3-1-2000

Defendant's Motion to Exclude Portions of Testimony of Dr. Mohammed Tahir Pursuant to EVID. R. 901 (A) and 702

Marilyn B. Cassidy
Cuyahoga County Assistant Prosecutor

William D. Mason
Cuyahoga County Prosecutor

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

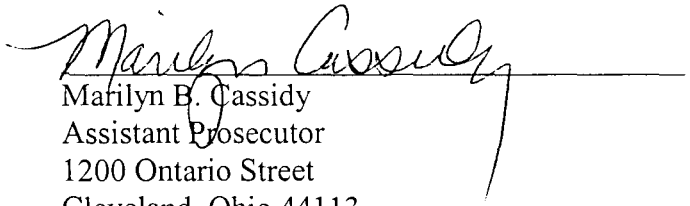
CHARLES MURRAY, EXECUTOR, Plaintiff	:	CASE NO. 312322
V	:	JUDGE: SUSTER
STATE OF OHIO Defendant	:	DEFENDANT'S MOTION TO EXCLUDE PORTIONS OF TESTIMONY OF DR. MOHAMMED TAHIR PURSUANT TO EVID. R. 901(A) AND 702

Defendant, by and through counsel, William D. Mason, Prosecuting Attorney for Cuyahoga County and Assistant Prosecuting Attorney, Marilyn B. Cassidy, move this honorable court to exclude testimony that the state expects from Plaintiff's expert, Dr. Mohammed Tahir. There are two principle grounds for this motion. First, plaintiff can authenticate neither the exhibit purporting to be a" wood chip from the basement riser", nor the exhibit claimed to be the stain from the wardrobe door, as required by Evid. R. 901. Hence, the proposed exhibits are inadmissible evidence. Second, Dr. Tahir's opinions as to exhibits including the trousers, door stain, wood chip, A59-1 and A59-2, and B-4-A (porch stain) do not meet a standard of reasonable scientific certainty and are thus, not competent expert opinions under Ohio law. With specific regard to the porch stain, no opinion is presented based on the witness' expertise. Hence, no

testimony is permissible. The unauthenticated exhibits and any incompetent expert testimony should be excluded, all as is set forth in the memorandum attached hereto and incorporated herein by reference.

Respectfully submitted,

WILLIAM D. MASON, PROSECUTING ATTORNEY, CUYAHOGA COUNTY



Marilyn B. Cassidy
Assistant Prosecutor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7785

MEMORANDUM IN SUPPORT OF MOTION

I. PLAINTIFF CANNOT AUTHENTICATE THE PURPORTED WOODCHIP AND WARDROBE DOOR STAIN AS REQUIRED BY EVID. R. 901 AND THEY SHOULD BE EXLUDED.

Defendant anticipates that Dr. Mohammad Tahir will attempt to testify as an expert as to the origin of DNA evidence, specifically the blood- stain on a wood chip and the bloodstain on the wardrobe door. Tahir is also expected testify relative to a stain from the porch (Exhibit B-4-1) Defendant submits that such testimony is impermissible under Ohio Evid. R. 901. Dr. Tahir's testimony relates to items that cannot be accounted for during the last forty-five and one-half years. Furthermore, the unknown whereabouts of this evidence indicate the possibility of tampering or confusion as to the identity of the evidence. Absent sufficient evidence as to the identity and authenticity of the exhibit, these items must be excluded.

Evid. R. 901 provides, in pertinent part:

Requirement of Authentication or Identification

(A) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

In authenticating any evidence,[the proponent] must be able to "sufficiently identify" the evidence in order for the testimony of the expert to be admitted. See, *State v. Brown* (1995), 107 Ohio App.3d 194; *State v. Frye* (1992), unreported, 1992 WL 303120. Furthermore, chain of custody is part of the mandate set forth by Evid. R. 901, and [the proponent] has the burden of establishing the chain of custody of a specific piece of evidence. *Brown,* 107 at 200. (citing *State v. Barzacchini* (1994), 96 Ohio App.3d 440, 457-8). In interpreting Rule 901, Ohio courts have consistently held that the burden of establishing a chain of evidence to identify the specimens or

exhibits is upon [the proponent of the evidence]. *State v. Moore* (1973), 47 Ohio App. 2d 181, 183. (citations omitted) (emphasis added). Although the burden is not absolute, the proponent must satisfy the court, with reasonable certainty, that confusion with the identity of the specimen or the possibility of tampering did not occur. *State v. Moore* , *supra* .

Applying the law to the case at hand, it becomes clear that the Plaintiff fails to meet such requirements. The evidence in question, the blood- stain on the wood chip and the bloodstain from the wardrobe door, were both exhibits in the 1966 trial. From that point, until now, the Plaintiff is unable to account for their whereabouts. Rather, thirty four and one-half years later they are offered as evidence without any authentication or identification. Evidence to date reveals gaps spanning years in a so-called chain of custody.

