

1 I JUST THINK THAT THE INTERPRETATION IS EXTREMELY
2 NARROW OF THE STATUTE -- I DON'T KNOW WHERE THEY GET
3 THE IDEA THAT THE TITLE -- BECAUSE I'VE SEEN A LOT OF
4 CASE LAW THAT SAYS THE TITLE IS NOT A DIRECT STATEMENT
5 OF LEGISLATIVE INTENT.

6 IT'S SOME CLERK UP THERE WHO TRIES TO
7 PARAPHRASE THE ACTION IN THE ACT WHEN IT'S ENACTED,
8 AND THE WHEREAS CLAUSE AS ADOPTED BY THE COMMITTEE
9 THAT REPORTS OUT THE BILL, OR MAY FILE IT AND REPORT
10 IT OUT, AS FAR AS LEGISLATIVE INTENT.

11 BUT A TITLE, A SYNOPSIS OF A STATUTE OR
12 SECTION OF THE STATUTE IS OBVIOUSLY MISLEADING, AND
13 IT IS NOT EVIDENCE OF LEGISLATIVE INTENT. SO I DON'T
14 AGREE WITH THEIR INTERPRETATION.

15 ALTHOUGH, I HAVEN'T LOOKED AT THE WISE CASE.
16 HOWEVER, I DON'T HAVE ANYTHING CONTRARY TO CHILDRESS.
17 AND I'M COMPELLED BECAUSE OF THAT TO PROHIBIT, IN AN
18 ABUNDANCE OF CAUTION, TO NOT CREATE THE POTENTIAL FOR
19 REVERSIBLE ERROR ON THE PART OF THE CHILD, TO NOT ALLOW
20 THE TESTIMONY OF THE YOUNGER GIRL, WHO IS MICHELLE.

21 SO THE COURT MAKES THE FINDING THAT CHILDRESS
22 WOULD PROHIBIT THE TESTIMONY OF MICHELLE AS BEING NOT
23 A NON-SEXUAL CHILD ABUSE OR BATTERY TYPE CASE, IN LIGHT
24 OF CHILDRESS. ALTHOUGH, I DON'T AGREE WITH CHILDRESS'
25 INTERPRETATION. SO THAT WOULD NOT BE ADMISSIBLE.

1 HOWEVER, THE COURT FINDS IN THIS HEARING ON
2 THE PROFFER OF TESTIMONY, OUTSIDE THE PRESENCE OF THE
3 JURY, THAT THE TIME; THAT IS, AT BREAKFAST APPROXIMATELY
4 FIVE AND-A-HALF HOURS AFTER THE INCIDENT ALLEGEDLY
5 OCCURRED, THE CONTENT OF THE STATEMENT OF ANGELA AND
6 THE CIRCUMSTANCES OF THE STATEMENT CONCERNING THE
7 EXCITED UTTERANCE OF WHAT MAY HAVE OCCURRED, THE THREATS
8 THAT WERE MADE, THE PERCEPTION BY THE MOTHER THAT HER
9 DAUGHTERS WERE SCARED IS SUFFICIENT AND PROVIDES
10 SUFFICIENT SAFEGUARDS AS FAR AS RELIABILITY.

11 AND, FURTHER, HAVING HEARD THE TESTIMONY
12 OF BOTH CHILDREN, THE COURT FINDS THAT THE STATEMENTS
13 REPORTED DO NOT LACK TRUSTWORTHINESS; THAT THEY ARE
14 TRUSTWORTHY; THAT THEY ARE CONSISTENT WITH THE STATEMENTS
15 OF THE WITNESSES, UNDER OATH, ON THE WITNESS STAND,
16 AND THOSE WITNESSES WERE COMPETENT TO TESTIFY.

17 SO, THEREFORE, I FIND THAT THE HEARSAY
18 STATEMENTS MADE BY ANGELA ARE, IN FACT, ADMISSIBLE.
19 IN CONSIDERING THE MENTAL AND PHYSICAL AGE OF ANGELA,
20 I ASSUME HER MENTAL AGE IS SIMILAR, IF NOT IDENTICAL,
21 TO HER PHYSICAL AGE OF TEN; THAT SHE SEEMS TO BE
22 ADEQUATELY MATURE FOR HER AGE.

23 THE NATURE OF THE OFFENSE WAS ONE THAT
24 OCCURRED -- IT WOULD, OBVIOUSLY, BE A MEMORABLE
25 EXPERIENCE FOR A CHILD AND OCCURRED WITHIN HOURS OF

1 THE TIME OF THE ASSERTION.

2 THE RELATIONSHIP OF THE CHILD TO THE MOTHER
3 AND THE RELIABILITY OF THE ASSERTION BEING THE ALMOST
4 IDENTICAL TESTIMONY, IF NOT THE IDENTICAL TESTIMONY
5 THAT THE CHILD GAVE IN COURT TODAY, INDICATES THAT
6 THE HEARSAY TESTIMONY IS RELIABLE; AND THAT THERE'S
7 NO REASON TO BELIEVE THAT THE VICTIM IS UNRELIABLE.
8 AND THAT THE CHILD DID, IN FACT, TESTIFY HERE IN COURT.

