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**IN THE COURT OF APPEALS
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY, OHIO**

STATE OF OHIO, : Appeal No. CA 029006
Plaintiff-Appellee, : Trial No. 2019-CR-01088
vs. :
TEAVEN CURTISS, :
Defendant-Appellant. :

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Appeal from the Montgomery County Common Pleas Court

**REPLY BRIEF OF DEFENDANT-APPELLANT
TEAVEN CURTISS**

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III. ARGUMENT

The state begins its brief by disparaging the amount of errors raised by Curtiss in the instant appeal. To be sure, Curtiss would have much preferred the trial to have not included so many errors of significance, particularly as the multitude of errors are the proximate cause of Curtiss' current status of an innocent man serving a life sentence. The errors, especially as each exacerbated the others, permitted the state to drastically reshape the facts of the case and secure a tainted conviction. The errors permitted the state to proceed with its theory: "...The Defendant was named by name by the victim. There is no one else. This is not a case of whodunit." (Tr. of Proc., p. 876). This theory, incorrect and untrue as it was, was only able to proceed because the state could: (1) keep out evidence indicating alternative explanations for K.J.'s problematic behaviors; (2) keep out evidence that could explain why K.J. named Curtiss; (3) keep out evidence of who else could have abused K.J. within the relevant time frame; (4) protect Jones' credibility; and (5) demonize Curtiss. In its Appellee Brief, the state continued to push its theory. In doing so, the state continued to misconstrue facts and applicable law.

A. MCCS records

The withholding of key records resulted in the defense being unable to mount effective challenges to the state's narrative, as well confront certain witnesses' lies and half-truths. To an extent, this Court is in a much better position to assess this issue as it reviews the records. Critically, this Court must seek out if the records in question contain contradictions to the state's trial theory. The state's theory is built on the following: K.J. demonstrated problematic behaviors because she was sexually abused; K.J. and Jones told the truth when they made allegations against Curtiss; Jones and K.J. had no reason to lie; and all of Jones' odd behavior following the alleged disclosure happened because of mistreatment by MCCS and the family court after one incident of abuse.

The records in this case are material to contesting the above. Critical to the defense are records that would support that Jones had reason to fabricate the abuse claims and coach the children in an effort to get them back in her custody (along with the social security payments attached to the

custodian). With all of the relevant records, the defense would have been able to fully show K.J.'s problematic behaviors could be explained by the domestic violence she was a witness to, including the violent incidents to and from her brother, Kh.J. The defense would have been able to further develop the theory that, given K.J.'s exposure to abusers, there was not proof beyond a reasonable doubt that it was Curtiss. Furthermore, the records likely contain proof of the animosity between Curtiss and Jones, which would have prevented the state from arguing that she had no motive to falsely accuse Curtiss.

Missing from the state's brief is acknowledgment that the defense would have been able to further its investigation upon the release of relevant records. This issue is not simply about the admissibility of records. Follow-up investigation by defense counsel is constitutionally required. As the Sixth Circuit recognized in the context of ineffective assistance,

A lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance. (Citation omitted.)

Richey v. Bradshaw, 498 F.3d 344, 362 (6th Cir. 2007). Here, the trial court prevented trial counsel from conducting the constitutionally required investigation that directly pertained to Curtiss' factual innocence.

As a specific example, Sealed Court's Exhibit I may contain reports from another M CCS employee, Michele Williams, who may have been a great defense witness. As described more fully in the Appellant Brief, M CCS employee Ms. Lowe was put on the stand to trash her colleague, Ms. Brown, by reading from Ms. Brown's reports in the M CCS records. The state needed to protect Jones' credibility by casting Ms. Brown in a negative light for failing to believe Jones about the allegations. However, a police report indicates another M CCS employee may have agreed with Ms. Brown that Jones lacked credibility. The report states that on April 30, 2018 (three months before Jones made the allegations against Curtiss), Michele Williams, a case worker for M CCS, was told by a therapist treating Kh.J. that Kh.J disclosed that *Jones* hit Kh.J in the face close to his right eye.¹

¹ Undersigned counsel made a public records request to various police departments after being informed that K.J. and Kh.J. have recently been removed from Jones' custody again. In response, counsel received police reports that are relevant to the time frame at issue in this case. The report

