[Cite as *State v. Smith*, 2006-Ohio-45.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 20828
v.	:	T.C. NO. 04 CRB 458
JEFFREY S. SMITH	:	(Criminal Appeal from Kettering Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 6th day of January, 2006.

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Jeffrey Scott Smith, filed December 2, 2004. Appellant was convicted of one misdemeanor count of sexual imposition upon his 12 year old step-daughter, A. H. A.H. initially told her friend, Shelby Pearson, that Appellant touched her inappropriately, rubbing his hand against her vagina after she climbed into her mother's and Appellant's bed on Christmas

morning, 2003. Shelby told her mother of the accusation, and Shelby's mother contacted A. H.'s mother. After speaking with A. H., A.H.'s mother contacted the police. A.H. relayed the same story to the responding officer, as well as the detective assigned to investigate the alleged incident. A.H. repeated the story to other girls, and to her therapist, Dr. Linda Ott, and to the prosecutor. At the initial trial of this matter, on August 18, 2004, A.H. testified that Appellant touched her inappropriately. Following a mistrial, a second trial was held on December 1, 2004. At the second trial, A.H. denied that any inappropriate contact had occurred. A.H. testified that she invented the allegations because she was seeking attention from her mother. Appellant denied touching A.H. inappropriately.

{¶ 2} Appellant asserts five Assignments of error on appeal that present evidentiary issues. "The decision whether to admit or exclude evidence lies in the sound discretion of the trial court." *State v. Carter*, Summit App. No. 22444, 2005-Ohio-4362. We review the trial court's decision regarding the admission or exclusion of evidence under an abuse of discretion standard of review. Id. "An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling." Id. (Internal citations omitted.) "An abuse of discretion demonstrates 'perversity of will, passion, prejudice, partiality, or moral delinquency.'" Id. We may not substitute our judgment for that of the trial court. Id.

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{¶ 3} Appellant's first assignment of error is as follows:

{¶ 4} "THE TRIAL COURT ERRED IN ALLOWING THE STATE TO IMPEACH ITS OWN WITNESS WITHOUT FIRST HAVING ESTABLISHED THE ELEMENT OF

SURPRISE"

{¶ 5} Evid. R. 607(A) provides that "[t]he credibility of a witness may be attacked by any party, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage."

{¶ 6} On direct, the State asked A.H. if she told Shelby, other girls, her mother, the police, the prosecutor and her therapist that Appellant touched her inappropriately, and A. H. testified that she did so accuse Appellant. On cross-examination, Appellant asked A.H. if it was true that Appellant touched her inappropriately, and A.H. said it was not true. On redirect, the State confronted A.H. with evidence of the prior statements concerning which she had testified in her direct testimony.

{¶ 7} The evidence the State introduced on re-direct was not inconsistent with evidence the State elicited from A.H. on direct. Rather, the re-direct evidence was consistent with her direct evidence testimony, offered not to impeach her direct evidence testimony but to rehabilitate her credibility after Defendant's cross-examination. Any inconsistencies it exposed were with her cross-examination testimony elicited by Defendant, not the direct evidence testimony elicited from A.H. by the State. Therefore, Evid. R. 607(A) does not apply, and no error occurred in permitting the State to question A.H. on re-direct examination as it did. Accordingly, Appellant's first assignment of error is overruled.

{¶ 8} Appellant's second assignment of error is as follows:

{¶ 9} "TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S

OBJECTION TO DR. OTT'S OPINION TESTIMONY BASED IN PART ON INFORMATION OBTAINED THROUGH CHILDREN'S SERVICES"

{¶ 10} Evid. R. 703 provides that "[t]he facts or data * * * upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing." Courts properly exclude expert opinions that are not based upon the personal knowledge of the witness or admitted evidence, but are instead based upon data compiled by others that are not in evidence. *State v. Fouty* (1996), 110 Ohio App.3d 130, 135-36 (finding an abuse of discretion where trial court admitted coroner's expert opinion as to cause of death when coroner did not perform the autopsy or view the body but instead relied upon notes, not in evidence, compiled by others who did).

{¶ 11} Dr. Linda Ott, a qualified expert, testified that Children's Services referred A.H. to her because A.H. had disclosed sexual abuse. She stated that she saw A.H. 10 times, and that, based on information she received from A.H., her mother, and Children's Services, she believed that inappropriate boundaries existed in A.H.'s home. She stated that it was inappropriate, due to A.H.'s age, for Appellant to chase and tickle A.H. and to allow her to sleep in bed with him. Dr. Ott did not testify regarding the information she received from Children's Services other than to mention that A.H. was referred to her by the agency after sexual abuse was reported.

