



2-21-2000

Supplemental Memorandum Regarding Admissibility of Statements of Samuel H. and Memorandum Regarding Admissibility of Character Evidence of Samuel H. Sheppard

Kathleen A. Martin
Cuyahoga County Assistant Prosecutor

William D. Mason
Cuyahoga County Prosecutor

How does access to this work benefit you? Let us know!

Follow this and additional works at: [https://engagedscholarship.csuohio.edu/
sheppard_court_filings_2000](https://engagedscholarship.csuohio.edu/sheppard_court_filings_2000)

Recommended Citation

Martin, Kathleen A. and Mason, William D., "Supplemental Memorandum Regarding Admissibility of Statements of Samuel H. and Memorandum Regarding Admissibility of Character Evidence of Samuel H. Sheppard" (2000). *1995-2002 Court Filings*. 140.
https://engagedscholarship.csuohio.edu/sheppard_court_filings_2000/140

This Davis v. State of Ohio, Cuyahoga County Common Pleas Case No. CV96-312322 is brought to you for free and open access by the 2000 Trial at EngagedScholarship@CSU. It has been accepted for inclusion in 1995-2002 Court Filings by an authorized administrator of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

2/22/00

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

ALAN DAVIS, Special Administrator
of the Estate of Samuel H. Sheppard,

Plaintiff,

v.

STATE OF OHIO,

Defendant.

: CASE NO. 312322

:

: JUDGE SUSTER

:

: SUPPLEMENTAL MEMORANDUM

: REGARDING ADMISSABILITY

: OF STATEMENTS OF SAMUEL H.

: AND MEMORANDUM REGARDING

: ADMISSABILITY OF CHARCTER

: EVIDENCE OF SAMUEL H.

: SHEPPARD

INTRODUCTION

On February 17, 2000, the State of Ohio filed a memorandum to advise the Court of its intention to offer the Coroner Inquest testimony of Samuel H. Sheppard and other statements of Samuel H. Sheppard including those made to police investigators and Coroner Sam Gerber. The thrust of that memorandum was to set forth that the admission of these statements is not barred by the Evid.R. 802, prohibiting the introduction of certain hearsay, because the Sheppard statements do not constitute hearsay. The State of Ohio does not offer these statements for the truth of the matters asserted. Indeed, the State's position is that the content of the statements were fabricated and that the fabrications evolved in the various statements to match the physical evidence and facts as they were being uncovered.

Additionally, the State urged that the very fact that Samuel H. Sheppard told inconsistent and evolving lies accounts relevant since such behavior is inconsistent with innocence. Regardless of the truth of any aspect of any of the statements, the very fact that the accounts given

by Samuel H. Sheppard regularly changed is relevant in and of itself.

This memorandum will further explain the reasons why the statements of Samuel H. Sheppard are admissible, particularly in light of the fact that plaintiff has made Samuel H. Sheppard a “declarant” in this case by submitting as substantive evidence the hearsay testimony of Samuel H. Sheppard. See Evid. R. 806.

In summary, the statements of Samuel H. Sheppard are admissible because:

1. They are not being offered by defendant to prove the truth of the matters asserted.
2. The statements are relevant because the question of Samuel H. Sheppard’s innocence is less likely to be true by the very fact that his accounts altered over time.
3. Hearsay statements of Samuel H. Sheppard have already been admitted into evidence. Pursuant to Evid. R. 806, Sheppard’s credibility as a declarant can now be attacked through his inconsistent statements and otherwise.
4. Inconsistency in statements is established when material fact is omitted in some versions when several accounts are given by a declarant.
5. Alternatively, the statements of Samuel H. Sheppard are party admissions pursuant to Evid. R. 801(D)(2)(b). By maintaining this action as a survivorship action pursuant to R.C. 2305.21, the Estate of Samuel H. Sheppard has manifested its adoption/belief in the truth of the statements of Samuel H. Sheppard regarding the death of Marilyn Sheppard. Also, Samuel Reese Sheppard, as trial representative of the Estate, has manifested his adoption and belief in the truth of his father’s statements in a variety of ways, including co-authorship of the book “Mockery of Justice.”

Additionally, a question has now arisen as to whether the State of Ohio will be permitted to elicit testimony regarding marital discord between Samuel and Marilyn Sheppard and to

rebut the character evidence already put into evidence by plaintiff.

As explained below, plaintiff has “opened the door” to the character of Samuel H. Sheppard. Moreover, evidence of “other acts” related to Samuel H. Sheppard’s marriage are admissible to establish the purpose and motive of his conduct which resulted in the death of Marilyn Sheppard.

