

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

THE STATE OF OHIO)	CASE NO. CR 15 593386
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	
)	
DEMETRIUS MOREEN)	<u>JOURNAL ENTRY DENYING</u>
)	<u>THE DEFENDANT'S MOTION</u>
Defendant.)	<u>FOR EXPERT ASSISTANCE</u>

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Demetrius Moreen was indicted on February 27, 2015. He is charged with four counts of rape, two counts of kidnapping, and two counts of gross sexual imposition. The complaining witness for each count is described in the indictment as "Jane Doe," a girl born on January 17, 2008. Counts one, two and three – for rape, gross sexual imposition and kidnapping, respectively – are alleged to have been committed in June 2014 when "Jane Doe" was six years old. The state alleges that the five other remaining charges were committed just after she turned seven, on January 29, 2015. The defendant was arrested that same date and remains in jail awaiting trial.

At his arraignment on March 4, 2015, Moreen was deemed indigent and counsel was assigned to represent him at the state's expense. The parties began discovery and, because the speedy trial clock was ticking, at a pretrial conference on March 12 a trial was scheduled for April 14. That trial date was continued at the defendant's request and rescheduled for May 27.

There is no evidence of record, but the prosecutor summarized the evidence in a motion in limine filed on May 11. There, the prosecutor asserts that the state will prove by the

testimony of Jane Doe – whose initials are D.G.¹ – that on January 29 the defendant forced his penis into D.G.'s mouth, then spit on it and put it in her vagina. The prosecutor claims that this happened in D.G.'s home while her mother was asleep, suggesting that the defendant was a family member or guest and not a stranger to D.G.

Proof of the state's case beyond a reasonable doubt will thus depend heavily upon D.G.'s credibility.

The defendant filed on May 6 a motion to appoint John Fabian, Psy.D. as a defense expert witness at the state's expense on the subject of "why a child would make false allegations."² The motion was opposed by the state through the May 11 motion in limine. The defendant supplemented the motion on May 13, and the plaintiff filed a "motion in opposition" on June 9.

This entry follows.

LAW AND ANALYSIS

The United States Supreme Court recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the state proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). But the Supreme Court has also said that the duty of the state is not to buy the same defense that a wealthy defendant may have, but only to assure the indigent defendant an adequate opportunity to present his claims fairly. *Ross v. Moffitt*, 417 U.S. 600, 616 (1974).

¹ The state has also described Jane Doe as a boy with the initials of "J.W." See the notice of introduction of child victim statements filed on May 4, third page (the filing does not have page numbers), describing the complaining witness as "J.W." and "him." But no witness with the initials J.W. is listed on the state's witness list filed on March 11. I will therefore assume that Jane Doe is a girl with the initials D.G.

² Defendant's May 6 motion, first page (the pages are not numbered).

Therefore, in deciding an indigent defendant's claim to an entitlement to expert assistance at the state's expense a court should examine three factors: (1) the effect on the defendant's private interest in the accuracy of the trial if the requested service is not provided, (2) the burden on the government's interest if the service is provided and (3) the probable value of the additional service and the risk of error in the proceeding if the assistance is not provided. *Ake*, supra, 78-79. But none of these things can be meaningfully considered without reference to evidence and the state is not required to supply an indigent defendant with an expert upon mere demand. *State v. Mason*, 82 Ohio St. 3d 144, 150 (1998). Instead, constitutional guarantees of due process require that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense and (2) that denial of the requested expert assistance would result in an unfair trial. *Id.*, at syllabus. Undeveloped assertions that the proposed assistance would be useful to the defense are patently inadequate. *State v. Yancy*, 8th Dist. Nos. 96527 and 96528, 2011-Ohio-6274, ¶29.

As grounds for the motion, Moreen asserts that Fabian is a board-certified forensic and clinical psychologist and trained clinical neuropsychologist who "can explain to the jury why a child would make false allegations and provide a unique insight into her motivation to lie and he would enlighten the jury regarding symptomatology assessments done which can assist the jury in determining factors often related to sexual abuse."³ According to a brochure attached as an exhibit to the defendant's motion Fabian provides a range of professional services that include child sex abuse allegation (*sic*), child sexual abuse symptomatology assessment and child sex abuse accommodation syndrome evaluation. Fabian's curriculum vitae is also

³ *Id.*

attached as an exhibit to that motion, and Moreen's May 13 supplement includes a copy of a paper by Fabian titled "A Forensic Psychologist's Perspective."⁴

The defendant describes that paper as providing "an overview of the content"⁵ of Fabian's expert testimony. But other than that, Moreen does not summarize the kind of evidence he hopes to elicit from Fabian, leaving it to me to scour the 15-page single-spaced paper to find that information.