{¶ 12} Dr. Ott's testimony complies with Evid. R. 703. A.H. testified that she slept in her mother's and Appellant's bed, sometimes on the side of the bed next to Appellant. She also testified that Appellant chased and tickled her. In other words, the facts upon which Dr. Ott based her opinion were admitted in evidence. Finding no abuse of discretion, Appellant's second assignment of error is overruled.

{¶ 13} Appellant's third assignment of error is as follows:

{¶ 14} "THE TRIAL COURT ERRED IN ITS ADMISSION OF THE TESTIMONY GIVEN BY OFFICER CALDWELL, DETECTIVE STEWART, AND SHELBY LEE PEARSON AS CONSTITUTING HEARSAY NOT WITHIN ANY RECOGNIZED EXCEPTION"

{¶ 15} Jeffrey Smith asserts the trial court erred in admitting hearsay testimony from Officer Caldwell, Detective Stewart and her friend, Shelby Pearson, because the testimony described what A.H. told them about the alleged molestation by her step-father. A.H. asserts all this testimony is inadmissible hearsay that does not fall within a recognized exception.

{¶ 16} "[A] 'trial court has broad discretion to determine whether a declaration should be admissible as a hearsay exception'. [*State v. Dever* (1992), 64 Ohio St. 3d 401 at 410]. 'The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.' *State v. Sage* (1987), 31 Ohio St.3d 173, 180. Unless the trial court has clearly abused its discretion, and the defendant has been materially prejudiced thereby, a reviewing court should be slow to interfere. *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163." *State v. Burgess* (Nov. 8, 1996), Montgomery App. No. 15548. The admission of hearsay is harmless error where the declarant was also a witness and examined regarding matters identical to those contained in the hearsay statements. *State v. Allen* (May 24, 1996), Darke App. No. 1390.

{¶ 17} Here, both the State of Ohio and defense counsel examined the victim, A. H., about her initial statements to the police and her girlfriend, Shelby. The jury heard from the victim herself that she initially gave these witnesses an account entirely

different than her trial testimony. The testimony of these three witnesses comported with an earlier version of the facts provided by A.H.

{¶ 18} The State's suggestion that this testimony was offered merely to explain the purpose for the investigation and not the truth of the matter asserted therein is disingenuous at best. The narration by these witnesses was not limited to a brief explanation of the basis for police involvement. Thus, we reject this argument by the State of Ohio.

{¶ 19} The accounts given of A.H.'s statements were clearly offered for the truth of the matter asserted therein. Further, the trial court's concession that these witnesses could testify pursuant to Evid. R. 801(D)(1)(b) is incorrect. This rule provides that a prior statement is not hearsay if: (a) the declarant testifies at trial; (b) the declarant is subject to cross examination concerning the statement; and (c) the statement is **consistent** with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper motive. As applied to this case, we find that (a) A.H., who is the declarant in this instance, testified at trial she was not molested but acknowledged giving different accounts to all government witnesses on earlier occasions; and (b) the declarant, A.H., was subject to cross-examination; but (c) the government witness statements are not consistent with A.H.'s own testimony at this second trial. Thus, the court was wrong in the reasoning employed to admit this testimony.

{¶ 20} However, based upon our ruling in *Allen*, we find that the admission of these statements was harmless and merely cumulative since A.H. testified in open court and was cross-examined on the same matters. Appellant's third assignment of error is

overruled.

{¶ 21} The Appellant's fourth assignment of error is as follows:

{¶ 22} "THE TRIAL COURT ERRED IN REFUSING TO ALLOW QUESTIONING REGARDING [A.H.'S] GENERAL VERACITY"

{¶ 23} Evid. R. 608(B) provides that "specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, * * * may not be proved by extrinsic evidence."

{¶ 24} An appellant may not predicate error upon a ruling excluding evidence unless a substantial right is affected and "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Evid. R. 103(A)(2).