THE STATEMENTS OF SAMUEL H. SHEPPARD ARE NOT OFFERED FOR THEIR TRUTH

The State of Ohio does not contend that the contents of the various statements of Samuel H. Sheppard are true. “A statement is not hearsay if it is admitted to prove that the declarant made it, rather than to prove the truth of its contents.” State v. Williams (1988), 38 Ohio St. 3d 346, 348. Irrespective of “the truth” of the contents of the statements, their relevance flows from their internal inconsistency, their alteration in account during which material details were added to match the discovery by officials of physical or other important facts.

“It is axiomatic that a statement is not hearsay if it is only offered for the fact that it was made, not for the truth of the matter asserted.” State v. Workman (8th Dist. 1984), 14 Ohio App. 3d 385, 392. Plaintiff argues that the statements are hearsay because the State of Ohio advances that they were “truly” stated. Plaintiff misses the point. The fact that the statements were “truly” made does not qualify the statements as hearsay. They are only hearsay if, after establishing proof that they were “truly” stated, the State were to also advocate the truth of the contents of the statement. Plaintiff’s confused interpretation of the definition of hearsay must be rejected by this Court.

PLAINTIFF HAS MADE SAMUEL H.
SHEPPARD A HEARSAY DECLARANT
WHOSE CREDIBILITY MAY NOW BE
ATTACKED PURSUANT TO EVID. R. 806

Through various witnesses, including the examination of Fred Drenkhan and the testimony of F. Lee Bailey, the hearsay testimony of Samuel H. Sheppard has already been admitted into evidence. As such, the State of Ohio is now permitted to attack the credibility of Samuel H. Sheppard the same as if he had been a testifying witness. Evid. R. 806 provides in pertinent part:

(A) When a hearsay statement... has been admitted in evidence, the creditability of the declarant may be attacked... by any evidence that would be admissible for those purposes if declarant had testified as a witness.

The credibility of Samuel H. Sheppard is now subject to attack by the State of Ohio by all permissible means, including the presentation of inconsistent statements, bias, interest, etc.

When hearsay testimony is admitted in a trial, particularly, when the declarant of hearsay is not presented at trial, Evid.R. 806 operates to alleviate in some degree the disadvantage to the adverse party since the jury is not given an opportunity to view the declarant's demeanor or "to see his credibility and veracity tested under cross-examination." State v. Klein (1983), 11 Ohio App. 3d 208, 212. Indeed, the refusal to permit an attack on the credibility of a hearsay declarant is highly prejudicial and has resulted in the reversal of criminal convictions. State v. Klein, supra, at 212. (Inasmuch as the trial court received in evidence [declarant] Emmons' hearsay statement through [witness] Taylor's testimony, it committed error prejudicial to [criminal defendant] appellant by excluding Emmons' inconsistent written statements offered to impeach him. Reversal [of the conviction] is therefore required.") (State v. Crossen October 18, 1988), 4th Dist. Case No. 902,

unreported, (attached) (reversing a conviction and holding that non-testifying “declarant’s inconsistent prior or subsequent statements, whether oral or written, may be admitted for the purposes of impeaching him.”)

The right to impeach a non-testifying declarant pursuant to Evid.R. 806 exists irrespective of whether the party against whom the hearsay was admitted objected and even if the proponent of the hearsay later argues that the statements were not offered to prove the truth of the matter asserted. State v. Watson (1991), 61 Ohio St. 3d 1, 6-7. In the instant case, the statements of Samuel H. Sheppard already admitted into evidence were plainly offered for the truth of their content.

Additionally, the State of Ohio is entitled to demonstrate to the jury that Samuel H. Sheppard told inconsistent versions, including the omission of materials details in his numerous accounts. As stated in State v. Klein, supra, at 212:

As a prerequisite for admitting prior or subsequent statements for impeachment purposes, the proponent must satisfy a threshold inconsistency requirement. In Ohio, the rule is a liberal one with respect to establishing inconsistency. The threshold inconsistency requirement is met if a statement offered for impeachment can be interpreted in either of two ways, though only one interpretation is actually inconsistent with the testimony of the witness sought to be impeached. ... Ohio law recognizes contradiction by reference to a material fact omitted in a witness’ prior or subsequent statement.

