

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC 84695
)	
NICKLOUS CHURCHILL,)	
)	
Appellant.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE FRANK CONLEY, JUDGE**

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Nicklous Churchill, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

STATEMENT OF FACTS

Nicklous incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

POINTS RELIED ON

I.

The trial court erred and abused its discretion in overruling Nicklous' objection and request for a mistrial when Dr. Solomon testified to her opinion that what A.T. alleged "was real" because the ruling denied Nicklous his rights to due process of law and to a fair trial before a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Dr. Solomon's testimony that the event that A.T. described "was real" constituted an impermissible opinion of another witness' credibility, thereby usurping the function of the jury. Allowing this inadmissible testimony made the jury more likely to convict Nicklous because the witness improperly bolstered A.T.'s credibility.

State v. Lawhorn, 762 S.W.2d 820 (Mo. banc 1988);

State v. Taylor, 663 S.W.2d 235 (Mo. banc 1984);

State v. Driscoll, 55 S.W.3d 350 (Mo. banc 2001);

State v. Williams, 858 S.W.2d 796 (Mo. App., E.D. 1993);

U.S. Const., Amends VI and XIV; and

Mo. Const., Art. I, Secs. 10 and 18(a).

II.

The trial court erred and abused its discretion in overruling Nicklous' objection to Dr. Solomon's testimony that the changes in A.T.'s behavior were "consistent" with sexual abuse and were indicative of a significant event in her life, because the ruling denied Nicklous his rights to due process of law and to a fair trial before a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that her testimony was without any foundation because there was no showing that Dr. Solomon had any mental health expertise that would render her competent to express an opinion on the meaning of behavioral changes in alleged child victims of sexual abuse. Allowing the testimony made the jury more likely to convict Nicklous because it improperly bolstered A.T.'s credibility.

State v. Silvey, 894 S.W.2d 662 (Mo. banc 1995);

In the Matter of Johnson v. State, 58 S.W.3d 496 (Mo. banc 2001);

U.S. Const., Amends VI and XIV; and

Mo. Const., Art. I, Secs. 10 and 18(a).

ARGUMENT

I.

The trial court erred and abused its discretion in overruling Nicklous' objection and request for a mistrial when Dr. Solomon testified to her opinion that what A.T. alleged "was real" because the ruling denied Nicklous his rights to due process of law and to a fair trial before a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, because Dr. Solomon's testimony that the event that A.T. described "was real" constituted an impermissible opinion of another witness' credibility, thereby usurping the function of the jury. Allowing this inadmissible testimony made the jury more likely to convict Nicklous because the witness improperly bolstered A.T.'s credibility.

Despite the State's efforts to make it so, this case is *not* about "whether a mistrial was mandated" when the State's witness violated the court's prior admonition not to give her opinion of A.T.'s' credibility. (Resp. Br. 9).

The trial court needn't have reached that question. The State has completely lost sight of the fact that Nicklous objected to evidence from Dr. Solomon about the "significance of behavioral changes" the *first* time the State brought it up -- he objected that the witness was going to give an opinion about whether sexual abuse had occurred, and that the court had admonished the witness at the prior hearing not to

give such an opinion (Tr. 260-61). Unfortunately, the court did not adhere to its earlier, correct, position. Whether it believed that the State would -- after the earlier comment -- have advised its witness to avoid the subject, or whether it simply erred, it overruled Nicklous' objection and Dr. Solomon said that the behavioral changes meant that "a significant event had occurred in the girl's life." (Tr. 261).

This was already a violation of the rule prohibiting expert testimony about a witness' credibility. *State v. Lawhorn*, 762 S.W.2d 820, 823 (Mo. banc 1988); *State v. Taylor*, 663 S.W.2d 235 (Mo. banc 1984). But despite this record, and the fact that Nicklous *objected* when the State returned to the subject scant moments later, eliciting the "it was real" testimony, the State maintains that Nicklous "did not seek any relief other than a mistrial." (Resp. Br. 8).

So even though the State recognizes the court's error,¹ it cannot recognize the plain language in the transcript: "**Objection**, Your Honor, may we approach." (Tr. 265) (emphasis added). How the State can read this to be solely a motion for a mistrial is mystifying. What else can the word "objection" mean except that Nicklous *objected* to the testimony? The subsequent request for a mistrial does not transform the character of the objection, nor does it remove either that objection or the earlier one from the record.

¹ The State recognized this at page 14 of its brief in the Court of Appeals; in this Court, the State avoids the question of admissibility, claiming that the issue is rather whether a mistrial was mandated (Resp. Br. 10).