After reading Fabian's "A Forensic Psychologist's Perspective" in the context of the defendant's claim that Fabian's expert testimony will "explain to the jury why a child would make false allegations," it appears that the defendant expects Fabian to testify to the following: that by examining D.G. he can testify to the "validity and genuinity (*sic*) of [her] claims, and potential for false allegations;"⁶ he can educate the jury "regarding sexual abuse symptomatology and common symptoms consistent/inconsistent with sexual abuse;"⁷ that proper interviewing technique is important in eliciting truthful allegations and that poor techniques will produce false allegations;⁸ that there are long lists of signs and symptoms that sexually abused children may or may not demonstrate;⁹ that "parental psychopathology . . . [is] related to increase (*sic*) risk of sexual abuse to children;"¹⁰ and that, for six-year-olds, the rate of false allegations of sexual abuse is about four to seven percent.¹¹

Finally, presumably on cross-examination by the prosecutor, Fabian may say:

Currently, there are no scientifically validated actuarial decision procedures designed to assist clinicians in the evaluation of allegations of child sexual abuse. The

⁴ This paper is not included on Fabian's curriculum vitae and it is not apparent from reading it where or whether it was published or presented.

⁵ Defendant's May 13 supplement, first page (the pages are not numbered).

⁶ "A Forensic Psychologist's Perspective," page 3.

⁷ *Id.*

⁸ *Id.* generally pages 4-7.

⁹ *Id.* generally pages 7-10.

¹⁰ *Id.*, p. 10.

¹¹ *Id.*, p. 11.

clinicians' decisions and ultimate clinical judgment are based on review and analysis of the available data in light of the clinician's own experiences and knowledge of the research.¹²

As an initial matter, and in light of Fabian's admission that there is no "scientifically validated" way to tell whether D.G.'s allegations are true or false, it is quite likely that his testimony is not admissible under Rule 702 of the Ohio Rules of Evidence, which allows only expert testimony which is "based on reliable scientific, technical or other specialized information."

But assuming the admissibility of Fabian's testimony, the defendant has failed utterly to show a reasonable probability that the testimony would aid in his defense and that denial of the requested expert assistance would result in an unfair trial.

As to the probability that the testimony would aid Moreen's defense, the record is devoid of not just the specific testimony Fabian would provide but even a precis of the testimony. As noted, I am only making inferences from Fabian's paper about what his testimony might be, and much of what is in the paper would not aid in Moreen's defense. Moreover, Fabian cannot assist the jurors by telling them something they will already know: that the determination of D.G's credibility must take into account all of the facts and circumstances in evidence. I have every confidence that those facts and circumstances – including, for example, whether those who interviewed D.G. used good or bad techniques and whether D.G. demonstrates the symptom of sexualized behavior often shown by sex abuse victims – will be part of the record evidence at trial through defense counsel's skillful cross examination of the state's witnesses.

As to whether Moreen's trial will be constitutionally infirm without Fabian's testimony, I can only note that the vast majority of criminal trials in this county (and, probably, the

¹² *Id.*, p. 4.

country) are conducted without testimony from a defense expert to the effect that a complaining witness might not be believable. Some of those trials are not scrupulously fair because of one legal error or another. Yet, I would wager that never has the failure to provide a credibility expert to the defendant at the expense of the state qualified as an error sufficient to deprive a defendant of his constitutional right to a fair trial.

CONCLUSION

Because I cannot determine that there is a reasonable probability that the appointment of John Fabian, Psy.D. as an expert at the state's expense would aid in Moreen's defense or that denial of the proposed expert assistance would result in an unfair trial, the defendant's May 6, 2015, motion is denied.¹³

IT IS SO ORDERED:

Judge John P. O'Donnell

July 22, 2015
Date

¹³ The motion is also denied on the independent basis that it is untimely under Rule 12(D) of the Ohio Rules of Criminal Procedure.

SERVICE

A copy of this journal entry was sent by email, this 22d day of July 2015, to the following:

Oscar Albores, Esq.

oalbores@prosecutor.cuyahogacounty.us

Assistant prosecuting attorney for the State of Ohio

Susan J. Moran, Esq.

susanjmoran@yahoo.com

Attorney for defendant Moreen

Judge John P. O'Donnell