[Cite as *State v. Becker*, 2001-Ohio-7033.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	**JUDGES:**
STATE OF OHIO	:	**Hon. Julie A. Edwards, P.J.**
	:	**Hon. W. Scott Gwin, J.**
	:	**Hon. John F. Boggins, J.**
Plaintiff-Appellee	:	
	:	**Case No. 01-CA-006**
-vs-	:	
	:	**O P I N I O N**
JAN BECKER	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	**Appeal from the Common Pleas Court, Case No. 2000CR040**
JUDGMENT:	**Affirmed**
DATE OF JUDGMENT ENTRY:	**12/20/2001**

APPEARANCES:

For Plaintiff-Appellee	**For Defendant-Appellant**
ROBERT RINFRET **Holmes County Prosecutor** **91 South Monroe Street** **Millersburg, Ohio 44654**	**DAVID DOUGHTEN** **4403 St. Clair Avenue** **Cleveland, Ohio 44103**

Boggins, J.

This is an appeal from the Holmes County Court of Common Pleas.

The Assignments of Error before this court are:

I.

THE VERDICTS ARE AGAINST THE WEIGHT OF THE EVIDENCE.

II.

THE TRIAL COURT ERRED BY OVERRULING DEFENSE OBJECTIONS TO IRRELEVANT VICTIM-IMPACT TESTIMONY.

III.

THE TRIAL COURT ERRED BY ALLOWING A PSYCHOLOGIST TO TESTIFY THAT AN ALLEGED VICTIM SUFFERS FROM POST-TRAUMATIC STRESS SYNDROME AS THE RESULT OF LONG-TERM SEXUAL ABUSE.

IV.

THE TRIAL COURT'S SENTENCE OF THE APPELLANT DID NOT COMPORT WITH OHIO'S STATUTORY SENTENCING SCHEME. SPECIFICALLY, THE TRIAL COURT IMPOSED CONSECUTIVE SENTENCES WITHOUT FOLLOWING R.C. §2929.14 AND R.C. §2929.11(B).

STATEMENT OF FACTS

The history of this case is that appellant was indicted for thirteen counts of sexual assault namely gross sexual imposition, sexual battery, felonious sexual

penetration, rape and attempted rape as to Jennifer Dawson (D.O.B. 8/30/79), eleven similar charges as to Christine Dawson (D.O.B. 1/9/81), and eleven such counts as to Teresa Dawson (D.O.B. 4/18/82).

Jennifer, Christine and Teresa were step-daughters of appellant and the conduct involved a time period between 1988 to 1995.

A force specification was attached to eighteen of the counts for which the appellant was indicted for felonious sexual penetration and rape with the victims being less than thirteen.

Guilty verdicts were issued as to eighteen of the thirty-five counts by the jury. Ten of the verdicts involved life imprisonment specifications.

Appellant received ten life imprisonment sentences, three of which were to be served consecutively with the remaining sentences to be served concurrently.

I.

Appellant argues that the jury's verdicts were against the weight of the evidence. We disagree. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine " whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Martin* (1983), 20 Ohio App.3d 172. See also, *State v. Thompkins* (1997), 78 Ohio St.3d 380. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against

the conviction. *Martin* at 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

At trial, each of three stepdaughters testified as to the escalating sexual acts committed by appellant. Jennifer (now 21 yrs.) described such conduct as beginning at age 9 to10 years. (T. at 246-252).

Christine Dawson (now 20 yrs.) testified that the same began with her at age 6 to 8 years. (T. at 375-381).

Theresa Dawson (now age 18 yrs.) also supported the charges with her experiences as to digital penetration at age 7 to 9 years, attempted penis insertion at age 9 years and oral sex thereafter. (T. at 480-495).

Appellant took the stand to deny such allegations.

Appellant questions the qualifications of Dr. Le Sure and excerpts certain portions of testimony produced under cross-examination and draws conclusions not accepted by the jury.

The qualification of a witness as an expert is governed by Evid. R. 701, 702 and 703.

The record indicates Dr. Le Sure's educational background, licensing, experience and authoring part of the training manual for Human Services Child Protective Workers. (T. at 746-749).

As to Jennifer Dawson, Dr. Le Sure gave an opinion as to post-traumatic stress disorder (PTSD) based upon the sexual conduct, without objection (T. at 793), even though subsequent testimony was subject to objection. (T. at 794-795).

The same opinion of PTSD as to Teresa Dawson was also admitted without objection. (T. at 799).

There are innumerable cases relative to consideration of the admissibility of opinions of an expert. The United States Supreme Court case which has produced much discussion in this area is *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579. Ohio Evid. R. 702 as amended 7/1/94, conforms to the *Daubert* concepts.

Another Federal case, *General Electric v. Joiner* (1997), 522 U.S. 136, which we accept, holds that the test for appellate review regarding admission of expert testimony is abuse of discretion.

In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. We must look at the totality of the circumstances in the case *sub judice* and determine whether the trial court acted unreasonably, arbitrarily or unconscionably.

In addition, while certain objections were subsequently made, a significant portion of testimony as to PTSD was admitted without objection.

We cannot consider selective testimony subject to objection when similar testimony was admitted without objection. *State v. Williams* (1977), 51 Ohio St.2d

112, *Stores Realty Co. v. City of Cleveland* (1975), 41 Ohio St.2d 41, *Greynolds v. Kurman* (1993), 91 Ohio App.3d 389, *Schade V. Carnegie Body Co.* (1982), 70 Ohio St.2d 207.

Under the guidelines of the qualifications provided by Dr. Le Sure, as subject to Evid. R. 702, we find no abuse of discretion in the admission thereof.

The argument, presented as fact by appellant of an admitted bias of Dr. Le Sure is not developed as such by the record. Of course, the Jury had the visual testimony upon which it could draw its conclusions as to a bias and, by this, test the credibility of such witness.