Plaintiff's failure to demonstrate a chain of custody, failure to sufficiently identify the evidence, and failure to establish with reasonable certainty that substitution, alteration and tampering did not occur, render absent the requirements for admissibility under Ohio Avid. R. 901. Hence, the exhibits purporting to be the stain on the wardrobe door, and the woodchip from the basement riser cannot be admitted into evidence. See, *Brown; Moore; Barzacchini.*

The purpose of the Ohio Rules of Evidence requiring authentication and identification is to ensure the credibility of evidence. Without evidence as to the whereabouts and conditions related to these exhibits, indicia of authenticity are absent. As a result, the condition precedent to admissibility established by Evid. R. 901(A) is not satisfied and the evidence must be excluded.

II. OPINIONS OF TAHIR, IF ANY, ARE MADE WITHOUT THE REQUISITE LEVEL OF SCIENTIFC CERTAINTY AND SHOULD BE EXCLUDED

Dr. Tahir will attempt to testify about DNA analyses conducted upon exhibits A59-1, A59-2, woodchip from the basement riser, stain from the wardrobe door, and trousers of Samuel H. Sheppard. Dr. Tahir's conclusions are not made to a reasonable scientific certainty and accordingly, are not permissible evidence.

In this jurisdiction, an expert opinion is competent only if it is held to a reasonable degree of scientific certainty. In this context, " reasonable certainty" means "probability, " ***State v. Benner,*** (1988) 40 Ohio St. 3d 301. In a recent case, this court equated "extremely likely" to the word "probable." *Benner, supra* citing *State v. Buell* (1986) 22 Ohio St. 3d 124. The Benner Court reviewed definitions of the words" likely" and "probably" in the context of such opinions and concluded that the term, "more than likely", a phrase that falls somewhere between "likely and extremely likely", is an appropriate standard.

Below are excerpts of Dr. Tahir's deposition testimony which illustrate that any opinion he has fails to meet the requisite standard:

- WOODCHIP

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Q. Can you say that this is Richard Eberling's blood on this object?

A. No ...

Q. Is it scientifically accurate to say this is Richard Eberling's blood?

A. No.

Q. Is it scientifically accurate to say that this test result somehow puts Richard Eberling at the location where this blood was recovered?

A. My answer is the same thing. I cannot say it's his blood or his DNA. No matter how many questions you ask on the same line, bottom line is I cannot say that's his blood.

- DOOR STAIN

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Q. Can you say Richard Eberling's blood is in 1-C?

A. No.

Q. Did you ever tell anyone that Richard Eberling's specific blood was in this?

A. No. All I can see is he cant be excluded.

Q. Did you ever tell anyone that his blood was in the tube?

A. No sir.

Q. Did you ever tell anybody this is Richard Eberling's blood?

A. No.

Q. Would it be scientifically accurate to say this is Richard Eberling's blood?

A. No.

- TROUSERS

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Q. Is it scientifically accurate to say that's Richard Eberling's blood on that swatch of clothing?

A. I didn't say that.

Q. I'm saying if someone made that statement is that scientifically accurate?

A. No.

• A-59-1

VAGINAL SMEAR

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Q. Did you ever tell anyone that Richard Eberling's DNA was in the sperm fraction on this slide A-59-1?

A. No.

Q. Did you ever tell anyone that this was Richard Eberling's sperm?

A. No sir.

Q. Is it scientifically accurate to say that this is Richard eberling's sperm based on this result?

A. No.

• A-59-2

VAGINAL SMEAR

Page 88

Q. Can you say that the 4.1 in A-59-2 came from a particular person?

A. No.

Q. Can you say it came from Richard Eberling?

A. No.

Q. Can you say his DNA was on that slide?

A. No.

Q. Is there Richard Eberling's sperm in this sperm fraction result that you have?

A. No. That's multiple profile.

Q. Is Richard Eberling's sperm in there?

A. No.

III. PORCH STAIN (EX B-4-A)

Plaintiff seeks to introduce expert testimony by a DNA expert, Mohammed Tahir. In addition to the argument set forth above, which Defendant submits applies to this exhibit as

well, Defendant asserts that the inconclusive result reached by Dr.Tahir in typing Exhibit B-4-A (porch stain) is not admissible evidence for the reason that it fails to constitute opinion. Moreover, any comment upon that inconclusive result will not assist the jury, and will likely confuse and/or mislead the jury. Accordingly it should be excluded under both Evid. R. 702 and 403(A).

Evid. R. 702 sets the parameters under which an expert may testify. The state does not dispute Tahir's credentials or qualification of an expert. However, an expert must demonstrate some knowledge on the particular subject superior to that possessed by an ordinary juror. *Scott v. Yates* (1994), 71 Ohio St.3d 219, citing *State Auto Mutual Ins. Co. v. Chrysler Corp*, (1973), 36 Ohio St. 2d 151, 160. The test was set forth in *State Auto Mutual Ins. Co. v. Chrysler Corp, supra:*

> "His qualification depends upon his possession of special knowledge which he can impart to the jury, and which will assist them in regard to a pertinent matter, . . . and it **must appear he has an opinion of his own, or is able to form one, on the particular question.** " Emphasis Added.