Demonstrating that a declarant has altered versions of their statements is a cornerstone to attacking credibility and does not constitute inadmissible hearsay. U.S. v. King (C.A. 6 1993), Case No. 92-2279, unreported (attached). There, an F.B.I. agent originally testified that he told another agent that he had reservations about his identification of the defendant. The agent later testified that he told the other agent that he was certain about his identification stated the court:

Defense counsel was entitled to explore this discrepancy, not for the truth of the matter asserted, which would be hearsay, but to impeach Agent Statlla's credibility by demonstrating to the jury that Agent Statlla had altered his testimony.

Even prior to plaintiff presenting Samuel H. Sheppard as a hearsay declarant, the statements of Samuel H. Sheppard would have been admissible because they were relevant (an innocent man need not change or alter his story) and not hearsay because they were not offered for the truth of their content. Now that Samuel H. Sheppard has become a hearsay declarant, the State of Ohio is fully entitled to attack his credibility through use of inconsistent statements and otherwise.

**MOREOVER, THE STATEMENTS OF
SAMUEL H. SHEPPARD ARE ADMISSIBLE AS
"ADOPTIVE" PARTY ADMISSIONS**

Evid.R. 801(D)(2)(b) provides in pertinent part:

(D) Statements which are not hearsay

A statement is not hearsay if:

(2) Admission by party-opponent. The statement is offered against a party and is... (b) a statement of which he has manifested his adoption or belief in its truth... .

All that is required for the finding of an adoptive admission is that there be a manifestation of the party's intent to adopt another's statement or evidence of the party's belief in the truth of this statement. U.S. v. Rollins (1988), 862 F.2d 1182, 1296. A manifestation can be by words, conduct, or, under certain circumstances, by silence.

In the instant case, plaintiff has been permitted to maintain this action pursuant to R.C.

2305.21. That section provides for the survival of certain causes of action despite the death of the person entitled to the cause of action. In other words, the Estate “stands in the shoes” of the person entitled to the cause of action. By the conduct of initiating a survivorship action, the Estate of Samuel H. Sheppard has certainly manifested its adoption and/or belief of the truth of Samuel H. Sheppard’s statements relative to his claim of innocence and wrongful imprisonment.

Additionally, while the Administrator of the Estate is the nominal party, the real party in interest is Samuel Reese Sheppard, a beneficiary of the Estate and the Estate’s trial representative. Samuel Reese Sheppard has manifested his belief in his father’s innocence and his father’s version of events innumerable ways, including his co-authorship of “Mockery of Justice.” An entire thesis of that book is the adoption of the statements of Samuel H. Sheppard regarding the circumstances surrounding the death of Marilyn Sheppard as true statements establishing the purported innocence of Samuel H. Sheppard.

Evid.R. 801(D)(2)(b) has operated in a fashion which has contributed to the conviction of defendants based upon their “adoption” of statements of others. Certainly, it is no huge leap to hold that the rule was also intended to place an estate in a survivorship action squarely in the shoes of the decedent by holding the estate to the statements of its decedent.

**THE PLAINTIFF HAS OPENED THE DOOR TO
CHARACTER EVIDENCE REGARDING
SAMUEL H. SHEPPARD AND "OTHER ACTS"
REGARDING THE SHEPPARD MARRIAGE IS
ADMISSIBLE PURSUANT TO EVID.R. 404(B)**

Plaintiff has presented through the testimony of numerous witnesses evidence that Samuel H. Sheppard was supposedly a good, even tempered man with a happy and satisfying marriage. Plainly, plaintiff has put Samuel H. Sheppard's character in issue. As such, the State of Ohio is permitted to rebut the testimony.

In State v. Schmidt (1979), 65 Ohio App. 2d 239, the State introduced testimony in a murder case evidencing the character and reputation of the deceased victim as a quiet and peaceable person. By doing so, the State had placed the victim's character in issue. The defense counsel, "for tactical reasons or otherwise... did not object to this incompetent evidence introduced by the state. It was, therefore, properly admitted in evidence." Id. at 242-43. As a consequence, the defendant was permitted to offer countervailing evidence to prove that the decedent was neither a good family man nor a quiet and peaceable person. The concept of 'opening the door' is based upon a theory that it is unjust to prevent a party from introducing irrelevant evidence to rebut irrelevant evidence that was submitted by the opposing party." State v. Croom (8th App. Dist. 1996), Case No. 67135, unreported (attached). Plaintiff has placed Samuel H. Sheppard's character in issue and the State of Ohio is entitled to rebut that evidence. This case is approaching day six of the trial. No instruction by the Court can undue the harm of the admission of character evidence that had already occurred.