None of the quotations excerpted from Dr. Le Sure's testimony support a conclusion that the testimony as a whole was not fully explained through direct and cross-examination with this Jury capable of acceptance of all or any portion thereof.

Again, as to the testimony of the three victims, the selected portions of their testimony was subject to the scrutiny of the Jury as to whether such was credible or an attempt to affect the mother's custody of Briggette as appellant postulated.

Based upon the facts noted *supra*, and the entire record, we do not find the verdict was against the manifest weight of the evidence. As stated, the jury was free to accept or reject any or all of the testimony of the witnesses including Dr. Le Sure and assess the credibility of those witnesses. There was sufficient, competent evidence to support the jury's finding.

Appellant's First Assignment of Error is overruled.

II., III.

The Second and Third Assignments of Error question admissibility of testimony as to the effect of the sexual conduct upon such stepdaughters and the expert's PTSD opinions.

Evidence Rule 705 requires disclosure as to facts supporting the expert's opinion.

Dr. Le Sure's testimony as to behavioral patterns present which conform to recognized symptoms of abused children is clearly admissible under such rule.

The Ohio Supreme Court in *State v. Stowers* (1997), 81 Ohio St.3d 260, in affirming this Court stated:

> **Expert witness's testimony that behavior of alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible, even if it conveys expert's belief that child was actually abused, as expert testimony on this ultimate issue is permissible as aid to jurors, abrogating *State v. Givens* 1992 WL 329453, and *State v. Yarber*, 102 Ohio App.3d 185, 656 N.E.2d 1322. Rules of Evid., Rules 702, 704.**
> **Lack of official recognition by psychiatric profession of child sexual abuse syndrome does not preclude expert testimony that child's behavior is consistent with sexual abuse, as such testimony qualifies as opinion based on specialized knowledge, experience, training and education, and is not subject to further requirements for admission of testimony involving scientific or technical testing. Rules of Evid., Rule 702(B), (C)(1-3).**
>
> **Although expert may not offer opinion testimony as to truth of child's statements about sexual abuse, expert is not precluded from giving testimony which is additional**

> **support for truth of facts testified to by child, or which assists fact finder in assessing child's veracity. Rules of Evid., Rules 702, 704.**

As stated by appellee, this Court in *State v. Rowe* (Aug. 3, 1999), Holmes App. No. 98-CA-6, unreported, relied upon the *Stowers* decision as to similar testimony.

We have previously discussed under the First Assignment of Error the lack of objection as to the initial PTSD expert's opinions.

Based upon these precedents, we find that the Second and Third Assignments of Error are not well taken.

IV.

The Fourth Assignment of Error deals with the imposition of consecutive sentences and relies for its presentation on the present requirements of R.C. §2929.14 and R.C. §2929.11(B).

As the offenses occurred prior to the July 1, 1996 effective date of S.B. 20, such reliance is misplaced. *State ex. rel. Lemmon v. Ohio Adult Parole Authority* (1997), 78 Ohio St.3d 186, *State V. Rush* (1998), 83 Ohio St.3d 53.

We find that the trial court did not exceed its authority in imposing consecutive life sentences under law in effect at the time the offenses for which those sentences were imposed were committed. The consecutive sentences were imposed for the violations of R.C. 2907.02(A)(1) that occurred in between 1988 to 1995. Thus, the sentencing guidelines in effect prior to July 1, 1996, are applicable to this case. See *State v. Rush* (1998), 83 Ohio St.3d 53, paragraph two of the syllabus (The provisions of Senate Bill 2 can be applied only to crimes committed on

or after its effective date.). Pursuant to previous law, an appellate court would generally not reverse a trial court's exercise of discretion in sentencing when the sentence was authorized by statute and was within the statutory limits. *State v. Hill* (1994), 70 Ohio St.3d 25, 30 (Citations omitted.) R.C. 2929.41(B), as effective at the time of the offenses in this case, allowed the imposition of consecutive terms of incarceration in several situations, including "when the trial court specifies" that they could be served consecutively. R.C. 2929.41(B)(1). Because the trial court had this broad authority to specify that the appellant's life sentences could be served consecutively under the statute, we find no error in the imposition of the consecutive sentences. Moreover, as to the life sentences themselves, they are mandatory under either version of R.C. 2907.02(B) and, as a result, not subject to the sentencing guidelines in effect either before or after July 1, 1996. See *State v. Metz* (Apr. 20, 2001), Sandusky, 2001 WL 396543, unreported.

Also, in his Reply Brief, appellant attempts to raise the additional Assignment of Error that the evidence was lacking as to testimony of force to support imposition of the life sentences.

Under Appellate Rule 16(C) a Reply Brief is appropriate in response to the Brief of appellee. However, new Assignments of Error cannot then be raised.

The Fourth Assignment of Error questions the imposition of consecutive sentences rather than the evidence presented in support of the sentences. The argument as to the absence of sufficient testimony as to the force specifications must be disregarded.

Therefore, we overrule the Fourth Assignment of Error.

The decision of the Holmes County Court of Common Pleas is affirmed.

By: Boggins, J.

Edwards, P.J. and

Gwin, J. concur

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JUDGES

JFB/jb 1210

[Cite as *State v. Becker*, 2001-Ohio-7033.]

IN THE COURT OF APPEALS FOR HOLMES COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	**JUDGMENT ENTRY**
Plaintiff-Appellee	:	**CASE NO. 01-CA-006**
-vs-	:	
JAN BECKER		
Defendant-Appellant		

For the reasons stated in our Memorandum-Opinion, the judgment of the Common Pleas Court of Holmes County, Ohio, is affirmed. Costs to appellant.

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JUDGES