 N.E.2d 50; *State v. Burnette* (1998), 125 Ohio App.3d 278, 281, 708 N.E.2d 276. The Ohio Supreme Court in *State v. Wallace* (1988), 37 Ohio St.3d 87, 93-94, 524 N.E.2d 466, addressed the issue of competency and the excited-utterance exception and held as follows:

{¶36} “[I]t has long been the common law of Ohio that the testimonial incompetency of a child-declarant does not bar the admission of the child's declarations as excited utterances. The overwhelming majority of jurisdictions which have considered this issue are in accord. * * *

{¶37} “* * *[C]ompetency is, in large part, inherently satisfied by the elements required to establish an excited utterance. * * * To be competent, a witness must appreciate the duty to tell the truth and possess the ability to recall accurately. These requirements are not relevant to the admissibility of an excited utterance because an excited utterance is made while the declarant is dominated by the excitement of the event and before there is opportunity to reflect and fabricate statements relating to the event.”

{¶38} Accordingly, we find Appellant’s argument to be unpersuasive and his assignment of error is overruled.

{¶39} For the foregoing reasons, we affirm the decisions of the Richland County Court of Common Pleas.

By: Delaney, J.

Edwards, P.J. and

Gwin, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. W. SCOTT GWIN

[Cite as *State v. Church*, 2010-Ohio-1142.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DONNY R. CHURCH	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-68
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

_____
HON. W. SCOTT GWIN