{¶ 25} Appellant asked A.H.'s mother on direct examination if she had experienced problems in the past with A.H. lying to her. This question violates Evid. R. 608(B) because it seeks extrinsic evidence to impeach A.H.'s credibility. Even if the question were proper, Appellant did not make the substance of the evidence known to the court, by means of a proffer, after the State's objection was sustained, and the evidence Appellant sought is not apparent from the context of his questions. There being no abuse of discretion, Appellant's fourth assignment of error is overruled.

{¶ 26} Appellant's fifth assignment of error is as follows:

{¶ 27} "THE TRIAL COURT ERRED IN THE ADMISSION OF PRIOR ACTS EVIDENCE"

{¶ 28} The following exchange occurred between Appellant and his counsel at trial:

{¶ 29} "Q. Have you ever been accused or, or has anyone ever tried to say that you have any other * * * problems like this with any of your other children?

{¶ 30} "A. No.

{¶ 31} "Q. * * * , in fact, have you ever been accused of anything at all of this nature?

{¶ 32} "A. No, not at all."

{¶ 33} During his cross-examination, the prosecutor asked Appellant if he had been accused of stalking and assaulting his wife in 1993. The trial court overruled the timely objection to the question "because the door was opened", and Appellant admitted to being accused of assault and stalking.

{¶ 34} We must first determine whether the court erred by allowing the jury to hear Appellant's testimony about the 1993 accusations, and then, whether such error is prejudicial or harmless to the Appellant. *State v. Davis* (1975), 338 N.E.2d 793, 800. We must "read the entire record, disregarding the objectionable material, and then determine whether or not there was overwhelming evidence of appellant's guilt." Id.

{¶ 35} Relevant evidence is 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." Evid. R. 401. Relevant evidence "is not admissible 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). Other acts evidence "is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation,

plan, knowledge, identity, or absence of mistake or accident." Evid. R. 404(B). Evidence "which tends to show that a defendant has committed a crime which is 'wholly independent' of the alleged crime for which he is on trial, is inadmissible and the introduction of such evidence over the defendant's objection is error." *Davis*, at 801.

{¶ 36} "In cases where evidence has been admitted for a very limited purpose and that evidence tends to show that Defendant has committed other criminal acts, the jury should be instructed that such evidence must not be considered by them as proof that defendant committed the crime charged." *State v. Tisdale*, Montgomery App. No. 19346, 2003-Ohio-4209. The "limiting instruction should be given at the time the 'other acts' evidence is received, * * * and it has been held that the failure to give any limiting instruction constitutes plain error." Id.

{¶ 37} We hold that the trial court erred when it allowed the jury to learn of the 1993 accusations of assault and stalking of an adult complainant. Appellant's direct examination did not open the door, but was instead limited to accusations of a sexual nature involving children. Evidence of other, unrelated accusations holds no probative value and is irrelevant. The evidence is also unrelated to the exceptions set forth in Evid. R. 404.

{¶ 38} Appellant argues that the error is prejudicial because it denied him the right to a fair trial in violation of his constitutional rights. "In criminal cases, errors are categorized as constitutional error and non-constitutional error." *State v. Walker* (August 12, 1999), Franklin App. No. 98AP-1293. "A federal constitutional error in the trial of a criminal case is harmless if the reviewing court concludes that beyond a reasonable doubt the error did not contribute to the defendant's conviction." Id.

{¶ 39} We conclude that the trial court's error in admitting testimony regarding the 1993 accusations is prejudicial and reversible. The testimony relating to accusations of assault and stalking is unrelated in nature to the offense of sexual imposition upon a child. This testimony suggests that Appellant generally engages in violence toward adult females. This is highly inflammatory. The only evidence of Appellant's guilt is the recanted testimony of a child with no attendant physical evidence. Because we cannot say that there is no reasonable possibility that the evidence relating to the 1993 accusations contributed to Appellant's conviction, the trial court's error in its admission is an abuse of discretion and grounds for reversal.

{¶ 40} In addition, we note that the trial court failed to give a limiting instruction to the jury, directing them not to consider the evidence as proof of the crime charged, a failure which constitutes plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim. R. 52(B). "The power afforded to notice plain error, whether on a court's own motion or at the request of counsel, is one which courts exercise only in exceptional circumstances, and exercise cautiously even then." *State v. Long* (1978), 53 Ohio St.2d 91, 94.

{¶ 41} Appellant's fifth assignment of error is sustained.

{¶ 42} The judgement of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion.

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GRADY, J. and YOUNG, J., concur.

(Hon. Frederick N. Young retired from the Second District Court of Appeals sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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