In arguing in the face of the record that Nicklous did not request relief other than a mistrial (Resp. Br. 14), the State has not proposed what else Nicklous could have done. Throughout the course of this appeal Nicklous has invited the State to explain what relief the court might have granted *after it overruled his objection*. So far, it has provided no answer. Requesting a curative instruction rather than a mistrial might make some sense if the objection had been sustained, but the State needs to explain what judge would even entertain such a motion when he just overruled the objection.

In four of the five cases the State cites, the defendant specifically *rejected* any relief other than a mistrial. *See, State v. Witte*, 37 S.W.3d 378, 384 (Mo. App., S.D. 2001) (defendant specifically declined a suggestion that the trial court instruct the jury to disregard the comment in issue); *State v. Mahoney*, 70 S.W.3d 601, 606 (Mo. App., S.D. 2002) (defendant's objection was sustained, but he withdrew his request to instruct the jury to disregard); *State v. Walls*, 911 S.W.2d 645, 647 (Mo. App., S.D. 1995) (request specifically limited to mistrial, claiming instruction was inadequate).

The other cases cited provide no further support. In *State v. Smith*, 934 S.W.2d 318, 319 (Mo. App., W.D. 1996), it was *defense counsel* who pursued a dangerous line of questioning until the witness referred to prior convictions, and then did not object to the testimony. And in *State v. Immekus*, 28 S.W.3d 421, 431 (Mo. App., S.D. 2000), the defendant requested only a mistrial. The State presents no case in which an objection was overruled but the conviction was affirmed because the defendant also requested a mistrial and such remedy was considered to be too drastic.

Once the question is answered affirmatively that the court erred in allowing an “expert” to give her opinion of five-year old A.T.’s credibility, the question is only whether the error was “‘outcome determinative,’ that is, whether ‘the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all the evidence properly admitted, there is a reasonable probability that the jury would have reached a different conclusion but for the erroneously admitted evidence.’” *State v. Driscoll*, 55 S.W.3d 350, 356 (Mo. banc 2001) (citation omitted).

In this case, this is a simple answer. Where the State did *not* have a doctor testifying that she believed A.T.’s mother’ allegations that Nicklous tried to intimidate her, the jury accepted Nicklous’ denial and acquitted him of victim tampering (L.F. 30, 34). There *cannot* be any doubt that this raises at the very least a reasonable probability that the jury would also have acquitted Nicklous on the charge of sodomy had not the doctor attested to A.T.’s credibility.

It is also mystifying that the State can call the doctor’s testimony “brief and non-responsive.” (Resp. Br. 11). The State asked, “what’s the significance of [A.T.’s] behavioral changes?” (Tr. 260), and received the answer that “a significant event had occurred in the girl’s life.” (Tr. 261). Then after Dr. Solomon said that the child’s history was of utmost importance, as was her “ability to tell me details that were beyond the scope of her developmental and chronological age” (Tr. 264), the prosecutor again asked why that was “significant” -- and received much the same answer (Tr. 264). Not satisfied, the prosecutor then asked, “What part of the demeanor was significant?” (Tr. 265), leading to the testimony at issue here. Finally,

even after Nicklous asked for, and was refused, a mistrial, the prosecutor asked the doctor for her opinion concerning her evaluation, and the doctor said that the exam “was consistent with sexual abuse.” (Tr. 267). In other words, the doctor again gave an opinion as to A.T.’s credibility. That this was again her opinion of A.T.’s credibility is clear because *she had no other basis on which to give any opinion*. There *were* no physical findings indicating *anything*, let alone sexual abuse (Tr. 265).

This line of questioning consumed several pages, and several minutes of the trial, and the “significance” was elicited three separate times. There can be no doubt that the prosecutor returned to this subject again and again with the specific intent to elicit the exact testimony she did elicit. This was neither brief nor non-responsive; it was deliberately calculated to elicit inadmissible evidence, and the State’s argument strains credulity.

Even if this case were about the necessity of the remedy of a mistrial, it was plainly mandated here. As the State noted (Resp. Br. 11), “[u]nsolicited statements that are brief and limited in substance do not amount to reversible error in the absence of evidence that the prosecutor intentionally tried to inject unfair prejudice into the trial.” *State v. Johnston*, 957 S.W.2d 734, 749 (Mo. banc 1997). Stated conversely, where, as here, the evidence *is* solicited, where it is *not* brief, and where the prosecutor apparently *did* try to inject unfair prejudice, the court should have declared a mistrial as Nicklous requested. Instead, the court denied the objection at the outset, it denied the objection to the specific testimony, and it denied the request for a mistrial.

As stated, even if the issue is his entitlement to a mistrial, the “five factors” cited by the State (Resp. Br. 12), favor Nicklous’ position.