In the instant case, Dr. Tahir, on page two of his report dated February 3, 1997 states, "DNA results for item #B-4-A (stain from porch) was typed with inconclusive results". Thus, Dr. Tahir has no opinion, to a reasonable scientific certainty, as to what donors of the stain may be included or excluded. For that reason, he has no information about that stain that will assist the jury in evaluating it. Moreover, any comment by Dr. Tahir would amount to sheer speculation and is likely to confuse or mislead the jury. The very mention of an inconclusive result by an expert such as Tahir is misleading because, although he is stating that he can draw no scientifically accurate conclusion, a juror can surmise that the evidence is somehow scientifically significant by virtue of the fact that he examined it. In view of the lack

of probative value coupled with the risk of misleading the jury, the State respectfully requests that this evidence be excluded.

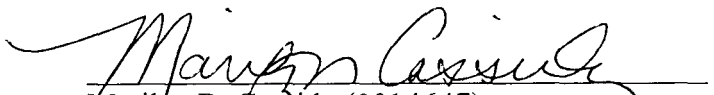
IV. CONCLUSION

Plaintiff cannot authenticate the exhibits purporting to be a bloodstain from the basement riser, stain from the wardrobe door as required by Evid. R. 901. These exhibits were in the possession of the State of Ohio as of 1966. During the intervening thirty- four years, the whereabouts of these exhibits are unknown for periods of years. Plaintiff cannot satisfy the court with reasonable certainty that confusion in identification or tampering has not occurred.

In addition, Dr. Tahir has rendered no conclusions pursuant to his expert analysis which meet a reasonable scientific certainty linking Richard Eberling to the stained trousers, the door stain, the stain on wood chip from the basement riser, and the two vaginal smear slides. He has no opinion derived from his expertise about the exhibit #B-4-A (porch stain). Under Evid. R. 702, 403 (A) and Ohio case law, no testimony about the exhibit should be permitted. Defendant respectfully requests that the court so direct.

Respectfully submitted,

WILLIAM D. MASON, PROSECUTING ATTORNEY, CUYAHOGA COUNTY



Marilyn B. Cassidy (0014647)
Assistant Prosecutor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7785

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support Excluding Portions of Testimony by Dr. Mohammed Tahir was hand delivered to Terry Gilbert, attorney for Plaintiff, at Court Room 20 (B) on the 1 day of March 2000.

Respectfully,

Marilyn Cassidy
Assistant Prosecutor

Q. Yes.
A. No.
Q. Okay. Can you tell us who deposited the 4.1 in the DQ Alpha?
MR. GILBERT: You mean who -- The name of the person?
Q. (BY MR. BOLAND) Can you identify the person who deposited the 4.1?
A. In this report I have given the blood of Eberling, and in this case that was the only one. The second report I have two other people. But in this comparing with this, Eberling cannot be excluded.
Q. Let me rephrase my question. I understand what you just said. Can you tell me that that 4.1 came from Richard Eberling?
A. Just saying that's him?
Q. That's my question. Did the 4.1 come from Richard Eberling's DNA?
A. No. He cannot be excluded.
Q. Can you say any of the other alleles in these polymarkers, if any of those alleles came from Richard Eberling? Can you conclude that definitely?
A. No. He cannot be excluded. That's all I can say.
Q. I understand. His exclusion I'll get into. But my question is can you say that came from him?

A. No.
Q. Okay. We'll get into this exclusion issue. Is there a test available to answer that question I just asked you to determine if any of those alleles in the polymarkers of the DQ Alpha came from Richard Eberling? Is there a test that can be run to determine that?
A. Sure. If there is enough evidence sample, sure, you can do it.
Q. Given what we have now, the technology we have now and these samples?
A. Not to my knowledge.
Q. Okay. Can you tell me the number, the exact number, of different people that contributed DNA to this Item No. 3?
A. 4.1 there could be one person. 1.1 and 2 could be another person. 2 and 3 another. And 4.1 and 2. 4.1 and 3. So you can make all these combinations.
Q. So my question is therefore can you tell me an exact number of people that contributed all this DNA? Is it seven people that are here or is it four? Do you have an exact number? That's what I'm asking, not a range. Is there an exact number of people?
A. I can calculate, but not right now.
Q. So you can determine the exact number of people that

stain on this object?

A. No.

Q. Okay. Can you say that this is Richard Eberling's blood on this object?

A. No.

Q. Okay. Did you ever tell anyone that Richard Eberling's DNA was on this object?

A. No.

Q. Did you ever tell anyone that Richard Eberling's DNA was in the blood on this object?

A. No.

Q. Okay. Did you ever tell anyone that this was Richard Eberling's blood?

A. No. I said he cannot be excluded. My answer is I cannot be excluded.

Q. Is it scientifically accurate to say this is Richard Eberling's blood?

A. No.

Q. Is it scientifically accurate to say that this test result somehow puts Richard Eberling at the location where this blood was recovered?

