IN THE SUPREME Court OF APPEALS OF WEST VIRGINIA

TEX B/ SIMMONS,

Appellant.

v.

STATE OF WEST VIRGINIA

Appellee.

From the Circuit Court
Of Morgan County
No. 35540

BRIEF OF APPELLANT

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I. The Kind of Proceeding and the Nature of the Ruling in the Lower Tribunal.

This is an appeal from the conviction in the Circuit Court of Morgan County, West Virginia wherein the Defendant, Tex B. Simmons was charged with and convicted of Sexual Assault in the First Degree and Sexual Abuse by a Custodian. It is from these convictions that the Defendant appeals.

II. STATEMENT OF THE FACTS OF THE CASE

On January 2, 2007 Tex B. Simmons was indicted by a Grand Jury in Morgan County, West Virginia charging in Count I the crime of Sexual Assault in the First Degree and Sexual Abuse by a Custodian.

On November 17, 2008 a pretrial was held in the Circuit Court of Morgan County and the trial was held on November 18 and 19, 2008.

On the morning of trial, the Prosecution represented to the Court that the child victim talked to her the night before and stated she could not remember what happened. (Tr 11-17-08. P. 184). Based upon that statement the Court declared the child to be "unavailable". (Tr. 11-17-08 P. 200). The Court went on to say that the statement made to the mother, the forensic nurse and the officer bore particular indicia of the reliability and would admitted into evidence. Defense counsel objected to the testimony and was overruled.

At the trial of this case, the alleged victim's mother testified over objection "and at 7:30 Amanda came to me and she stated that last night Tex put his pee-pee in my mouth and peed and kept it there until I swallowed." (Tr. 11-19-08, pg. 13)

Defense counsel then objected and the Court restated its prior ruling that the statement of the child to the mother, the officer and the forensic nurse could come in because of the child's lack of recollection made her unavailable.

Later Cynthia Leahy, a forensic nurse at Winchester Medical Center, testified that on April 7, 206, the day after the alleged assault took place, she interviewed the child. During that interview the child told her:

> A. She told me that she was asleep on the couch in her house. And while she was still asleep - she didn't refer to any body parts, but she said something was placed in her mouth. (Tr. 11-19-08, pg. 67)

Defense counsel then objected to the testimony, which was overruled by the Court. She went on to say that the child said:

> A. And something came out of it, and it tasted yucky. And she also told me that

she had cried earlier that day because she still had a yucky taste in her mouth from that. (Tr. 11-19-08, pg. 67)

ASSIGNMENT OF ERROR AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

1. That the lower Court erred in allowing the testimony of the child to be admitted into evidence through the testimony of the mother, forensic nurse and police officer after the child said she didn't remember what happened.[1]

[1]This Court in its Order granting the appeal limited the defenses to this issue.

POINTS AND AUTHORITIES RELIED UPON

Crawford v. Washington 541 U. S. 36 (2004)

Ohio v. Roberts, 448 U.S. 56 (1980)

State v. Walker 188 W. Va. 661, 425 S. E. 2d 616 (1992)

State v. James Edwards 184 W. Va. 408, 400 S. E. 2d 843 (1990)

State v. Shrewsbury 213 W.Va. 327 (2003)(per curiam)

State v. Pettry, 209 W.Va. 449 , 549 S.E2d 323 (2001))

State v. Payne, No. 34889 (2010)

In Re Marriage of Misty D. G. v. Rodney L. F. 221 W.Va. 144, 650 S.E.2d 243 (2007)

West Virginia Rule of Evidence 804(b)(5)

West Virginia Rules of Evidence Rule 803 (4)

DISCUSSION OF THE LAW

Standard of Review

Discussion

1. That the lower Court erred in allowing the testimony of the child to be admitted into evidence through the testimony of the mother and forensic nurse after the child said she didn't remember what happened.

This case breaks down into two areas. The first is the testimony of the mother who testified at trial to what the child told her happened. At the trial the child told the prosecutor and later testified that she could not remember what happened.

The second area is the testimony of the forensic nurse at Winchester Medical Center in Winchester, Virginia. The Court allowed the testimony of the forensic nurse.

In both cases the defense objected to the testimony at a pre trial hearing and again when the testimony was offered.

A. The testimony of the mother:

In Crawford v. Washington 541 U. S. 36 (2004) the United States Supreme Court had the opportunity to address the issue of the use of an out of Court statement against a Defendant when the declarant did not testify at trial.

In Crawford the Defendant's wife gave a statement to authorities during interrogation but did not testify at trial because of the marital privilege.

The trial Court admitted the statement under the provision of Ohio v. Roberts, 448 U.S. 56 (1980) which allows such statements against a criminal Defendant from an unavailable witness when the statement bears "adequate indicia of reliability" a test that is met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantee of trustworthiness". Id. 66. The State Supreme Court upheld the conviction.

The United States Supreme Court reversed the conviction holding that the use of the wife's statement violated the confrontation clause because where testimonial statements are at

issue, the only indication of reliability sufficient to satisfy constitutional demand is confrontation.

In reaching its conclusion, the Court looks to the confrontational clauses historical background as well as the test. This history supports two principles: the first is the principle evil at which the clause is directed where the civil law made particularly the use of ex parte examination as evidence against the accused. The clauses primary objection is testimonial hearsay. Second the Framers would not allow these testimonial statements of witnesses who did not appear at trial unless the witnesses were unavailable to testify and that the Defendant had a prior opportunity for cross examination.

The Court found that the confrontational clause commands that reliability be assessed in a particular manner: by testifying in the crucible of cross examination.

Rule 804 of the West Virginia Rules of Evidence covers statements made by a declarant that is unavailable. In certain cases Rule 804(b)(5) allow a statement where (1) the statement is to a material fact; (2) the statement is more probative on a point and (3) the general purposes of the rules will be satisfied by admission.

In State v. James Edwards 184 W. Va. 408, 400 S. E. 2d 843 (1990) the West Virginia Supreme Court of Appeals outlined that the use of the residual exception contained in Rule 804(b)(5) is presumptively unreliable but where there is a particularized guarantee of trustworthiness the statement may be admissible.

In State v. Walker 188 W. Va. 661, 425 S. E. 2d 616 (1992) the Court reiterated the principle that hearsay that is not firmly rooted in a hearsay exception is not admissible, except where the State can make a particularized guarantee of trustworthiness.

In this case it is important to note that all of the West Virginia cases were decided prior to Crawford. Those cases used the same logic as was found by the trial Court and Washington State Supreme Court in Crawford. It essentially used the logic of Roberts that the United States Supreme Court discredited.

In this case the testimony of the mother is inherently flawed. She testified that she had memory problems. (Tr. 11-19-08 p. 40) Chanin Kennedy, a forensic psychologist testified that

the Mother was an "invalid reporter" (Tr. 11-19-08 p. 115) She went on to testify that Ms. Charlene Simmons, the mother, had a brain injury and that her ability to remember was compromised. She said:

> She's not someone who is very good at organizing her thoughts, at providing information and accurately providing information regarding long-term events or even short-term events really. She's very poor at this due to her brain injury. (Tr. 11-19-09 p. 116)

She went on to say:

> As I testified before, the word encoding means your ability to see something, to experience something, and then to store it in your brain so that later on, you can pull it back up and use it for whatever purpose. And her ability to store that information is very compromised due to her car accident. (Tr. 11-19-08 p 116)

From the above it is clear that the court's finding that the mother's testimony was consistent with the Rule and the cases is incorrect. At that point in time the court should have declared a mistrial and retried the defendant.

B. The testimony of the forensic nurse:

This Court also looked at this issue from another angle. In State v. Shrewsbury 213 W.Va. 327 (2003)(per curiam) this Court looked at the admission of these statements from the view of allowing the testimony using a West Virginia Rules of Evidence Rule 803 (4) "Statement for Purposes of Medical Diagnosis or Treatment." In Syllabus point 8 the Court talked about the statement made for the purpose of treatment.

During the course of the trial, a forensic nurse made numerous statements regarding what the victim had allegedly said to her about the involved incident. (Tr 11/19/08 p. 66-67, p. 71-72) Defense counsel objected to these statements as hearsay. (Tr. 11/19/08 p.12, p. 67) The nurse often referred to her "report"(That "report" is actually a "Forensic Exam Form", item # 206 11/18/08 Docket Sheet). The State moved and the Court allowed that document to be admitted into evidence under the hearsay exception found in West Virginia Rule of Evidence 803 (4) or

803 (6).

While reports of physical exams and therapy sessions by counselors and psychologist are admissible under the "Medical Diagnosis and Treatment" hearsay exception (See, State v. Pettry, 209 W.Va. 449 , 549 S.E2d 323 (2001)) reports related to forensic investigations, such as was conducted here where DNA samples are collected (Tr. 11/18/08 p. 202-203) are not. In Re Marriage of Misty D. G. v. Rodney L. F. 221 W.Va. 144, 650 S.E.2d 243 (2007) In this case the nurse was a forensic nurse. Her job was to determine if the child had been sexually abused. She was not in any way a treater. She was an arm of the police who is trained to gather evidence.

Much was made over the child witness being unavailable. In looking at the issue of unavailability we need to look at the timing.

West Virginia Rule of Evidence 804(b)(5) has the further requirement that "however a statement may not be admitted under this exception unless the proponent of it makes known to the adverse parties sufficiently in advance of the trial or hearing to provide the adverse party with a formal opportunity to meet it . . .".

A review of the transcript of the trial essentially showed that the State did disclose the unavailability of the witness on the morning of trial. The time frame was less than what is necessary to prepare a defense. The fact that the State waited until the day of the trial to interview the child witness to determine the state of her memory meant that the trial needed to be continued.

We should use the same analysis as the statement to the mother when we look at the statement made to the forensic nurse. Reliability of the statement is the key to the admissibility of the statement.

In State v. Payne, No. 34889. A case decided one and one-half months ago we had the exact same situation. It was the same court, the same nurse, and the same prosecutor.

In that case this court made great moment of the fact that the statement made by the 12 year old child was made for a "Dual purpose" at p. 7. The child testified that she did not know

what a forensic nurse was but that she knew that Ms. Leahy was a "nurse".

The court also took note that the mother testified in court that the child was taken to the hospital to be "checked". At p. 9. All of the indicia was that the child in the Payne case might have in fact bee examined for treatment purposes. At no time did the court or prosecutor inquire of this 4 year old what was in her mind when she went to the nurses office. Given the nature of this offense there was no physical treatment that was necessary or even possible.

Where there is no intention for the interview to be for treatment purposes it cannot fulfill the "Dual Purpose" role. In this case it was purely to collect evidence for the authorities. There can be no other conclusion.

In this case the child did not testify at all. The child was allowed to stand on her lack of recollection of the facts and circumstances surrounding the case. She was declared unavailable.

A review of footnote 7 from Payne shows that this court is fully aware of requirements of Crawford v. Washington when it recognized that the out of court declarant was subject to cross examination in the trial.

Crawford requires that when the testimony of an out of court declarant is used in a trial the constitution of the United States requires that the statement have first been confronted by the defendant and had the opportunity to cross examine that statement.

PRAYER FOR RELIEF

Your Appellant would pray that this Court reverse his conviction and grant him a new trial..

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