9 NOW, YOU CAN ONLY TESTIFY AS TO WHAT YOUR
10 OLDER DAUGHTER TOLD YOU, IF YOU'VE BEEN FOLLOWING ME
11 WHAT I'VE BEEN SAYING, AS FAR AS MY RULING IS CONCERNED.

12 THERE'S SOME CASE LAW THAT SAYS BECAUSE, IN
13 EFFECT, YOUR DAUGHTER WAS NOT THE VICTIM OF A SEXUAL
14 ATTACK, YOUR YOUNGER DAUGHTER, THAT HER STATEMENTS,
15 HER HEARSAY STATEMENTS, WHAT SHE TOLD YOU HAPPENED TO
16 HER ARE NOT ADMISSIBLE.

17 AND SO THE COURT HAS RULED THAT ONLY YOUR
18 DAUGHTER WHO HAS CLAIMED SHE WAS SEXUALLY ATTACKED,
19 HER STATEMENTS ARE APPLICABLE. SO YOU ARE CAUTIONED
20 THAT YOU ARE ONLY TO REFER TO THOSE STATEMENTS MADE
21 BY YOUR OLDER DAUGHTER CONCERNING THE INCIDENT.

22 DO YOU UNDERSTAND WHAT I'M SAYING?

23 THE WITNESS, CATHY ██████: YES.

24 THE COURT: DO YOU HAVE ANY QUESTIONS CONCERNING
25 THAT? I WANT TO MAKE SURE BEFORE WE GET THE JURY BACK

1 IN HERE THAT EVERYBODY IS ON THE SAME WAVE LENGTH.

2 THE WITNESS, CATHY [REDACTED]: SO I'M JUST TO --

3 THE COURT: IF THE STATE ATTORNEY ASKS YOU:

4 DID YOUR DAUGHTERS MAKE ANY STATEMENTS TO YOU, OR DID

5 ANYONE MAKE ANY STATEMENT TO YOU AT BREAKFAST, THEN

6 YOU MAY TESTIFY THAT, YES, ANGELA MADE A STATEMENT TO

7 YOU AT BREAKFAST. YOU CANNOT SAY THAT THEY BOTH MADE

8 A STATEMENT TO YOU; ONLY, THAT ANGELA MADE A STATEMENT

9 TO YOU.

10 THE WITNESS, CATHY [REDACTED]: I'M TO JUST PRETEND SHE

11 WASN'T THERE?

12 THE COURT: IT'S A QUESTION THAT HER STATEMENT IS

13 NOT ADMISSIBLE AND COULD CREATE ERROR THAT COULD BE

14 REVERSED ON APPEAL.

15 SO YOU HAVE TO IGNORE THE EXISTENCE OF THAT

16 STATEMENT FOR PURPOSES OF TESTIMONY TO THE JURY. IT'S

17 NOT THAT YOU'RE LYING TO THE JURY; THAT THERE WAS NO

18 STATEMENT MADE TO YOU. BECAUSE THE ATTORNEYS ARE UNDER

19 THE INSTRUCTIONS OF THE COURT NOT TO ASK ANY QUESTIONS

20 IN THAT REGARD.

21 BUT I'M JUST SAYING THAT IF HE SAYS:

22 "DID ANYONE SAY ANYTHING TO YOU," YOU MAY TESTIFY:

23 "YES, ANGELA TOLD ME THIS," WITHOUT MAKING REFERENCE

24 TO YOUR YOUNGER DAUGHTER.

25 DO YOU UNDERSTAND THAT?

1 MR. BENDER: JUST TO ADD, YOUR HONOR --

2 CATHY, WHAT HE'S SAYING IS YOU CAN SAY THAT
3 MICHELLE WAS THERE AND YOU CAN EVEN, PERHAPS, COMMENT
4 ABOUT HOW SHE WAS ACTING. YOU JUST CANNOT SAY WHAT
5 SHE TOLD YOU.

6 DO YOU UNDERSTAND?

7 THE WITNESS, CATHY [REDACTED]: OKAY.

8 THE COURT: AND YOU CANNOT SAY THAT SHE AGREED WITH
9 HER SISTER. BY SAYING THAT SHE AGREED WITH HER SISTER
10 IS TANTAMOUNT TO SAYING THAT SHE SAID THE SAME THING
11 THAT HER SISTER SAID.