(1) *Whether the statement was, in fact, voluntary and unresponsive to the prosecutor’s questioning or whether the prosecutor deliberately attempted to elicit the comments.* Nicklous has already demonstrated above that this line of inquiry was actively pursued by the prosecutor, and there could have been no other response sought to the prosecutor’s repeated “significance” questions.

(2) *Whether the statement was singular and isolated, and whether it was emphasized or magnified by the prosecution.* Also as noted above, the prosecutor asked three different times as to the significance of behavioral factors, then concluded up by asking for a conclusion that could only have been based solely on the doctor’s belief in A.T.’s credibility.

(3) *Whether the comments were vague and indefinite, or whether they made specific reference to crimes committed by the accused.* Because this is not an “other crimes” issue, to paraphrase, the question is whether the comment specifically referred to A.T.’s credibility. Here, there can be no other interpretation of the phrase “this event she was telling me was real” than that the doctor believed her, and so should the jury.

(4) *Whether the court promptly sustained defense counsel’s objection to the statement and instructed the jury to disregard the volunteered statement.* Of course, this is the exact issue Nicklous discussed at length above. The court in fact promptly *overruled* Nicklous’ objection, thus making any request for an instruction moot.

(5) *Whether in view of the other evidence presented and the strength of the State's case, it appeared that the comment played a decisive role in the determination of guilt.* A.T.'s story was farfetched at best. She could not even remember how many times, or in what rooms this supposedly happened. And where Nicklous did not have to contend with an alleged expert reinforcing a witness' credibility, the jury found Nicklous not guilty. There was no evidence to support this charge beyond A.T.'s own testimony -- and statements to others -- and an opinion as to her credibility, the central issue in the case, could not but have played a decisive role.

All five factors are in Nicklous' favor.

The State says that the factual situations in *State v. Taylor*, *supra*, and *State v. Williams*, 858 S.W.2d 796 (Mo. App., E.D. 1993), are very different from the facts of this case. (Resp. Br. 16). But in *Taylor*, this Court disapproved the State's use of a psychiatrist's opinion that the alleged victim suffered from rape trauma syndrome; this went "beyond proper limits of opinion expression." 663 S.W.2d at 239-40. The Court noted that the jury was competent to assess the witnesses' testimony, and allowing a doctor to express his opinion of the alleged victim's veracity "designed to invest scientific cachet on the critical issue was erroneously admitted." *Id.* at 241. The Court was not concerned with the number of questions addressing this issue, but the *fact* of admitting an opinion as to credibility.

Similarly, in *Williams*, the Eastern District reversed the defendant's conviction where the "expert" did not even address the victim's individual credibility, but only opined that "very rarely do children lie about" sexual abuse. 858 S.W.2d at 800-801.

Again, this was not a “lengthy series” of questions, but a single paragraph of the doctor’s answer to a single question. Indeed, the Court found that this vouching even reached the level of manifest injustice and reversed for plain error. *Id.* at 801.

Since the jury’s verdict was the result of its impression of the witnesses’ credibility, we hold that the doctor’s opinion on the truthfulness of the victim manifestly prejudiced appellant by usurping the province of the jury.

Id. Neither Court relied on the thought that only a lengthy series of questions was involved, or that such was required to constitute reversible error.

Just as did the prosecutors in *Taylor* and *Williams*, this prosecutor took step by measured step towards the conclusion she desired: the doctor believed A.T. was telling the truth, thus making it more likely that the jury would also. Despite being ordered by the trial court to avoid this topic (Tr. 44, 51), the prosecutor returned again and again to it in examining the doctor, then hammered the jury again and again with her argument that A.T. was credible (Tr. 341, 343, 345, 346, 347, 359, 361).

The trial court improperly overruled both Nicklous’ objection and request to let him start over -- to declare a mistrial so he could have a fair trial with an untainted jury. It erred as to both requests.

II.

The trial court erred and abused its discretion in overruling Nicklous' objection to Dr. Solomon's testimony that the changes in A.T.'s behavior were "consistent" with sexual abuse and were indicative of a significant event in her life, because the ruling denied Nicklous his rights to due process of law and to a fair trial before a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that her testimony was without any foundation because there was no showing that Dr. Solomon had any mental health expertise that would render her competent to express an opinion on the meaning of behavioral changes in alleged child victims of sexual abuse. Allowing the testimony made the jury more likely to convict Nicklous because it improperly bolstered A.T.'s credibility.

Nicklous and the State really do not disagree as to the law applicable to qualifying an expert. The disagreement is as to whether the State offered any testimony that Dr. Solomon was a person who "has knowledge which will aid the trier of fact." (Resp. Br. 22). It is not enough that the subject is one in which expert testimony will assist the jury (Resp. Br. 20-22). The State still has to show that its witness can do so. More specifically, the dispute is as to how the State gets from "medical doctor" to "expert witness in the area of child sexual abuse" (Resp. Br. 21).