A. My answer is the same thing. I cannot say it's his blood or his DNA. No matter how many questions you ask on the same line, bottom line is I cannot say that's his blood.

the little dusting brown blood that you tested? Can you say that?

A. When you say that you mean identify him, just him?

Q. Is Richard Eberling's DNA in that blood?

A. Not. Like he can't be excluded?

Q. That's what I'm saying. Is his DNA blood in that DNA?

A. No.

Q. Can you say this is Richard Eberling's blood in 1-C?

A. No.

Q. Did you ever tell anyone that Richard Eberling's specific blood was in this?

A. No. All I can say is he can't be excluded.

Q. Did you ever tell anyone that his blood was in the tube?

A. No, sir.

Q. Did you ever tell anybody this is Richard Eberling's blood?

A. No, sir.

Q. Would it be scientifically accurate to say this is Richard Eberling's blood?

A. No.

Q. Let's move on to Tahir Exhibit No. 1, your item number is b-3-b-1. You describe it as a blood stain from Sam Sheppard's trousers. Can you tell me who

Q. Is it scientifically accurate to say that's Richard Eberling's blood on that swatch of clothing?
A. I didn't say that.
Q. I'm saying if someone made that statement, is that scientifically accurate?
A. No.
Q. Let's move on to the next item, which is your item number on Tahir Exhibit No. 1, your first test results, Item A-59-1, which you describe as a vaginal smear from Marilyn Sheppard.
A. That's right.
Q. Who did you receive that sample from?
A. Cuyahoga County Coroner's Office.
Q. When did you receive that?
A. May 2, 1996.
Q. And what were you told this was that you were receiving, this individual package?
A. Vaginal smears.
Q. Who told you that?
A. It was written on the package.
Q. Did you document the receipt of that object the same way you did others?
A. The same way. They came in the one box.
Q. How many people in your lab handled this object?
A. I handled it.

somewhere on this mixed result?
A. No.
Q. Did you ever tell anyone that Richard Eberling's DNA was on the slide A-59-1?
A. No.
Q. Did you ever tell anyone that Richard Eberling's DNA was in the sperm fraction on this slide?
A. No.
Q. Did you ever tell anyone that this was Richard Eberling's sperm?
A. No, sir.
Q. Is it scientifically accurate to say that this is Richard Eberling's sperm based on this result?
A. No.

(Recess taken.)

Q. (BY MR. BOLAND) Dr. Tahir, I want to go back briefly to a couple issues regarding this slide and some of your experience. You mentioned before you've testified in rape cases in criminal trials?
A. Yes.
Q. And you've handled vaginal smear slides from rape victims in your lab?
A. Yes.
Q. And can you conclude if you look through one of those cases that you had handled and saw two sperm

Q. Do you know how all these multiple contributors got there?
A. No idea.
Q. The same possibilities exist that we mentioned?
A. Yes.
Q. Handling?
A. Handling.
Q. And in your lab?
A. Yes.
Q. Do you know how many individual person's profiles are included in the result in A-59-2, the exact number of people it took to make this mixed stain?
A. No.
Q. Do you know if the person in A-59-2, for example, who contributed the 1.2 in the DQ Alpha also contributed the 3 allele in the DQ Alpha?
A. No, I cannot tell you.
Q. Do you know if any of the DQ Alpha alleles that are showing up there in that result are connected to any of the polymarkers that are showing up? Do you know which ones are connected to which?
A. No.
Q. Can you say that the 4.1 in A-59-2 came from a particular person?
A. No.

Q. Can you say it came from Richard Eberling?
A. No.
Q. Is Richard Eberling's DNA in the result A-59-2? Can you say his DNA is in there?
A. No.
Q. Can you say his DNA was on that slide?
A. No.
Q. Can you say that the 4.1 in the DQ Alpha came from Richard Eberling and no one else?
A. No.
Q. Is there Richard Eberling's sperm in this sperm fraction result that you have?
A. No. That's multiple profile.
Q. Is Richard Eberling's sperm in there?
A. No.

MR. GILBERT: It could be, right?

A. When he's asking me these questions, you're asking identification.

MR. GILBERT: So we make sure about that.

Q. (BY MR. BOLAND) I'm not asking probability. I'm saying can you say definitely that Richard Eberling's sperm is on this slide?
A. I can't tell you the identification of him it's him.
Q. Is his sperm on this slide?