12 DO YOU FOLLOW WHAT I'M SAYING?

13 THE WITNESS, CATHY [REDACTED]: YEAH.

14 THE COURT: SO YOU CAN TESTIFY AS TO WHAT ANGELA
15 SAID BUT NOT WHAT MICHELLE SAID.

16 MR. BENDER: YOUR HONOR, WOULD YOU BE REQUIRING
17 A SIMILAR PROFFER OF INVESTIGATOR ROACH?

18 THE COURT: HMM-HMM.

19 MR. BENDER: WE MIGHT AS WELL DO THAT.

20 THE COURT: LET'S GET HER TESTIMONY.

21 MR. BENDER: I WAS GOING TO BE CALLING WILLIE
22 STOCKWELL NEXT AND THEN MRS. [REDACTED].

23 THE COURT: WHY DID WE CALL HER THEN?

24 MR. BENDER: YOUR HONOR, AS I TOLD YOU, I THOUGHT
25 WE COULD GO AHEAD AND GET THE PROFFERS DONE OUT OF THE

1 PRESENCE OF THE JURY RATHER THAN TAKING A BREAK.

2 BUT MY ORDER WAS TO CALL WILLIE STOCKWELL,
3 BUT THE NEXT WITNESS I WAS GOING TO BE CALLING WAS
4 MRS. COLE.

5 THE COURT: OH, WHO IS WILLIE STOCKWELL?

6 MR. BENDER: RAYMOND'S WIFE. HER TESTIMONY WILL
7 BE BRIEF, YOUR HONOR, AND THEN I WILL BE CALLING CATHY
8 ██████.

9 THE COURT: WELL, DO YOU WANT TO DO THE SAME
10 PROFFER ON THE POLICE OFFICER?

11 MR. BENDER: YES. IF THE COURT IS REQUIRING IT.
12 I WOULD PREFER THAT THE SAME RULINGS THAT YOU HAVE
13 MADE REGARDING THE ADMISSION OF ANGELA'S STATEMENTS,
14 THROUGH MRS. ██████, WOULD BE DONE THROUGH --

15 THE COURT: I STILL NEED THE PROFFER. I STILL
16 NEED THE CIRCUMSTANCES UNDER WHICH THEY WERE MADE. SO
17 IN AN ABUNDANCE OF CAUTION, UNDER CHAPTER 90.803, IT
18 CALLS FOR THE COURT TO MAKE THAT DETERMINATION.

19 THE COURT IS TO FIND IN A HEARING CONDUCTED
20 OUTSIDE THE PRESENCE OF THE JURY. AND I FEEL TO
21 ADEQUATELY DO THAT I NEED TO PROFFER WHAT THE WITNESSES
22 WOULD TESTIFY.

23 MR. BENDER: HOW ABOUT IF WE TAKE HIS PROFFER NOW?

24 THE COURT: THAT'S FINE.

25 MR. BENDER: THANK YOU, CATHY.

1 THE COURT: SO YOU MAY STEP DOWN. WE'RE GOING TO
2 BE CALLING YOU BACK SHORTLY, WITH THOSE INSTRUCTIONS.

3 THE WITNESS, CATHY [REDACTED]: OKAY.

4 THE COURT: ALL RIGHT. WHO WAS THE OFFICER?

5 MR. BENDER: INVESTIGATOR FRANK ROACH. HE IS IN
6 THE WITNESS ROOM.

7 THE COURT: NOW, YOU HAVE HOW MANY LEFT?

8 MR. BENDER: FOUR, YOUR HONOR.

9 THE COURT: TINA, THAT'S THE GIRL FRIEND?

10 MR. BENDER: YES, FORMER GIRL FRIEND.

11 THE COURT: WHAT'S SHE GOING TO BE TESTIFYING?

12 MR. BENDER: FIVE MINUTES; AS TO THE RELATIONSHIP.
13 YOU'RE MAKING ME GIVE THEM MY WHOLE CASE.

14 THE COURT: OH, ALL RIGHT. WELL, THEN I WON'T
15 DO THAT.

16 MR. BENDER: SHE'S GOING TO BE TESTIFYING BRIEFLY
17 TO THE RELATIONSHIP THAT THEY HAD, BETWEEN HER AND
18 MR. MERSON, AND THE CHILDREN AND THEIR RELATIONSHIP.

19 THEREUPON,

20 FRANCIS P. ROACH,
21 WAS CALLED AS A WITNESS BY THE STATE AND, AFTER HAVING
22 BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED ON HIS
23 OATH AS FOLLOWS:

24 DIRECT EXAMINATION ON PROFFER

25 BY MR. BENDER: