[Cite as *State v. Micomonaco*, 2012-Ohio-5239.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-07-139
	:	O P I N I O N
- vs -		11/13/2012
	:	
KEVIN N. MICOMONACO,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-09-1603

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YOUNG, J.

{¶ 1} Defendant-appellant, Kevin Micomonaco, appeals his conviction and sentence in the Butler County Court of Common Pleas for child endangering and assault.

{¶ 2} In October 2010, appellant was indicted on two counts of child endangering in violation of R.C. 2919.22(B)(1) (both second-degree felonies) and one count of assault in violation of R.C. 2903.13(A) (a first-degree misdemeanor). With regard to the child

endangering charges, the state alleged that during the 2010 Memorial Day weekend, appellant abused two young girls, E.S. (then five years old) and her sister H.I. (then three years old), causing both girls serious physical harm. With regard to the assault charge, the state alleged that on September 26, 2010, appellant caused extensive bruising to the buttocks of a young boy, M.T. (then six years old). The boy is not related to the girls. The record shows that appellant was in a relationship with both the girls' mother and the boy's mother, appellant was left alone with the victims while their mothers went out, and while being alone with the victims, appellant physically harmed them.

{¶ 3} On May 5, 2011, pursuant to Evid.R. 807, the state filed a notice of its intent to use at trial statements made by the three children to their family members. On May 23, 2011, the trial court held a competency hearing, found that the boy was competent to testify, determined H.I. was not competent to testify, and reserved its ruling regarding E.S. The court noted that appellant's presence at the hearing appeared to affect E.S.'s ability to communicate and her memory. The court noted that E.S. appeared to "freeze up to a degree" after she looked directly at appellant from the witness stand.

{¶ 4} The trial court subsequently conducted an in camera hearing to determine E.S.'s competency. The only persons present in the courtroom were court personnel and both counsel. The trial court found that E.S. was competent to testify. The trial court noted how the child's demeanor and testimony during the in camera hearing in the absence of appellant were "like night and day."

{¶ 5} The following day, the trial court found that E.S. was unavailable to testify in the presence of appellant due to her inability to communicate about the alleged offense "because of extreme fear, failure of memory or another similar reason." As a result, the court allowed E.S. to testify via closed circuit television pursuant to R.C. 2945.481. Although appellant was

not present in the courtroom, E.S. could see him on a computer screen.[1] The record indicates that during her direct examination, E.S. became fixated on the computer screen, denied knowing appellant, and replied to many of the state's questions with "I don't know." The subsequent encouragement of her grandmother did not help.

{¶ 6} As a result, the trial court found that E.S. "either refused to testify or claimed lack of memory." The court subsequently found that based on their refusal to testify or lack of memory, the testimony of both E.S. and her sister H.I. regarding appellant's abuse was not reasonably obtainable under Evid.R. 807(B). The court then conducted an evidentiary hearing pursuant to Evid.R. 807 during which the girls' mother (Mother), father (Father), and maternal grandmother (Grandmother) testified as to the statements the girls made to them. At the conclusion of the hearing, the trial court found that four of the girls' statements to family members were admissible under Evid.R. 807.

{¶ 7} The four statements were used by the state at a jury trial. On May 26, 2011, the jury found appellant guilty as charged. He was subsequently sentenced to 14 years in prison and 180 days in jail to be served consecutively.

{¶ 8} Appellant appeals, raising three assignments of error.

{¶ 9} Assignment of Error No. 1:

{¶ 10} THE TRIAL COURT ERRED WHEN IT ALLOWED PREJUDICIAL HEARSAY STATEMENTS MADE BY H.S. AND E.S. TO BE ADMITTED DURING TRIAL. [sic]

{¶ 11} Appellant argues that the trial court erred in allowing Mother and Grandmother to testify about statements E.S. and H.I. made to them regarding appellant's abuse. Specifically, appellant first argues that the hearsay statements were improperly admitted under Evid.R. 807(A)(1) because "the trial court does not support its finding that under the

1. Likewise, appellant was able to see and hear E.S. during her testimony and communicate with defense counsel via walkie-talkies.

totality of the circumstances surrounding the statements that E.S. made to [family members], that there are particularized guarantees of trustworthiness." Appellant also argues that because he was unable to cross-examine E.S., and because her statements were testimonial in nature, the admission of her statements violated his rights under the Confrontation Clause.