A. No.
Q. Can you identify any male who contributed sperm to this slide?
A. No.
Q. Not Richard Eberling, some other person?
A. No.
Q. And this entire result you've reported here came from the two sperm heads that you identified?
A. No. Two sperm heads were seen in the little portion which I took, but the rest of the sample was in the tube. That was the presumptive test.
Q. Your assumption is that there's more sperm in that tube?
A. Yes. Because I can't take all and put it on the slide. In the tube like that thing is 30 or 40 microliter in the tube. I took half a microliter. So then I tested the sperm in that. So it's not two sperms.
Q. You're assuming many more than two sperm?
A. Yes.
Q. You actually only saw two sperm heads?
A. Yes.
Q. Are there items in these two reports, Tahir Exhibit 1 and Tahir Exhibit 2, that you tested twice?
A. There may be, yes.

*303120 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.
Jean Marie FRYE, Defendant-Appellant.

No. 14-92-3.
Court of Appeals of Ohio, Third District, Union County.
Oct. 21, 1992.

Criminal Appeal from Common Pleas Court.

Stuart A. Benis, Columbus, for defendant-appellant.

R. Larry Schneider, Pros. Atty., Rick Rodger, Marysville, for plaintiff-appellee.

OPINON

HADLEY, Presiding Judge.

**1 This is an appeal by Defendant-Appellant, Jean Marie Frye, ("Appellant") from the judgment and sentencing of the Court of Common Pleas of Union County, finding her guilty of complicity to aggravated trafficking in violation of R.C. 2923.03 and sentencing her to not less than 3 years nor more than 15 years.

Union County Sheriff's Department deputy Wertz approached Rick Salmons ("Salmons") about making a drug purchase from appellant. Salmons agreed as he thought it would help reduce his sentence for a pending driving under suspension charge.

Salmons contacted appellant between 10-15 times before she agreed to help him purchase cocaine. On January 26, 1991, appellant contacted Salmons to arrange for the purchase of a quarter ounce of cocaine for $450 to be delivered that evening at Salmons' residence. Prior to the arrival of appellant and her boyfriend, Terry Moore, ("Moore") Deputy Nelson placed a microcassette recorder in Salmons' living room to record the drug transaction and searched Salmons and his residence for any controlled substances. No controlled substances were found. Deputy Nelson gave Salmons $460 to purchase the cocaine. Then Deputy Nelson hid in a closet in Salmons' house during the drug transaction.

On January 27, 1991, at approximately 1:30 a.m. appellant and Moore arrived at Salmons' residence in Marysville. During this time, Moore gave Salmons a quarter ounce (approximately 7 grams) of cocaine with appellant present. Salmons paid Moore $460 for the cocaine and appellant gave him $10 change. Appellant stated during the transaction that she should have not gotten Salmons the "shit" (cocaine) as he did not call her anymore. She also stated that from now on, he would deal more with Moore than her.

After appellant and Moore left, Salmons and his residence were searched again and the cocaine was confiscated by deputy Nelson.

Moore pled guilty to aggravated trafficking, a fourth degree felony, and was awaiting sentencing when he testified at appellant's trial. Appellant was charged with complicity to aggravated trafficking, a third degree felony. As appellant had a prior felony drug abuse conviction, the charge of complicity to aggravated trafficking was enhanced to a felony in the second degree.

A jury trial was held on December 30th and 31st of 1991. The jury found appellant guilty of complicity to aggravated trafficking. Thereupon, the trial court sentenced appellant to not less than 3 years nor more than 15 years. Appellant timely appeals from the judgment and sentencing and asserts the following six assignments of error.

ASSIGNMENT OF ERROR NO. I

The trial court abused its discretion in refusing to instruct the jury on the entrapment defense when there was sufficient evidence of entrapment, even though defendant denied one or more elements of the crime.

Appellant asserts that the trial court should have given the jury instruction on the defense of entrapment whether or not appellant denied that she aided or abetted Moore in the sale of cocaine to Salmons.

**2 Appellant cites *Jacobson v. United States* (1992), --- U.S. ----, --- S.Ct. ----, 118 L.Ed.2d 174, in support of her first assignment of error. *Jacobson, supra,* is distinguishable from the case *sub judice.* In *Jacobson,* the government not only solicited Jacobson for 2 1/2 years but also induced him to purchase the magazines. Herein, Salmons only called appellant about the possibility of purchasing cocaine from her. There is no testimony that Salmons pressured or induced appellant into assisting him in the purchase of

cocaine. Appellant then contacted Salmons when she and Moore had made arrangements to get the cocaine from Moore's supplier in Columbus.

Appellant also cites *State v. Haller* (January 24, 1989), Franklin App. No. 87 AP 143, unreported, in support of her assignment of error. However, *Haller, supra,* is distinguishable from the case *sub judice.* Herein, Salmons did not try to manipulate appellant in arranging the drug transaction or in the conversation during the drug transaction.

In *State v. Dotson* (1987), 35 Ohio App.3d 135, 139, the court stated that a person is not entrapped when police officers merely present the opportunity to commit a crime. Under these circumstances, craft and pretense may be used. The court further stated where there is credible evidence that a defendant has the predisposition and criminal design to commit the acts and that he was merely provided with an opportunity to commit those acts, he has not been entrapped. *Id.* at 139. Herein, appellant was only given the opportunity to commit the crime.