Moreover, "other acts" testimony regarding the Sheppard marriage are independently admissible pursuant to Evid.R. 404(B) for the purpose of establishing the reasons and motives


actuating Samuel H. Sheppard's conduct which resulted in the killing of his wife Marilyn. The State's theory is premised upon one of the most fundamental realities of human relationships and the human condition. That is, that long seated infidelities, resentments, disappointments, and feelings of entrapment, jealousy, etc. in a marital relationship can lead to bitter anger and violent behavior on the part of both partners and can erupt into uncontrolled violence and death. The admission of such evidence is relevant and admissible pursuant to Evid.R. 404(B) and particularly warranted since plaintiff has "opened the door". Evid.R. 404(B) fully applies to civil actions. Tschantz v. Ferguson (8th District 1994), 97 Ohio App. 3d 693.

CONCLUSION

For the foregoing reasons, the State of Ohio should be permitted to introduce any and all statements of Samuel H. Sheppard and any and all evidence regarding his character and the conditions of his marriage.

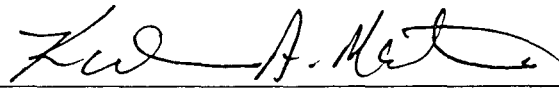
Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney
of Cuyahoga County, Ohio


KATHLEEN A. MARTIN (0040017)
Litigation Manager, Civil Division
The Justice Center, Courts Tower
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7785
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

A copy of the foregoing Supplemental Memorandum Regarding Admissibility of Statements of Samuel H. Sheppard and Memorandum Regarding Admissibility of Character Evidence of Samuel H. Sheppard was sent by ordinary United States Mail, postage prepaid, to Terry H. Gilbert, 1370 Ontario Street, Cleveland, Ohio 44113, and also via facsimile transmission to Terry H. Gilbert at (216) 621-0427, this 21st day of February, 2000.



KATHLEEN A. MARTIN
Litigation Manager, Civil Division

***17314** NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

STATE of Ohio, Plaintiff-Appellee,

v.

Bernard CROOM, Defendant-Appellant.

No. 67135.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.

Jan. 18, 1996.

Criminal Appeal from Common Pleas Court, No. CR-293443.

Stephanie Tubbs Jones, Cuyahoga County Prosecutor, A. S. Dever, Assistant Prosecuting Attorney, Louis Brodnik, Assistant County Prosecutor, Cleveland, for Plaintiff-Appellee.

Thomas E. Shaughnessy, Cleveland, for Defendant-Appellant.

Bernard Croom, Leavittsburg, pro se.

JOURNAL ENTRY and OPINION

PATRICIA AND BLACKMON, Judge:

****1** Defendant-appellant Bernard Croom appeals his conviction for murder and assigns ten errors for our review. (FN1) Having reviewed the record of the proceedings and the legal arguments presented by the parties, we affirm the decision of the trial court. The apposite facts follow.

Michele Finklea was found murdered in her home on the morning of January 10, 1993. Death was caused by thrusts of a sharp instrument to Michele's neck, a deep wound through her heart, and perforations of the lung, liver, stomach, and back. In total, she was stabbed 25 times.

A jury convicted her son Bernard Croom of the murder. The state called several witnesses who testified regarding her death, and their observation of Croom on that morning.

Cleveland Paramedic Wayne Lach concluded Michele Finklea was murdered as recently as thirty minutes before he arrived on the scene. He arrived at

4:10 a.m. He observed Michele Finklea's body lying on the carpeted floor with her head propped against the couch. On the carpet was a large amount of blood, which had not dried and was mushy. He also noticed the blood on Michele's body was also moist. The blood was warm, and from his experience rigor mortis had not occurred.

Lach recited his experience as a paramedic. He had been a paramedic for six years. He had worked for Cleveland for a year. Before that he had worked for various other fire departments. During his time as a Cleveland paramedic, he had observed 15 to 20 fatalities a month. His education included both Tri-C and on the job. Consequently, he offered his opinion as to the time of the murder and opined that although the stiffness existed in Michele's fingers, no stiffness existed in her joints. Moreover, the stiffness in her neck was from her head being propped against the couch. From this along with the mushy, bloody carpet and the lack of dry blood on the carpet and on Michele's body, he concluded the time of the murder was within a half hour to an hour before he arrived.

Lach also described Croom's behavior as unusual. During his experience with 15 to 20 fatalities as a Cleveland Paramedic, he had observed many family members of fatality victims. These family members would neither make eye contact nor stay in the room with the victim. Lach said Croom did both.