{¶ 12} The record shows that on July 9, 2010, about one and one-half months after appellant's abuse of the girls, Grandmother picked them up so that they could spend the weekend at her house. This was the first time Grandmother was alone with the girls. During the ride, after E.S. mentioned that she and H.I. were in the hospital, H.I. stated, "Kevin [appellant] hurt me. Hurt my butt." E.S. told Grandmother that appellant had hurt her too, she tried to run upstairs to get away from appellant, but "when I got up there, my mommy wasn't there."

{¶ 13} Mother testified that following the 2010 Memorial Day weekend, she did not see or have contact with her daughters again until mid-July 2010, when she went to see them at her sister's house. As soon as Mother arrived, E.S. asked her if appellant "was in a place where he couldn't hurt them any more." Later, as Mother and E.S. were in the den, E.S. once again brought up the subject of appellant, stating, "Mommy, when you were gone taking Aunt Heather home, Kevin used his fingers and made me and [H.I.] bleed." The record shows that the girls were left alone with appellant during Memorial Day weekend when Mother took Heather home at appellant's request. Mother was gone between 45 and 60 minutes

{¶ 14} We first address appellant's argument that the admission of the girls' statements was improper under Evid.R. 807(A).

{¶ 15} We initially note that decisions regarding the admissibility of evidence are within the sound discretion of the trial court and will not be reversed absent a showing of an abuse of discretion. *State v. Cain*, 12th Dist. No. CA2010-06-012, 2011-Ohio-3759, ¶ 14. The trial

court's determination regarding the girls' statement and whether the disputed evidence fits within a hearsay exception is therefore left to the trial court's broad discretion. *Id*.

{¶ 16} Evid.R. 807 allows the admission of out-of-court statements made by a child under 12 years of age describing sexual or physical abuse as an exception to the rule against hearsay if four conditions are met: (1) the trial court finds that under the totality of the circumstances, the statements bear particularized guarantees of trustworthiness bearing demonstrable indicia of reliability, (2) the child's testimony is not reasonably obtainable by the proponent of the statement, (3) there is independent proof of the sexual act or act of physical violence, and (4) at least ten days before the trial or the hearing, the proponent of the statement has notified the other party of the content of the statement, the time and place the statement was made, the identity of the witness who is about to testify about the statement, and the circumstances surrounding the statement that indicate its trustworthiness. *State v. Stuart*, 9th Dist. No. 20111, 2001 WL 324387, *3 (Apr. 4, 2001); Evid.R. 807(A)(1)-(4).

{¶ 17} We note it is undisputed that the state's May 5, 2011 notice of intent complied with the notification requirement under Evid.R. 807(A)(4). The obtainability of the girls' testimony under Evid.R. 807(A)(2) and the independent proof requirement of Evid.R. 807(A)(3) are not an issue in this appeal. We will therefore only address the admission of the girls' statements under Evid.R. 807(A)(1), which provides:

> The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child

> of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

{¶ 18} Applying these requirements to the case at bar, we find that the trial court carefully reviewed the totality of the circumstances surrounding the girls' statements to Mother and Grandmother and appropriately determined that there were sufficient indicia of reliability and particularized guarantees of trustworthiness that made the statements as reliable as those admitted under Evid.R. 803 and 804. And while the trial court did not fully expound on each requirement with regard to each of the four statements found to be admissible under Evid.R. 807, considering the arguments raised by the state at the Evid.R. 807 hearing and the trial court's own statements, there were sufficient findings of fact made on the record to satisfy Evid.R. 807(C). *In re Bright*, 12th Dist. No. CA94-10-027, 1995 WL 447796, *3 (July 31, 1995). We are confident that the record is complete and affords ample review of the trial court's findings as required by the rule. *State v. Cain*, 12th Dist. No. CA2010-06-012, 2011-Ohio-3759, ¶ 19.

{¶ 19} The testimony from the Evid.R. 807 hearing is clear that the circumstances surrounding the girls' statements had the particularized guarantees of trustworthiness to make the statements as reliable as those permitted under Evid.R. 803 and 804. As stated earlier, the girls made the statements to Grandmother at the first opportunity they had to be alone with her following appellant's abuse. Likewise, E.S. made the statements to Mother the very first time she was able to see her following appellant's abuse (Mother was forbidden from contacting and seeing the girls for several weeks following the 2010 Memorial Day weekend). Both visits happened early to mid-July 2010, a few weeks after the abuse.