Appellant has the burden of establishing the defense of entrapment by a preponderance of the evidence. *State v. Doran* (1983), 5 Ohio St.3d 187, 193-194. Once the defense of entrapment is established the state can rebut the entrapment defense by showing that the defendant was merely provided with the opportunity to commit the offense and defendant was predisposed to commit the crime. *State v. Italiano* (1985), 18 Ohio St.3d 38. If the defendant fails to establish that he was entrapped, the state is relieved of its burden of proving defendant was predisposed to commit the crime. *State v. Cheraso* (1988), 43 Ohio App.3d 221, 222. In the case *sub judice,* appellant on direct examination denied any participation in the sale of cocaine to Salmons. However, appellant's statements in the tape recorded transaction establish that appellant was well aware of the drug culture and the transaction.

Herein, appellant has not established by a preponderance of the evidence she was entrapped. Appellant testified that Salmons called her 10-15 times about purchasing cocaine. However, appellant does not state that Salmons threatened her or in anyway pressured her into selling him cocaine nor does appellant contend that she had told Salmons no and to quit calling her. In fact, appellant denies any participation in the drug transaction. She testified that she did not know that a drug transaction was to occur that evening at Salmons' residence. Appellant testified that she went with Moore without any idea that he planned to sell cocaine to Salmons.

**3 Entrapment occurs when the agents or officers of the government originate the idea of a crime and then induces another person to commit the crime. (Citations omitted) However, one cannot be entrapped when she has no knowledge of the crime. Appellant cannot argue on one hand that before the drug transaction took place, she was totally unaware that Moore had planned on selling cocaine to Salmons, and also say she was entrapped because Salmons called her 10-15 times without showing how she was induced by Salmons.

Whereas appellant did not establish the defense of entrapment by a preponderance of the evidence, the trial court did not err in refusing to give the jury instruction of entrapment and appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. II

> The trial court abused it's discretion and violated defendant's due process right [sic] in admitting selective tape recordings of conversations between defendant and a confidential informant when portions of the tapes were inaudible, when the tape was not presented to defense until shortly before trial, when a deputy sheriff with no audio expertise altered the audio by dubbing a microcassette into [sic] a regular cassette tape on his home stereo system to defendant's surprise, when the trial court limited inquiry into differences in the audio recording in the microcassette and cassette versions, when the entire conversation between the confidential informant and defendant was not recorded and where the parties to the conversation had trouble remembering their conversations.

Appellant's second assignment of error for purposes of discussion will be subdivided into four assignments.

A. Whether the trial court abused its discretion in admitting the tape recordings when portions of the tape recordings were inaudible and the entire conversation between appellant, Moore and Salmons was not recorded.

A tape recording in order to be admissible must be authentic, accurate and trustworthy. Admission into evidence of tape recordings containing inaudible portions is a matter within the sound discretion of the trial court. In determining whether or not to admit a tape recording, the trial court must decide if the unintelligible portions of the tape are so substantial as

to render the tape as a whole untrustworthy. *State v. Gotis* (1984), 13 Ohio App.3d 282, 283. See, also *United States v. Mitchell* (1976), 559 F.2d 31, *cert. denied* (1977), 431 U.S. 933; and *United States v. Slade* (1980), 627 F.2d 293.

The tape was only thirty minutes in length, however, appellant and Moore remained at Salmons' residence for at least forty minutes. After reviewing both the microcassette and the cassette, it is apparent that the tapes recorded the entire drug transaction. The fact that the trial court permitted the jury to hear only the portion of the tape concerning the drug transaction and did not admit that portion of the tape which contained mere conversation unrelated to the drug transaction, was not prejudicial to appellant. Therefore, the trial court did not err in admitting the tapes into evidence.

B. The tape was not given to the defense until shortly before trial.

**4 Appellant contends that the state knew of the tape recording prior to December 23, 1991, when appellant was notified of its existence. Appellant received a transcript of the tape on December 24th and listened to the tape on the 27th of December. Appellant filed a motion in limine regarding the tape recording on December 27, 1991.

In order to find reversible error in admitting the tapes, appellant must demonstrate that the trial court abused its discretion in admitting the evidence and that she was prejudiced as a result of the state's noncompliance with discovery. *State v. Fricke* (1984), 13 Ohio App.3d 331, 332.

Appellant has failed to show that she was prejudiced by the state's failure to disclose the tape recording prior to the 23rd of December; assuming that the state was aware of the existence of the tape recording. Appellant did not request a continuance nor was there a showing that appellant was ill-prepared at trial. Therefore, the admission of the tape recordings was not in error.

C. The original microcassette tape recording was altered by the deputy sheriff when he recorded the events onto a regular cassette to be played at trial to appellant's surprise and the trial court limited inquiry into the differences between the tape recordings.

Appellant contends that the tape was altered when it was transferred to a larger cassette. However, appellant has failed to show that the content of the tape was altered in any way. After careful review of both tape recordings, this court cannot find any discrepancies between the two tapes. Appellant upon learning that the microcassette had been transferred to a larger cassette did not request a continuance or request an in camera inspection by the trial court.

As there were no differences in content between the two tapes, the trial court did not err in limiting appellant's inquiry into the tapes and admitting the tapes into evidence.

D. The trial court erred in admitting the tapes when the parties to the conversation had trouble remembering their conversation.

Appellant contends that some of the statements were changed when the tape recording was transcribed. However, since the transcript of the tape was not allowed into evidence, this issue is not properly before this court.

Next appellant contends that it was difficult to conclude who said what in the tape and that the witnesses had trouble remembering the conversation of that evening independently of the tape. Appellant's contention does not preclude the admission of the tape but goes only to the weight afforded the tape and the credibility of the witnesses. See, *State v. Cooper* (October 2, 1985), Logan App. No. 8-84-31, unreported.

Whereas the trial court did not abuse its discretion in admitting the tapes into evidence, appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR NO. III

The trial court erred in entering a finding of guilty when the defendant was denied her sixth amendment right to competent counsel when her attorney failed to file a motion to suppress statements which severely affected her defense.

**5 Appellant contends that her appointed counsel, prior to her hiring of Mr. Benis, was ineffective as she failed to file a motion to suppress her statements made to the deputies on May 22, 1991. However, appellant has failed to show that her statement to the deputies was used at trial. Appellant does not cite anywhere in the trial transcript where her statement was used to impeach or cross-exam her. Even if her statement was used, appellant did not object. As appellant's statement was not used in the trial, this assignment of error is not properly before this court.

See, *Paulin v. Midland Mutual Life Ins. Co.* (1974), 37 Ohio St.2d 109.

ASSIGNMENT OF ERROR NO. IV

The trial court abused its discretion in not granting relief from appellant's failure to file a pretrial motion to suppress statements within 35 days after arraignment.

Appellant now asserts that the trial court erred in not allowing her motion to suppress even though it was untimely filed. Appellant argues that because she hired new counsel on December 5, 1991, the court should have granted the motion to suppress filed on December 11, 1991, as the hiring of new counsel was good cause for waiving the time requirement set forth in Crim.R. 12(C).

Crim.R. 12(C) states that all pretrial motions except as provided in Rule 7(E) and Rule 16(F) shall me made within 35 days of arraignment or seven days before trial, *whichever is earlier.* (emphasis added). The court in the interest of justice may extend the time for making pretrial motions. Herein, appellant was arraigned on October 16, 1991. The motion to suppress was not filed until 55 days after arraignment. Therefore, the motion was not made in a timely manner.

Appellant argues that the hiring of new counsel is good cause to waive the time requirements in Crim.R. 12(C). However, appellant has not shown that the state used her statement at trial or how she was prejudiced, if the statement was used. Appellant's attorney does not specifically point out where her statement was used at trial. Nor was appellant's statement marked as an exhibit or admitted into evidence. A bare assertion by appellant is not sufficient to show that the trial court abused its discretion in overruling her motion to suppress as untimely. Therefore, appellant's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR NO. V

The trial court abused its discretion and usurped the function of the jury as a factfinder [sic] in ruling that defendant could not mention the chain of custody of the cocaine in her closing argument, and in taking the factual issue of whether the cocaine admitted as evidence at the trial was the same substance that was allegedly sold by the defendant away from the jury.

Appellant asserts that the trial court's statement to the jury that the issue of chain of custody of the cocaine was not a determination for the jury, thereby not allowing appellant to comment on whether the cocaine produced at trial was the same substance as that sold to Salmons.

**6 A strict chain of custody is not required before physical evidence will be admitted into trial. *State v. Wilkins* (1980), 64 Ohio St.2d 382. The state needs only to establish that it is reasonably certain that substitution, alteration or tampering did not occur. Furthermore, any breaks in the chain of custody goes to the weight afforded to the evidence not to its admissibility. *State v. Blevins* (1987), 36 Ohio App.3d 147, 150. See, also, *State v. Nichols* (December 11, 1991), Allen App. No. 3-90-35, unreported; *State v. Watson* (August 27, 1990), Logan App. No. 8-89-6, unreported.

The state established the chain of custody of the cocaine through the testimony of Deputy Nelson and the BCI chemist, Gregory Kiddon. Appellant objected to the admission of the cocaine on the basis of chain of custody. As the chain of custody was reasonably established, the trial court properly overruled appellant's objection.

Appellant's attorney during closing argument began to comment on the chain of custody. The state objected and the trial court sustained the objection. Thereafter the trial court instructed the jury:

Ladies and gentlemen of the jury, the question and issue of chain of custody is not one for you to make a determination on here today, and not part of your function as fact finders in this case.

