[Cite as *State v. Kingsley*, 2010-Ohio-1187.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
NATHAN KINGSLEY	:	Case No. 2009CA00113
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2008CR1832
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 22, 2010

APPEARANCES:

For Plaintiff-Appellee

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Farmer, J.

{¶1} On November 3, 2008, the Stark County Grand Jury indicted appellant, Nathan Kingsley, on one count of rape in violation of R.C. 2907.02(A)(1)(b). Said charge arose from incidents involving his five year old daughter, S.K. Mother of S.K. is appellant's live-in companion, Stephanie McKnight.

{¶2} A jury trial commenced on April 14, 2009. The jury found appellant guilty as charged. By journal entry filed May 6, 2009, the trial court sentenced appellant to life in prison without the possibility of parole.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED THAT A DEFENSE WITNESS COULD NOT TESTIFY BECAUSE SHE VIOLATED THE TRIAL COURT'S ORDER FOR A SEPARATION OF WITNESSES."

I

{¶5} Appellant claims the trial court abused its discretion when it prohibited the testimony of Stephanie McKnight because she violated the trial court's order for a separation of witnesses.

{¶6} Evid.R. 615 provides for the separation of witnesses as follows in pertinent part:

{¶7} "(A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the

'exclusion' or 'separation' of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses."

{¶8} Appellant argues the 2003 staff notes to the rule indicate the general granting of a motion for separation of witnesses is not favored:

{¶9} "The amendment rejects an 'implicit-terms' approach and adopts instead the narrower rule employed by several Ohio courts and by what appears to be a majority of other jurisdictions that have addressed the question. Under this rule, generally-stated or 'bald' separation orders are effective only to order the exclusion of witnesses from the courtroom during the testimony of other witnesses.***A separation order does not forbid other conduct by witnesses, such as being present during opening statements or discussing the case with other witnesses outside the courtroom. To the extent that a trial court, in the exercise of its discretion, determines to order forms of separation in addition to exclusion, it remains free to do so, but it can do so only by making the additional restrictions explicit and by giving the parties notice of the specific additional restrictions that have been ordered. Notice to the parties is required because, with the exception of contempt, sanctions for violation of the rule tend to have their greatest effect on the parties, rather on the witnesses." (Citations omitted.)

{¶10} It is uncontested that the trial court's order in granting the motion for separation of witnesses was a general order:

{¶11} "THE COURT: Very well. Anyone who has been advised or feels that they may be called as a witness in this matter, if you would now please step out of the courtroom, and the attorney who is going to call you will call you at the appropriate time.

And counsel, I do remind you that it is your responsibility to police your own witnesses." T. at 4.

{¶12} During the course of the trial, the state made a request to voir dire Ms. McKnight as to the separation of witnesses order. T. at 311. It was the state's position that Ms. McKnight had violated the order:

{¶13} "MS. CURD: Yes, Your Honor. As per our separation of witnesses rule, Defendant and prosecution witnesses have been in the hallway or in the witness room for both days of trial, that included Miss Stephanie McKnight.

{¶14} "The State is in possession of a recorded phone call made last night from the jail to Miss McKnight, between the Defendant and Miss McKnight, wherein Miss McKnight tells the Defendant that she heard testimony because she was standing outside the door listening in as the witnesses were testifying, specifically her mother. So the State just wished the Court to voir dire her on that issue." T. at 392-393.

{¶15} Defense counsel did not argue against the state's request and in fact, asked the trial court to voir dire Ms. McKnight "on that issue as well." T. at 393.

{¶16} During voir dire, Ms. McKnight denied hearing anything, but admitted to purposefully positioning herself outside the courtroom door to hear the testimony of her mother. T. at 395-396. Ms. McKnight admitted to telling appellant that she had heard her mother's testimony, but explained to the trial court that she only heard her mother's voice raised, "I didn't hear what - - what she said." T. at 397. Following voir dire, the trial court found Ms. McKnight violated the separation of witnesses order and determined she could not testify. T. at 399.

{¶17} Defense counsel offered the following proffer:

{¶18} "MR. BRUNER: Miss McKnight would indicate that - - essentially she would say that her husband did not have any activity with her daughter, that there was nothing unusual about her daughter. And that since that day, her mother and sister have had custody of her daughter, and she's had a number of conversations with her daughter that did not result in talking about this incident, but talked about numerous other things.

{¶19} "And essentially the crux of it was that her father did not commit these acts, that Mr. McKnight - - Mr. Kingsley did not commit these acts. For the record, they are not husband and wife, they are live-in partners I guess you would call it under Ohio law, but they are the parents of S.K.." T. at 400-401.

{¶20} In *State v. Waddy* (1992), 63 Ohio St.3d 424, 434, the Supreme Court of Ohio explained the purpose of Evid.R. 615 and the meaning of a separation order:

{¶21} "The purpose of separation order is 'so that [witnesses] cannot hear the testimony of other witnesses,' Evid.R. 615, and tailor their own testimony accordingly. Thus, a spectator or witness may not tell a prospective witness what has taken place in court if the judge has ordered separation of witnesses. *State v. Spirko* (1991), 59 Ohio St.3d 1, 14, 570 N.E.2d 229, 246."

{¶22} The threshold question is whether the trial court improperly excluded Ms. McKnight and whether such exclusion was prejudicial to appellant. The general rule in Ohio was set forth in *State v. Cox* (1975), 42 Ohio St.2d 200, 202, which adopted the following from *U.S. v. Schaefer* (1962), 299 F.2d 625, 631:

{¶23} "In the interest of brevity, we deem it sufficient to state that after a thorough study of the record we are convinced these witnesses were in the courtroom in

violation of the court's order of sequestration. However, it appears that they did not wilfully violate the rule; likewise, there is no indication that their presence was with the consent, connivance, or knowledge of defendant or his counsel."

{¶24} In *State v. Smith* (1990), 49 Ohio St.3d 137, 142, the Supreme Court of Ohio explained the following:

{¶25} "Exclusion of witnesses is ordinarily a decision within the sound discretion of the trial court. However, where the court seeks to exclude a witness for violating a separation order, there must be a showing that the party calling the witness consented to, connived in, procured or had knowledge of the witness' disobedience. Secondly, the testimony sought to be introduced must be important to the defense such that exclusion of the evidence constitutes prejudicial error."

{¶26} We note although the telephone conversations from the jail between Ms. McKnight and appellant were recorded, they were not marked as an exhibit, nor was there any indication that the trial court reviewed them. Appellant did not contest the nature of the calls.

{¶27} There was no specific finding by the trial court that appellant "consented to, connived in, procured or had knowledge" of Ms. McKnight’s violation of the order. Clearly, the trial court did not believe Ms. McKnight's assertion that she did not hear anything.

{¶28} Based upon all of these factors, we find the trial court erred in denying Ms. McKnight's testimony absent a showing of appellant's contrivance. However, we find the error to be harmless. Harmless error is described as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right.

{¶29} As indicated by the proffer, Ms. McKnight's testimony would have been that the child never told her of the sexual incidents and the incidents did not occur.

{¶30} The child victim, S.K., testified she told her "mama" (grandmother) about the sexual incidents, but not her mother. T. at 185-186, 192, 196-201, 211-212. S.K. talked to her aunt about the incidents, but only after the grandmother had told the aunt. T. at 185, 199, 201, 205.

{¶31} Polly McKnight, the child's grandmother, testified Ms. McKnight denied any knowledge of the sexual incidents. T. at 243.

{¶32} The investigating officer, Canton Police Detective James Armstrong, testified Ms. McKnight found the allegations unbelievable, and she had no knowledge of any sexual incidents between appellant and S.K. prior to being questioned by the police. T. at 270-271.

{¶33} The trauma specialist who evaluated S.K., Cynthia Keck-McNulty, Ph.D., testified S.K. told her that "she whispered it to her grandma so that her grandma would be the only one to know that secret." T. at 355, 362. Dr. McNulty interviewed Ms. McKnight who denied the allegations against appellant. T. at 365.

{¶34} From all of these witnesses, we find Ms. McKnight's proffer was consistent with what she had said to the police and Dr. McNulty: the child never told her of the incidents and the allegations were unbelievable.

{¶35} Given the volume of the testimony consistent with Ms. McKnight's proffer, we find the exclusion of her testimony to be harmless error as there has been no showing of undue prejudice or a violation of a substantial right.

{¶36} The sole assignment of error is denied.

{¶37} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Wise, J. concur.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ John W. Wise_____

JUDGES

SGF/sg 0209

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
NATHAN KINGSLEY	:	
Defendant-Appellant	:	CASE NO. 2009CA00113

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

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ John W. Wise

JUDGES