The police report also indicated that Ms. Williams, noted that similar allegations had been made *against Jones* for physically abusing Kh.J. When MCCA attempted to interview Kh.J. about the physical abuse allegations he made against Jones, Jones *refused to allow Kh.J. to be interviewed*. Further, following a violent incident on April 15, 2019, resulting in Kh.J. being taken to the ER, Jones was asked to leave the room but came back in a short time later and “ordered everyone out and started yelling at [Kh.J.] for talking to the medical staff.” (*Id.*)

The state enlists the adage no harm no foul in its response on this issue. After all, according to the state, defense counsel was free to bring up any topics during cross. First, counsel would have to be aware of the topics before cross examining witnesses. With records in hand, counsel is in a far different position because counsel requires a good faith basis of knowledge to begin questioning on topics such as whether Jones ever physically abused Kh.J and told him not to disclose the abuse to authorities. Second, questions informed by relevant records are better than those that are not. There is a difference between blindly probing around subjects like, for example, animosity between Jones and Curtiss, and fully investigating and preparing the issue with the aid of documents that directly evidence the animosity - which goes to Jones’ motivation to lie. Third, trial counsel could not refresh certain witnesses’ recollections, a key cross-examination technique that can be utilized even when the document in question may not be admissible.

Finally, Curtiss requests that, upon identification of documents that should have been disclosed to trial counsel, this Court consider whether it would be necessary to disclose the documents to appellate counsel and permit limited briefing on the prejudice suffered from the trial court’s non-disclosure.

B. Cross-examination of Erica Jones

The state asserts Jones admitted she lied on the stand. The state is wrong, and the apparent misunderstanding of the record on this issue colors the state’s entire analysis. Jones’ actual testimony was that she did “not necessarily” agree that she previously lied. She used an equivocation

discussed above, evidences an additional subset of highly relevant, material information that likely exists in Sealed Court’s Exhibit I. Records that indicate Jones abused the children are relevant to the cause of K.J.’s problematic behaviors, Jones’ credibility, and Jones’ motivation to lie.

technique with the design to disagree with defense counsel that she had previously lied. Jones never, especially when reading her answer in context, admitted that she did not tell the truth.

Her answer to the question following the “not necessarily” dodge further highlights her refusal to be honest about the domestic violence the children were, at minimum, witness to. Trial counsel asked if there were offenses of violence where Children’s Services were involved in January, April, and July of 2017. (Tr. of Proc., p 429). Jones responded, “For what... Against who?” (Tr. of Proc., p. 430). Previously, Jones described the July 2017 incident to an MCCS employee who wrote the following in an Activity Report:

Demarco stated that he was going to kill her...He yanked her by the hair and threw her into the garage. . . . She stated that she told him ‘you have the baby in your hands, stop’. Erica stated that he always grabs the baby and puts the baby in his hands . . . She asked him why he always picks the baby up when they fight. She said that she will never push him off of her, when he has the baby, due to fear that the baby might get hurt, so maybe that’s why he grabs the baby...he pushed [Erica] over to the kitchen, and was banging her head on the microwave. He flipped her around and banged her head on the cabinets. Demarco grabbed her by her hair again, and dragged her from the tile to the carpet, while he had the baby. Erica stated that the baby’s head was just wobbling. She said if you have to beat me, at least put the baby down, so you don’t hurt her. . . . she just left, and went to the police station.

(Sealed Court’s Exhibit I). “For what... Against who?” she said. It seems incredible that she could have honestly forgotten the incident. The trial court’s intervention that disallowed counsel from confronting Jones on her lies is more fully set forth in the opening brief. This Court should not side-step this critical issue by misreading the record as the state invites this Court to do.

Finally, the state’s focus on the admissibility of documents is a red herring. As described above, there are many means to confront witnesses during cross-examination beyond impeachment by admitting a document. Defense counsel was prevented from attacking the credibility of a key witness against Curtiss. Further, the limitation of Jones’ cross examination did not involve collateral matters as the prior domestic violence allegations served to explain K.J.’s problematic behaviors. Jones was able to lie not just about some random topic, but about a key alternative explanation for one of the tenants of the state’s theory of the case.

C. K.J.’s hearsay statement to detective

Here, the state's interpretation of what constitutes an "excited utterance" eviscerates the rule and would significantly unsettle related case law. The state would have this Court find that when a person sits down for a law enforcement interview *several months* after the alleged victimization occurred and the state shows the witness an item of suspected evidence (a blanket in the case at hand), statements from the law enforcement interview are admissible because the viewing of the suspected evidence re-excited the person. Effectively, law enforcement could show the complaining witness a suspected item of evidence, "re-excite" the witness, and then render all statements made to law enforcement officers by an alleged victim admissible hearsay subject to the "excited utterance" exception. This Court should reject this line of argument.

Instead, this Court should decide this case in line with the Ohio Sixth District Court of Appeals in *State v. Slane*.

In this case, after carefully considering the totality of the circumstances surrounding the statements C. made to his parents, we conclude that the trial court's decision to admit C.'s statements as excited utterances was not reasonable. The record shows that the statements were made in July 1997, many months after the alleged incident of molestation of C. by appellant took place in March 1997. In the time between that alleged incident and the time C. made his statements to his parents, C. was shown pictures of naked individuals, was told about good touches and bad touches, was directly asked by a caseworker, a uniformed police officer and his mother if appellant had ever touched him. The evidence in this case is insufficient to show that C. was under the stress of a startling occurrence when he made the out-of-court statements his parents were permitted to repeat in court.

State v. Slane, 6th Dist. Fulton No. F-98-020, 1999 WL 961453, at *15 (Oct. 22, 1999).

Separately, because K.J. was incompetent, the fact that she did testify does not nullify the Confrontation Clause violation that occurred here. Moreover, the fact that K.J. took the stand does not render her prior statements as non-hearsay.

D. Competency of K.J. and the forensic taped statements

The issue of K.J.'s competency is fully set forth in the opening brief and thus, for the sake of brevity, will not be readdressed here except to comment on the state's claim that counsel did have an adequate opportunity to cross-examine K.J. When trial counsel asked K.J. if she remembered a time she lived with Curtiss, she testified that she did not remember. (Tr. of Proc, p. 346). How do you successfully confront an autistic seven-year-old who, at the time of trial did not "quite understand

her ABCs...” and functioned “more at like a three or four-year-old level?” (Tr. of Proc., p. 505-506). Meaningful confrontation of K.J. was not possible, and this was made abundantly clear during K.J.’s limited time on the stand.

As for the forensic interviews of K.J. and Kh.J, which were played for the jury and focused upon during the state’s closing, the state has essentially requested this Court to overrule *Arnold*—an Ohio Supreme Court case. In the opening brief, Curtiss listed specific hearsay topics that the Ohio Supreme Court has designated (in *Arnold*) to not be for medical purposes. In response, the state ignored the listed hearsay statements; the state never addresses how the specifically listed statements could theoretically relate to medical diagnosis or treatment. Moreover, the state never addresses how Kh.J.’s *entire statement was about what happened to someone else*. How was Kh.J.’s description of where Tanya Curtiss was during the alleged assaults relevant to his medical diagnosis and treatment? The state provides no answer. But that out of court statement was certainly relevant to the state’s theory of the case as the state repeatedly brought up the statement during closing arguments. (Tr. of Proc., pgs. 888, 914) (“ . . . [E]ven though [Kh.J.] did not come to court. He has spoken to you with his interview.”)

Instead of addressing the specific *Arnold* statements, the state presented a vague argument that essentially boils down to an allegation that the Ohio Supreme Court did not think hard enough about this issue when deciding *Arnold* (suggesting that “it is unclear” that the Supreme Court “considered mental health in its decision.” (Appellee Brief, p. 18)). This Court should not oblige the state’s request to overrule the Ohio Supreme Court.

E. Melissa Lowe’s false testimony

The timing of the alleged outcry is one of the most critical elements of any sexual assault case. When close in time to the alleged assault, alleged victims are considered more believable to the average jury. Prosecutors are keenly aware of this, and therefore, when delayed disclosures are at issue, the state often presents expert testimony to explain how and why some accusers delay their allegations. Melissa Lowe’s false testimony was a direct alteration of the timing of K.J.’s allegation.

Here, Ms. Lowe's testimony was not, as the state suggested, a "mere inconsistency." A lie, in one sense, is always inconsistent with the truth. This lie, however, cannot be reduced to a common contesting of contradictory or competing statements during a trial.

The state asked Ms. Lowe if she remembered the date that Ms. Brown went to visit Jones and the kids after receiving the email from Jones that K.J. had been sexually abused by Curtiss and J.C. (Tr. of Proc., p. 633-34). Ms. Lowe did not remember. (*Id.*). The state asked her if it would help if they showed Ms. Lowe the record. (Tr. of Proc., p. 634). *The state then directed:* "can you review the next section of that as well before I ask you the next question?" (Tr. 634). The state knew what the next section said when it directed the witness to read it. So do we. The next section indicated Kh.J. made a statement about the alleged abuse but that K.J. did not. The next section indicated that K.J. *did not* make a disclosure. At this stage of the proceedings, the state now admits in its brief that K.J. did not make such an accusation.

After Ms. Lowe and the prosecutor read Ms. Brown's statement, the state asked Ms. Lowe "...does Lisa Brown's note indicate that [K.J.] made a statement to her about what Teaven had done to her during that home visit?" It should be uncontroversial that the state knew the answer was that K.J. did not make such a statement. At trial, however, Ms. Lowe stated, "[K.J.] and [Kh.J] both did." (Tr. of Proc., p. 634). Critically, the state did not correct the record, but ended its questioning with the blatant lie.

The state is caught red-handed here. The best response the state could come up with is that Ms. Lowe's "testimony was simply that, to her knowledge, both K.J. and Kh.J had told Brown what Curtiss did to them." (Appellee Brief, p. 24). To the extent that response is coherent at all, it is not true. Ms. Lowe was asked to read the report right there on the stand and she did. She then lied; this part of the issue is not complicated. In addition, speaking of what Ms. Lowe "to her knowledge" was aware of, it worth noting that Ms. Lowe (and the prosecutor, more on that shortly) also possessed an email from Ms. Brown specifically stating that K.J., on July 31, *did not* corroborate the allegation of abuse by Curtiss. (Sealed Court's Ex. II, p.7).

Finally, the state attempts to shift blame for Ms. Lowe's false testimony to defense counsel. This tactic does not work for false testimony. As outlined by the Eight Circuit Court of Appeals in *United States v. Foster*, 874 F.2d 491, 494 (8th Cir. 1988) and the Michigan Supreme Court in *People v. Smith*, 870 N.W.2d 299 (Mich. 2015), defense counsel's failure to address the false testimony during the trial is of no moment. "The obligation to avoid presenting false or misleading testimony of its own witness begins and ends with the prosecution and is prudent in the unique *Napue* context because *Napue* requires the prosecution's knowledge of the false or misleading testimony of its own witnesses." *Smith*, 870 N.W.2d at 306, n.7. Thus, the issue is whether the state knew the testimony was false, not whether defense counsel was prepared to address the state's presentation of false testimony. As for the state's knowledge, it could not be clearer as 1.) the state was holding in hand the exact report that the witness reviewed (at the state's request) and lied about (also at the state's request); and 2.) the state had possession of a separate email described above where Ms. Brown specifically advised Ms. Lowe that K.J. did not make an accusation on July 31.

F. Misapplication of Rape Shield Law

This issue should not be set aside for the reason suggested by the state. First, a constitutional right cannot be waived through inaction, and this issue is of constitutional importance. Second, the trial court ruled on the motion in limine *during* trial, not before it. The state's motion in limine to exclude the part of the initial disclosure that mentioned J.C. was filed four days before the trial started. The trial court ruled on the motion *after the jury was sworn in* (Tr. of Proc., p. 288) and right before opening argument. Trial counsel inquired, again, after the jury was sworn in, "Judge, so I'm clear, you're going to limit my cross-examination of the mother in this case as to the statements that were contemporaneously made?" (Tr. of Proc., p. 297). "Correct," said the trial court. (*Id.*) Third, at minimum, this critical issue must factor into this Court's cumulative error analysis.

The state's motive to keep evidence of J.C. out is transparent. No one in their right mind would conclude that K.J. was promiscuous or that the fact she allegedly had sexual contact with J.C. makes it more likely that her alleged contact with Curtiss was consensual. This is not a rape shield issue. Rather, the state sought to exclude it to keep out evidence indicating alternative explanations for

K.J.'s problematic behaviors; to keep out evidence that could explain why K.J. named Curtiss; to keep out evidence of who else could have abused K.J. within the relevant time frame; and to protect Jones' credibility. In other words, the state needed to keep it out to protect their narrative.

The state's claim with respect to timing of the abuse by J.C. is desperate and not supported by any evidence. There is no evidence to conclude, as the state has, that abuse to K.J. by J.C. not only occurred, but occurred at a different time than the alleged abuse at the hands of Curtiss. She was exposed to both in the same time frame. The fact that both were named during the first disclosure of abuse in this case is significant.

There was a reason, according to the state's own expert witness, K.J. would have said Curtiss sexually abused her even if he had not done so. According to Dr. Miceli, the state's expert, when a child has been involved in multiple sexual abuses involving different people, coaching can occur to direct a child in a certain way. (Tr. of Proc., p. 607). Thus, had trial counsel been able to introduce the allegation against J.C., trial counsel could have evidenced, using expert testimony, that the fact K.J. named Curtiss as an abuser does not mean he was an abuser, particularly if she had been the victim of multiple abuses.

G. Prosecutorial misconduct during its closing arguments

In its closing, the state presented K.J. as "your victim." (Tr. of Proc., p. 925). As in, the jury had a victim of its own and the jury needed to protect its victim. This characterization of the K.J. as somehow belonging to the jury—or, at a minimum, as a child the jury was responsible for—is not acceptable. This Court should not condone such a blatant violation of law.

This case is meaningfully different than *Ross* when it comes to prejudice. In *Ross*, this Court took care to point out "the prosecutor *did not ask* the jurors to imagine that their children were the victims of sexual abuse." (Emphasis added.) *State v. Ross*, 2nd Dist. Montgomery No. 22958, 2010-Ohio-843, ¶ 127. Here, the prosecutor *did ask* the jurors to put themselves in "Erica's shoes." (Tr. of Proc., p. 884). In characterizing K.J. as "your victim," the state was not asking the jury to apply a common-sense approach to analyzing evidence. Rather, the state sought to inflame the emotions of

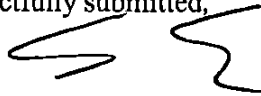
the jury by demanding they protect their victim, that they put themselves in the mother's shoes, and that they imagine they were the party to the case.

The *Ross* case is interesting, although not for the reason the state listed. It is interesting because it is a decision from this Court regarding statements made by Montgomery County prosecutors. In it, this Court noted that several statements by the prosecutors were inappropriate. "Although it was arguably improper for the state to mention that Ross's expert did not accuse the children of lying, when such testimony would not have been permitted, the comment was not unfairly prejudicial in light of its context." *Ross*, at ¶ 120. "Although we acknowledge that the prosecutor should not have commented on the truthfulness of the witnesses, it was proper in closing argument to point out that the state's witnesses, particularly the children, had been consistent about their stories despite intense and lengthy cross-examination." *Id.* at ¶ 124. "The prosecutor should not have asked the jurors to imagine themselves in a situation similar to one described at trial. However, the prosecutor's comment seems to appeal more to the jurors' common sense than to their emotions." *Id.* at ¶ 127. The takeaway here is that the Montgomery County prosecutor's office will not be deterred from making improper statements unless and until this Court finds that the defendant was prejudiced.

H. Cumulative Error.

The instant appeal raises alarming concerns about the fairness of Curtiss' trial. Curtiss' conviction was the direct result of the errors described above and in the opening brief. While each error must be analyzed on its own, the cumulative error analysis permits this Court to assess the overall effect the errors had on the fairness of the trial. In the end, the collective impact of the errors rendered the trial a gross miscarriage of justice. Curtiss respectfully requests this Court reverse his convictions and remand his case for a new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a foregoing was served on J. Joshua Rizzo via email at rizzoj@mcoho.org on this 20th day of October 2021 and via regular mail at:

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