As the issue of chain of custody goes to the weight afforded the evidence not its admissibility, the trial court erred in instructing the jury that this was not an issue before them. However, in view of the trial court's instruction to the jury (you are the sole judges of the facts, the credibility of the witnesses and the weight of the evidence) and the fact that appellant did not show that the chain of custody was broken or that the cocaine introduced at trial had been tampered, altered or substituted, the error was harmless. Therefore, appellant's fifth assignment of error is overruled.

ASSIGNMENT OF ERROR NO. VI

The trial court violated defendant's rights to confront witnesses and deprived defendant of a fair

trial when it abused its discretion by limiting legally admissible evidence bearing directly on credibility of adverse witnesses, by allowing the prosecutor to read a transcript that was previously excluded as inaccurate of the alleged sale to the jury in closing argument but in refusing to allow defendant to use the same transcript as an aid to cross examine [sic] witnesses during the trial.

As appellant's sixth assignment of error addresses two separate and distinct issues, they will be discussed separately.

A. The trial court erred in allowing Moore to claim the privilege against self-incrimination when questioned about other drug transactions on cross-examination by appellant and limited appellant's questioning of other witnesses.

Appellant's attorney states in his brief that the trial court allowed Moore to plead the fifth amendment during cross-examination about "specific, legitimate details about the transaction (in question) on cross examination [sic]."

**7 Upon review of appellant's attorney cross-examination of Moore, he asked 230 questions of Moore. Out of the 230 questions, Moore only claimed the privilege of self-incrimination *once*. The question by appellant's attorney in which Moore claimed the privilege of self-incrimination was not related to the transaction in question, but to uncharged misconduct of the witness. Appellant's attorney questioned Moore as to his bias, memory and his credibility. The one question that Moore refused to answer, did not deprive appellant of her right to confront this witness or deprive her of a fair trial. See, *State v. Williams* (1981), 1 Ohio App.3d 156. Therefore, the trial court did not err in allowing Moore to plead the fifth amendment on that one question.

Next appellant's attorney in his brief argues that the trial court abused its discretion by limiting the cross-examination of Deputy Nelson about the differences in the tapes. As this court stated in assignment of error number 2(C), the tapes did not contain any discrepancies, therefore, the trial court did not err in not allowing appellant's attorney to cross-examine deputy Nelson on this issue.

Appellant's attorney in his brief then asserts that the trial court limited the cross-examination of Salmons regarding the charge for which he was jailed. Appellant's attorney did cross-examine Salmons as to any reduction he received for his driving during suspension charge by becoming an informant. The trial court ruled that appellant's attorney could not ask Salmons if he was in jail but could ask him if he was under sentence. Again appellant's attorney is implying that one question propounded to a witness constitutes a denial of appellant's right to confront witnesses. This one question does not amount to a violation of appellant's sixth amendment rights.

Appellant's attorney in his brief also asserts that the trial court erred when it prevented appellant from testifying why she was afraid of Moore and why he would lie against her. The trial court did not deny appellant's attorney from eliciting testimony from appellant regarding why she was afraid of Moore. The trial court allowed appellant to testify that Moore tried to kill her, their relationship was violent, that she was afraid of Moore, and that Moore was testifying against her because she had him arrested for domestic violence on two occasions, the last one being after the sale of cocaine to Salmons. Therefore, there was no error committed by the trial court.

Next appellant's attorney argues that these incidents taken as a whole amount to a denial of appellant's sixth amendment right and a denial of a fair trial. These four incidents taken separately or as a whole, do not amount to a denial of appellant's right to confront witnesses or amount to a denial of a right to a fair trial. Therefore, the trial court did not deny appellant of her sixth amendment right to confront witnesses.

B. The trial court erred in allowing the prosecutor to read from the transcript of the tape in closing argument but did not allow appellant's attorney to use the transcript during cross-examination of the state's witnesses.

**8. Appellant's attorney filed a motion in limine regarding the admissibility of the tapes and the transcript of the tape. The trial court ruled that the transcript would not be allowed into evidence, but the parties could use the transcript to follow along with the tape during the trial court's hearing on appellant's motion in limine.

Appellant's attorney now argues that the prosecutor read from the transcript of the tape to the jury in his closing argument. However, appellant's attorney does not specifically point out where the prosecutor read from the transcript during his closing argument. Since the transcript of the tape, of which appellant's attorney received a copy, was not admitted or attached

to appellant's brief, this issue is not properly before this court.

Appellant's attorney next argues that the trial court erred by not allowing him to use the transcript for purposes of cross-examination. However, appellant's attorney is the one who objected to the use of the transcript and the trial court agreed. Appellant's attorney did not want the transcript put into evidence, therefore, he cannot complain when the trial court did not allow him to use the transcript on cross-examination. Therefore, appellant's sixth assignment of error is overruled and the judgment and sentencing of the trial court is affirmed.

Judgment affirmed.

EVANS and SHAW, JJ., concur.