

State of New Hampshire
Supreme Court

NO. 2005-0754

2006 TERM

JULY SESSION

STATE OF NEW HAMPSHIRE

v.

RICHARD CLOUTIER

RULE 7 APPEAL OF FINAL DECISION OF COOS COUNTY SUPERIOR COURT

REPLY BRIEF OF DEFENDANT, RICHARD CLOUTIER

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SUMMARY OF ARGUMENT

In this reply brief Mr. Cloutier first disputes the State's suggestion that the inability of the defendant to get answers to the most basic circumstances surrounding the mentally handicapped complaining witness's allegations was the result of a "tactical decision" by defense counsel.

He then disputes the suggestion that defense counsel was faulted for intimidating the witness.

Finally, Mr. Cloutier requests that his constitutional arguments, presented in his opening brief, should be reviewed for plain error.

ARGUMENT

I. **Saphire’s Failure to Answer Questions Cannot be Attributed to the Conduct of Mr. Cloutier’s Lawyer**

In its brief the State alleges that the delays in Saphire’s testimony are not due to her mental incapacity to narrate, but are the fault of Mr. Cloutier’s lawyer: “Defense counsel’s apparent tactical decision to continue to ask questions before [Saphire] . . . had answered the pending question.” *State’s Brief* at 8; *see also State’s Brief* at 12-13.

Both attorneys had trouble getting Saphire to answer – the prosecutor had to lead her through most of her testimony, and hoped that her mother’s presence in the courtroom would help. But listening to the tape, particularly the cross-examination, shows the implausibility of attributing the problem to a “tactical decision” by the defendant.

Moreover, because the interpretation of the delays and non-answers may be important to the resolution of this case, attention must be paid to a portion of the State’s brief which suggests Mr. Cloutier’s attorney intimidated Saphire. The State wrote: “[T]he court admonished defense counsel not to intimidate the victim.” *State’s Brief* at 5. A full reading of the transcript, however, forces a different conclusion:

Q: [by defense attorney]: All right. Do they ever talk about the truth in school?

3 second delay, no answer

Q: Do they ever talk about what it means—what it means to be—tell the truth or promise to tell the truth? Do you ever talk about that?

8 second delay, no answer

Q: Do you understand my question?

18 second delay, no answer

Q: Do you understand what I'm asking?

A: Yes.

Q: Okay. Can you ask me back the question I just asked to make sure you understand me, okay? What did I just ask you?

THE COURT: I'll see Counsel.

(BEGIN BENCH CONFERENCE)

THE COURT: You didn't object, Mr. Clouatre. Mr. Harden, that's not an appropriate line of questioning. I don't want to have a witness in this situation responding to that kind of question.

MR. HARDEN: I'm sorry.

THE COURT: I understand you're attempting to question her competency—

MR. HARDEN: I'm just asking if she understands what the word means.

THE COURT: Well, move closer to her and—

MR. HARDEN: Okay.

THE COURT: —don't intimidate her.

MR. HARDEN: I—

THE COURT: I know you're not intending to—

MR. HARDEN: I'm not trying to. That's why I'm staying away.

THE COURT: I know you don't intend to, but I think that—

[portion omitted]

THE COURT: My point is that I'm not sure from where you are and she is from her perception it may be a yelling situation.

MR. HARDEN: Okay.

THE COURT: Okay?

MR. HARDEN: I'll certainly deal with that.

(END OF BENCH CONFERENCE)

CROSS EXAMINATION CONTINUED

BY MR. HARDEN:

Q: Sapphire, I think I told you earlier, if you couldn't hear me, I wanted you to let me know that, okay?

A: Okay.

Q: All right. And the other thing I want to let you know, I actually don't hear too well in my left ear, and I don't know—I think the Judge also has some problems with his hearing. There's nothing wrong with that, okay? Do you understand that?

A: Yes.

Q: All right. And I'm not trying to yell at you, and I hope you under—have you understood that, that I'm not yelling at you? Okay. I just want to try and ask you some questions, and if you think I'm yelling at you, I'd also—just raise your right hand, okay? And if you can't understand something, can you raise your right hand? Okay. Does that makes sense? Can we make that a deal?

A: Yeah.

1 *Trn.* at 149-151 (portion omitted indicted in brackets) (indications of delays added).

Certainly the defense attorney may have been frustrated with his inability to hear Sapphire give a cogent story about the most basic circumstances of the alleged crime, or to reconcile inconsistencies in her statements. And certainly the trial judge was justifiably concerned that the witness should not be intimidated. But the transcript does not form the basis for any suggestion that the defense attorney's conduct was either improper or was the reason that Sapphire would not answer.

II. Sapphire's Failure to Answer Basic Questions Affected Mr. Cloutier's Constitutional Rights Which Should be Reviewed as Plain Error

As conceded in Mr. Cloutier's opening brief, although his attorney complained to the court about Sapphire's testimony and the inability to get answers to questions, the lawyer did not bring to the court's attention specific constitutional objections. *Opening Brief* at 22 n.1. Constitutional arguments were nonetheless presented in Mr. Cloutier's opening brief as plain error.

Under this Court's plain error rule, the court considers "the following four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. *State v. Taylor*, 152 N.H. 719 (2005).

As noted in his opening brief, the defendant's inability to have Sapphire narrate during cross-examination harmed Mr. Cloutier's ability to effectively question her. Had the court been apprised of the constitutional impact of the problem, it would have been error for the court to allow the trial to continue without some remedy. Given the principles fully described in *Crawford v. Washington*, 541 U.S. 36 (2004), and more recently in *Davis v. Washington*, ___ U.S. ___, 126 S.Ct. 2266 (2006), the error is plain, and clearly affected Mr. Cloutier's substantial rights. The inability to cross-examine Sapphire affected the fairness, integrity, and public reputation of the proceeding because it is impossible to tell what is the basis of the jury's verdict. Sapphire could not cogently describe the most basic facts surrounding the alleged crime; she came nowhere close to reconciling her conflicting statements. New Hampshire citizens expect results of criminal trials to turn on the facts, and not on the natural sympathy toward a mentally deficient child.

Accordingly, this Court may review these proceeding on the merits

In its brief the State does not address the constitutional issues Mr. Cloutier raises regarding his inability to effectively cross-examine Saphire. If those questions are cognizable under this Court's plain error rule, it appears that the State has conceded the merits of the defendant's constitutional arguments.

Accordingly, this Court should reverse Mr. Cloutier's conviction.

CONCLUSION

For the foregoing reasons, and also for those reasons enumerated in his opening brief, Mr. Cloutier requests that his conviction be reversed.

Respectfully submitted,

Richard Cloutier
By his Attorney,

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Dated: July 5, 2006

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Richard Cloutier requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because lacking the mental capacity to narrate on cross-examination is a novel issue in this jurisdiction.

I hereby certify that on July 5, 2006, copies of the foregoing will be forwarded to Thomas D. Ralph, Assistant Attorney General.

Dated: July 5, 2006

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