{¶ 20} The hearing testimony shows that the girls' statements to Grandmother and E.S.'s statements to Mother were clearly spontaneous and unsolicited as they were not the

result of prodding or questioning from either Mother or Grandmother. The girls' statements to both family members essentially came out of the blue. The trial court found, and the hearing testimony supports the finding, that both girls made consistent statements.

{¶ 21} With regard to the girls' mental state, the testimony shows that while riding in the car on their way to Grandmother's house, H.I. was feeling stressed because she and her sister were returning for the first time to the home where the abuse occurred. For the same reasons, E.S. was afraid to go to Grandmother's house. She was also afraid of telling her what had happened and was quiet and sucking her thumb again. The testimony shows that when E.S. told her mother that appellant made her and her sister bleed, E.S. was somewhat afraid to tell Mother and was stuttering. Notwithstanding the girls' foregoing demeanor, the record does not contain any reference to a mental state which would undermine the veracity of the girls' statements to Grandmother and Mother.

{¶ 22} The record is void of any reason that either E.S. or H.I. would fabricate their statements. There is no apparent motive for the girls to fabricate. With regard to the terminology used, both girls used terminology expected of a child of similar age.

{¶ 23} With regard to the means by which the statements were elicited, the testimony clearly shows that the statements were not elicited in any way. Neither E.S. nor H.I. was coached or coerced, and the statements were given without input from either Mother or Grandmother.

{¶ 24} Finally, while the girls did not make the statements until several weeks after the abuse occurred, the record clearly shows that following the abuse, the girls did not have the opportunity to see or talk to Mother for the first time, and to spend time alone with Grandmother for the first time until several weeks after the 2010 Memorial Day weekend. In other words, the girls made their statements at the first possible moment.

{¶ 25} The record clearly demonstrates that based on the totality of the circumstances

surrounding the making of the statements, there were particularized guarantees of trustworthiness that make the statements at least as reliable as statements admitted under other hearsay exceptions. The circumstances discussed on the record plainly establish that E.S. and H.I. were particularly likely to be telling the truth when their statements were made and that the test of cross-examination would add little to the reliability of the statements.

{¶ 26} We therefore find that the girls' statements were properly admitted under Evid.R. 807.

{¶ 27} We next address appellant's argument that the admission of the girls' statements violated his rights under the Confrontation Clause.

{¶ 28} The Sixth Amendment to the United States Constitution gives a defendant in any criminal prosecution the right to confront witnesses against him. Pursuant to the Confrontation Clause, out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354 (2004). The Confrontation Clause applies only to testimonial statements. *State v. Muttard*, 116 Ohio St.3d 5, 2007-Ohio-5267, ¶ 59.

{¶ 29} The United States Supreme Court has not defined what constitutes a "testimonial" statement, but it has given examples of "formulations" for "testimonial statements": ex parte in-court testimony or its functional equivalent, extrajudicial statements contained in formalized testimonial materials (such as affidavits, depositions, prior testimony, or confessions), and statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Muttard* at ¶ 60, citing *Crawford* at 51-52. In determining whether statements implicate Confrontation Clause analysis, courts are to view them objectively and should focus on the expectation of the declarant at the time of making the statement. *State v. Stahl*, 111

Ohio St.3d 186, 2006-Ohio-5482, ¶ 22, 36.

{¶ 30} We find that the statements made by E.S. and H.I. to Mother and Grandmother are not testimonial in nature. The statements were not made in the context of in-court testimony or its equivalent. There is no suggestion that they were elicited as part of the police investigation or in a sworn statement with intention of preserving the statement for trial or that they were a pretext or façade for state action. *Muttard*, 2007-Ohio-5267 at ¶ 61. Nor were the girls' statements to Mother and Grandmother made under circumstances indicating to E.S. and H.I. that the statements would be used in a trial. *State v. Osborne*, 3d Dist. No. 1-06-94, 2007-Ohio-5776, ¶ 18. To the contrary, the statements were made spontaneously, without any prompting or questioning from either Mother or Grandmother. *See State v. Brock*, 3rd Dist. No. 5-07-42, 2008-Ohio-3220. The fact that the information given by the girls to Mother and Grandmother was subsequently used by the state does not change the fact that the statements were not made for the state's use. *Muttard* at ¶ 62.

{¶ 31} We therefore find that the state's use of the girls' statements at trial did not violate the Confrontation Clause. Having already found that the statements were properly admitted under Evid.R. 807, appellant's first assignment of error is overruled.

{¶ 32} Assignment of Error No. 2:

{¶ 33} THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICT AND/OR THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 34} Appellant argues that his child endangering conviction regarding E.S. was supported by insufficient evidence and was against the manifest weight of the evidence because the state failed to establish he caused the child serious physical harm. Specifically, appellant asserts that the state failed to establish E.S. suffered "'acute pain' of a duration that results in substantial suffering or prolonged and intractable pain."

{¶ 35} Whether the evidence presented is legally sufficient to sustain a verdict is a

question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Layne*, 12th Dist. No. CA2009-07-043, 2010-Ohio-2308, ¶ 23. After examining the evidence in a light most favorable to the prosecution, the appellate court must then determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 36} In determining whether a conviction is contrary to the manifest weight of the evidence, an appellate court must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses to decide whether the jury clearly lost its way in resolving evidentiary conflicts and created such a manifest miscarriage of justice that the conviction must be reversed. *Layne* at ¶ 24. This discretionary power is to be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *Id.* A determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Rodriguez*, 12th Dist. No. CA2008-07-162, 2009-Ohio-4460, ¶ 62.

{¶ 37} R.C. 2919.22(B)(1) prohibits a person from abusing a child under 18 years of age or a mentally or physically handicapped child under 21 years of age. Child abuse is defined as "an act which inflicts serious physical harm or creates a substantial risk of serious harm to the physical health or safety of the child." *State v. Burdine-Justice*, 125 Ohio App.3d 707, 714 (12th Dist.1998). R.C. 2901.01(A)(5) defines "serious physical harm to persons" as meaning any of the following:

> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

> (b) Any physical harm that carries a substantial risk of death;
>
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶ 38} E.S. and her sister H.I. spent most of the 2010 Memorial Day weekend with Mother and appellant. Father picked them up late afternoon on Sunday. E.S. was very withdrawn, timid. Later that evening, upon discovering bruises on E.S.'s legs and stomach (and numerous bruises on H.I.), Father filed a police report; the girls were subsequently taken to Children's Hospital. Father testified that at the hospital, while E.S. was not in as much pain as her sister (who had a laceration to her liver), she was withdrawn and did not want to be touched.

{¶ 39} Grandmother and the maternal aunt (Aunt) of E.S. both saw the child at the hospital on Monday afternoon. Aunt testified that E.S. was very scared, was "curled in a little ball" on the bed, and was "very bruised, very timid, just very hurt." E.S. was also "just terrified of me, and she's never been terrified of me." Grandmother testified that E.S. was "very backwards, fearful," and "kind of curled up, like, little fetal position sucking her thumb," which was not something she normally did.

{¶ 40} Photographs taken at the hospital show multiple bruises on E.S.'s body, including on her face, ears, neck, legs, torso, and lower abdomen. E.S. also had abrasions in her vaginal area. Kathi Makoroff, M.D., an expert in pediatric child abuse who examined E.S. at the hospital, testified that given E.S.'s bruises and genital injuries, she expected E.S.

to feel pain. E.S. and her sister were hospitalized for two days. While in the hospital, "because of the number of bruises, [and] because some of her laboratory tests * * * were elevated, [E.S.] required some x-rays." Upon release from the hospital, E.S. took Motrin for about two weeks and was not allowed to ride a bicycle or play with any outside playground equipment.

{¶ 41} E.S.'s teacher testified that before the 2010 Memorial Day weekend, E.S. was "the sweetest little thing ever." By contrast, when she returned to school a few weeks later, E.S. was a "totally different child," was violent with other children, pulling their hair, getting on top of them, and beating them up, and was running out of the classroom.

{¶ 42} Upon a thorough review of the record and considering the standard of "serious physical harm" as stated in R.C. 2901.01(A)(5), we find that a rational trier of fact could conclude that E.S. suffered serious physical harm. Thus, the jury did not lose its way in finding that E.S. sustained serious physical harm as a result of appellant's abuse. Appellant's child endangering conviction regarding E.S. is therefore not against the manifest weight of the evidence. Our determination that appellant's conviction is supported by the weight of the evidence is also dispositive of the issue of sufficiency. *Rodriguez*, 2009-Ohio-4460 at ¶ 62.

{¶ 43} Appellant's second assignment of error is overruled.

{¶ 44} Assignment of Error No. 3:

{¶ 45} THE TRIAL COURT ERRED WHEN IT IMPOSED CONSECUTIVE SENTENCES ON ALL THREE COUNTS AS WELL AS THE MAXIMUM SENTENCE FOR COUNT ONE OF THE INDICTMENT.

{¶ 46} Appellant was sentenced to 8 years in prison on Count One (child endangering regarding H.I.), 6 years in prison on Count Two (child endangering regarding E.S.), and 180 days in jail on Count Three (assault regarding M.T., the six-year-old boy); all three sentences

were ordered to be served consecutively. On appeal, appellant argues that the trial court erred in sentencing him to eight years in prison on Count One (the maximum prison term for a second-degree felony) and in ordering that the sentences on all three counts be served consecutively. Appellant also argues that his "sentence was not consistent with sentences imposed for similar crimes committed by similar offenders" in violation of R.C. 2929.11(B).

{¶ 47} The Ohio Supreme Court set forth a two-part test for appellate courts to use when reviewing an appellant's sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. First, an appellate court must review the sentence to "determine whether the sentence is clearly and convincingly contrary to law." *Id.* Should the sentence satisfy the first prong, "the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Id.* An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 181.

{¶ 48} "A sentence is not clearly and convincingly contrary to law, where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible range." *State v. Elliott*, 12th Dist. No. CA2009-03-020, 2009-Ohio-5926, ¶ 10, citing *Kalish* at ¶ 18.

{¶ 49} R.C. 2929.11(B) provides in relevant part that "a sentence imposed for a felony shall be * * * consistent with sentences imposed for similar crimes committed by similar offenders." Consistency in sentencing, however, does not mean uniformity. *State v. Bonness*, 8th Dist. No. 96557, 2012-Ohio-474, ¶ 27. A consistent sentence is not derived from a case-by-case comparison, but from the trial court's proper application of the statutory sentencing guidelines. *State v. Hall*, 10th Dist. No. 09AP-302, 2009-Ohio-5712, ¶ 10. In other words, a defendant claiming inconsistent sentencing must demonstrate that the trial

court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12. *State v. Lang*, 12th Dist. No. CA2011-03-007, 2011-Ohio-5742, ¶ 25.

{¶ 50} Upon review of the record, we first find that appellant's sentences were not contrary to law. The trial court stated it considered the purposes and principles of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12. *Kalish*, 2008-Ohio-4912 at ¶ 18. Moreover, the trial court properly applied postrelease control and sentenced appellant to prison terms within the statutory range for the offenses.

{¶ 51} We next find that the trial court did not abuse its discretion in sentencing appellant to the maximum prison term of eight years for his abuse of H.I., and in imposing consecutive sentences. The trial court considered the presentence investigative report which revealed appellant's criminal record both as a juvenile and an adult, and the fact appellant abused all three children while he was on community control for an attempted robbery and "had just been released from the Monday program a few months before where he had an intensive program designed to assist him with any drug issues, criminal thinking issues[.]"

{¶ 52} The trial court also considered the serious nature of the offenses, and the seriousness of the injuries suffered by the children at the hands of appellant. As noted earlier, E.S. had multiple bruises on several parts of her body and had abrasions in her vaginal area. Because of their injuries, both E.S. and her sister were hospitalized for two days. Photographs of the boy's buttocks revealed profuse bruising which was likely inflicted with great force.

{¶ 53} Testimony at trial revealed that H.I. had multiple bruises on her body, including to her face, legs, arms, and torso, a laceration to her liver (which was a very serious injury), lacerations and bruises on her anus, and small lacerations in her vaginal area. Both her hip bones were fractured. Dr. Makoroff testified that H.I. was in a lot of pain at the hospital;

family members testified that at the hospital, H.I. was very lethargic, crying and whimpering, in a lot of pain, and did not want to be touched or held.

{¶ 54} Lastly, we cannot say that appellant's aggregate sentence of 14 years in prison is inconsistent with sentences imposed for similar crimes committed by similar offenders. Appellant has failed to show that the trial court did not properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12. *Lang*, 2011-Ohio-5742 at ¶ 29.

{¶ 55} In light of the foregoing, appellant's third assignment of error is overruled.

{¶ 56} Judgment affirmed.

S. POWELL, P.J., and RINGLAND, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.