Lach said Croom was more interested in developing his theory of the crime event rather than his mother. Croom made sure that everyone in the room heard his story, even making eye contact, Lach said. Lach, furthermore, observed Croom's repetitive yelling would end suddenly when he exited the room where the body was located.

Michele Finklea's brother, Alvin Croom, testified his sister had been upset with the long hours her sons were keeping. She had the only keys to the front screen door and had told him she was planning to lock them out in the future. He said she was also concerned about drugs in her house.

Homicide Detective John Bornfield found no forced entry to the house. The outside and back of the house revealed no suspicious entry. On the couch near Michele's body, he found a set of house keys. They matched the front screened security door and the front wooden door. During the police questioning of Croom, he said he entered the house with his keys. Yet, after he was released from police custody, he

called the police to get his mother's keys to lock the front door of the house.

**2 Detective Bornfield also found a knife handle near Michele Finklea's body. The blade was located in the dining room. Michele's blood was on the broken knife, which was believed to be the murder weapon.

Detective Bornfield observed Michele Finklea's body. Her shoulder, neck, and face were covered with blood. Gashes were about her body specifically the right side and back of her neck. The cuts on her arms indicated she either struggled or attempted to block the attack.

Near her body on the couch was a bloody, broken crockpot. There was a thumb print on the inside of the broken piece, which matched Croom's thumb. Detective Prinz stated it was in a position consistent with having been placed there either before construction or after it was broken.

Blood was on the walls in the living room, dining room, and kitchen. It was on the banister going into the upstairs. No blood was found in the victim's room. Her room was reasonably undisturbed. Money was on the dresser.

Croom's room was ransacked, and he claimed money had been taken. A blanket with a drop of blood on it was found in one of the opened dresser drawers.

Later Croom's hands were examined for blood. Blood was found in his fingernails and cuticles. The blood analysis from the crime scene and Croom revealed Michele's blood on the crockpot, on Croom's jeans, on the broken knife, and on the blanket in Croom's room. Blood was also on the pillowcase near Michele's purse, which was Croom's blood.

In the last bedroom, three year old Oliver Finklea, Jr. was located. He had been asleep. He shared this room with his other brother who was in the hospital suffering from a gunshot wound.

In a statement to the police, Croom said he left home at midnight and returned at 4:00 a.m. He entered the house with his key and found his mother's purse open on the dining room table. In the living room, he found his mother. He immediately exited the house to seek help from the neighbors. He

returned, lifted his mother's head, and knew she was dead. He said Oliver was in his mother's room asleep. Bornfield noticed Croom's jeans were torn on the right knee, and he had blood on his thigh. Bornfield asked him if he touched anything. He adamantly said "No." Croom told Bornfield the killer knew his mother because she would not allow a stranger to enter her home.

Bornfield arrested Croom because of the inconsistency in his statement. He removed his pants and jacket. The jacket had blood on the left shoulder, but not the sleeves where Croom had said he cradled his mother. Bornfield also noticed a fresh, untorn scratch mark on Croom's neck.

Croom called the coroner to learn, if any, skin evidence was found under his mother's fingernails.

Croom spoke with Detective Kovacic on the day he went to the station to obtain his mother's keys. While there he offered to Kovacic his belief as to how his mother was murdered. He said his mother would not allow a stranger in her house, and the killer used short, rapid thrusts with a knife to inflict the wounds. He explained he was not afraid to stay in the house because the killer was someone his mother knew. The officer was impressed that Croom so accurately portrayed how Michele was murdered.

**3 Three year old Oliver Finklea, Jr. had told his father Oliver Finklea, Sr. that Bernard had killed his mother. However, Croom had told Oliver, Sr. that his brother did not see anything.

At trial, during questioning by the prosecution, Oliver, Sr. testified his son had identified the murderer. On cross-examination the defense asked about William Blunt, and whether he knew that Blunt was a suspect. Oliver, Sr. replied "yes." On redirect, the prosecution asked if Blunt was the person his son identified, and Oliver, Sr. said "No." On recross, the defense asked if Oliver, Jr. had been inconsistent in his identification of the murder. Oliver, Sr. said "No." Thereafter, the court allowed the prosecution to ask who Oliver, Jr. consistently identified, and Oliver, Sr. said "he first said it was a black man and then he said it was 'Ber.'" Oliver, Sr. said he identified Bernard Croom as the killer.

Croom, during questioning by the police, was asked if he killed his mother. He never denied it, he simply asked to take a lie detector test. During the interview the police described Croom as emotionless, cool, and