This is another mystifying proposition. There was not one word of testimony to support the claim that Dr. Solomon “had extensive experience in the area of evaluating the behavior of sexually abused children.” (Resp. Br. 21). Not a single word. Dr. Solomon is a pediatrician; she specialized in pediatrics in medical school (Tr. 250-51). Perhaps to the State, saying it makes it so, but it could at least point out where Dr. Solomon mentioned her course work in child psychology. Or her studies in this field as part of the requirements to become and remain a SAFE examiner -- the “initial SAFE training and then a yearly update that I attend.” (Tr. 252). This was as far as it went.

Even when Nicklous objected to the doctor’s qualifications to render an opinion on “the significance of [A.T.’s] behavioral changes” (Tr. 260-61), the prosecutor backtracked only to confirm that the doctor had conducted between 100 and 200 SAFE examinations on children (Tr. 261). Nothing more.

And the doctor described no studies indicating the significance of behavioral changes, or that she, indeed, even studied A.T.’s or other children’s behaviors. Instead, the questioning returned to the physical and genital exam she conducted (Tr. 262-64).² There was no testimony that the doctor was familiar with “behavioral

² Of course, this exam was normal, so the prosecutor then went into, not *common* behaviors of child sex victims, as this Court permitted in *State v. Silvey*, 894 S.W.2d 662, 671 (Mo. banc 1995), but Dr. Solomon’s specific evaluation of A.T.’s credibility, as measured by her demeanor and the history she gave. See Point I, *supra*.

changes” so as to make her competent to assist the jury with this subject. Indeed, she herself said that the purpose of interviewing A.T. was to “establish rapport and to aid in [her] medical diagnosis and treatment.” (Tr. 259). So the importance of the history she obtained was relegated solely to the medical field, not behavioral or mental health.

The State continues to misinterpret *Silvey, supra*, when it cites that case in support of the assertion that “Dr. Solomon’s testimony thus was proper expert testimony and the trial court did not abuse its discretion in admitting it.” (Resp. Br. 22). *Silvey* says nothing of the kind. All the case stands for is that whether a child “exhibit[s] several behavioral indicators consistent with a child that has been sexually abused . . . is clearly within the province of allowable expert testimony and did not invade the province of the jury.” 894 S.W.2d at 671. *Silvey* does not stand for the proposition that a *doctor*, even a SAFE examiner, is automatically qualified to render an opinion on this subject. Further, in *Silvey*, there was *no* objection. *Id.* Thus, there was no opportunity for the trial court to rule on the expert’s qualifications. Here, Nicklous *did* object on foundational grounds (Tr. 260-61).

After misciting *Silvey*, the State proceeds to miscite Nicklous’ argument. It claims that he “contend[ed] that no foundation was laid because any testimony about behavioral changes in the victim would have been a psychiatric opinion and Dr. Solomon was not a psychiatrist.” (Resp. Br. 22). This distorts Nicklous’ argument by omitting part of it. He did not claim that only psychiatrists may give opinions as to behavioral issues. He merely said that this Court noted in *In the Matter of Johnson*

v. State, 58 S.W.3d 496, 499 (Mo. banc 2001), that licensed medical doctors practicing psychiatry, licensed psychologists, and licensed social workers are permitted by law to evaluate persons and make diagnoses of mental disorders. Thus the reference to psychiatry was made because Dr. Solomon was already qualified as a medical doctor. She would have been automatically qualified to discuss behavioral issues had she testified that she practiced psychiatry. But she did not. Nor did she say she practiced or even had studied psychology or any other mental health field. Nicklous did not cite *Johnson* for anything beyond the proposition that even experts must be limited to the field in which there is evidence of their qualifications.

The State's entire argument is that the behaviors of child sex abuse victims is a proper subject for expert testimony. Other than asserting without evidentiary support that it established that Dr. Solomon had experience or education in this field (Resp. Br. 21, 23), its argument begs the question of what evidence will qualify a witness as an expert. Here, the question is whether a medical background, without more, qualifies a witness in the field of the behaviors of child sexual abuse victims. A ruling that this is sufficient would be a retreat from *Johnson*, and a denial of Nicklous' right to a fair trial.

CONCLUSION

For the reasons set forth in Points I and II herein and in his opening brief, appellant Nicklous Churchill respectfully requests that this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,878 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, updated in September, 2002. According to that program, these disks are virus-free.

On the _____ day of October, 2002, two true and correct copies of the foregoing reply brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, MO 65109.

Kent Denzel