

Testimony of Melissa Byers in Misskelley trial Feb 1994

MELISSA BYERS

having been first duly sworn to speak the truth, the whole truth and nothing but the truth, then testified as follows:

DIRECT EXAMINATION

BY MR. FOGLEMAN:

Q: Will you please state your name and where you live?

A: Melissa Byers, 1400 East Barton, West Memphis, Arkansas.

Q: Who do you live there with?

A: My husband, John Mark Byers; my son, Shawn Ryan Clark; and I used to live with my son, Chris Byers.

Q: How old was Chris?

A: He was eight years old when he was - - when he passed away.

Q: What grade was he in?

A: He was in the second grade.

Q: Did he also go to Weaver?

A: Yes, sir.

Q: Do you know who his teacher was?

A: Miss Jones.

Q: I want to direct your attention to May 5th, 1993. After school got out, first of all to save Mr. Stidham some time, did Chris go to school that day?

A: Yes, sir.

Q: He didn't skip school?

A: No, sir.

Q: After school, when was the last time you saw Chris?

A: On our carport.

Q: About what time was that?

A: Around five-thirty, quarter to six.

Q: Did you later discover that he wasn't under the carport?

A: Yes, sir.

Q: How did you come to discover that?

A: I went outside hollering for him and he was gone out of the yard.

Q: What happened after you discovered that he wasn't under the carport?

A: I felt like he had just gone next door to play. My husband got home. He had gone to pick Ryan up and when he got home, I said - - we were going to go out to eat at Shoney's and I told Mark, "Let's get in the car and ride around in the neighborhood. We will pick him up and let's go eat."

Q: Did you find him?

A: No, sir.

Q: After y'all drove around the neighborhood, did you also look other places?

A: We drove around the neighborhood and drove around the neighborhood and drove around the neighborhood, and then we saw a police officer that was parked up there where the old Family Dollar Store is that's closed down, and he was parked by that phone there and we pulled up there, and we told him we couldn't find our eight-year-old and we were looking for him for a couple of hours. "How do you go about getting the police involved to help us look," and he told us to go home and call the police department and file a missing child report, which is what we did.

Q: You went directly from there back home?

A: Yes, sir.

Q: Did an officer come out and take a report?

A: Yes.

Q: What time was that, approximately?

A: Right around eight o'clock. It was getting dark.

Q: After the report was made, what did y'all do?

A: During the time the report was made Dana Moore came over and she said - -

Q: She lives across the street?

A: She lives across the street from me. She said, "They are together. I saw them together earlier," and she said, "They are all three together wherever they are at."

Q: And after she came over, what happened?

A: She told the - - we got pictures of the kids for the police officer, and we just continued to start looking, to look.

Q: Where all did y'all look?

A: Everywhere.

Q: About how many of you were looking?

A: Britt Smith, my son, another friend of Britt's, Patsy - - Britt's mother, Terry Hobbs, Pam Hobbs, my husband, myself, Dana Moore.

Q: Was the officer who had - -

A: And the officer - - well, she looked some, but she didn't go - - and then Dana came and said that someone told her they had seen them at the edge of Robin Hood. And that's when my

husband and Britt and Ryan went down in the woods and started looking down there and Terry, too.

Q: If you would - - I don't believe you have seen this before - - but this is State's Exhibit Two. It's an area map of West Memphis. Would you take this yellow marker and see if you can locate where you live on there?

And if it will help you out, (INDICATING) this is Broadway, this is the interstate, here's Barton, and this area has been highlighted - -

A: 1398 East - - that's Dana. I live right here. (MARKING)

Q: I want to show you what I have marked for identification as State's Exhibit One and ask if you can identify that? (HANDING)

A: (EXAMINING) Yes, sir.

Q: Is that Chris?

A: He's my baby.

MR. FOGLEMAN: Your Honor, we would offer State's Exhibit One.

MR. STIDHAM: No objection, your Honor.

THE COURT: It may be received without objection.

(STATE'S EXHIBIT ONE IS RECEIVED IN EVIDENCE)

BY MR. FOGLEMAN:

Q: Were you in the courtroom when I gave my opening statement?

A: Yes, sir, I was.

Q: Prior to today, were you aware of the specific injuries that all the boys had?

A: I don't - - I don't understand the question.

Q: Did you know - - had we told you what the injuries were?

A: No, sir.

Q: Had anybody else told you?

A: No, sir.

CROSS EXAMINATION

BY MR. STIDHAM:

Q: Ma'am, you say that your son didn't skip school that day?

A: No, sir, he did not.

Q: He was there the entire day?

A: Yes, sir.

Q: Who picked him up from school?

A: The school is - - where Miss Moore lives - - where Miss Moore lives is like one house over. Chris walked home from school. He walked one block through the crossing guard and he was home.

Q: To your knowledge, no one picked him up that day?

A: That day I was at work. One of our vehicles was broken down. His daddy couldn't find him after school. He didn't come straight home from school. So Ryan was at home. Mark said, "Stay here wait for your brother." No, he had to take - - excuse me.

Q: It's okay. Take your time.

A: I beg your pardon. He had to take Ryan to court. Ryan had to go to court that day. So he had to run around court. He still couldn't find Chris so he knew I was stranded in Memphis on Hollywood Street, which is not a great area of town, so he ran to pick me up from work and then run home to try to find Chris.

Q: Did you ask him when - -

A: When he went to go get Ryan to go back up to court to be with Ryan, he left me at home in case Chris came home and that is when he found Chris.

Q: You didn't send anybody to pick him up that day or ask a friend or relative to pick him up?

A: No, sir. His daddy got him from school. His daddy was home every day when Chris came home from school.

(WITNESS EXCUSED)

MELISSA BYERS

having been previously duly sworn to speak the truth, the whole truth and nothing but the truth, then further testified as follows:

REDIRECT EXAMINATION

BY MR. FOGLEMAN:

Q: Alright, you're the same Melissa Byers that's previously testified, is that correct?

A: Yes, sir.

Q: Alright. Melissa, I want to direct your attention to an incident that occurred in February or Mar --

MR. CROW: Your Honor, may we approach the bench?

(BENCH CONFERENCE)

CROW: Your Honor, previously the Court ruled that the parents would stay out of the courtroom until they testified and then let them stay. Shes been in the courtroom ever since.

THE COURT: Well, yeah, um. But there is a specific statute that the victims families are permitted to be in the courtroom --

CROW: The Court excluded her.

THE COURT: I excluded her until her testimony in chief but then I let her come back in, and the

statute provides that you can so Im waiving the rule in that regard.

STIDHAM: I anticipate that shes going to testify about a photograph that someone may have taken of her child.

THE COURT: I dont have any idea. Are you objecting?

STIDHAM: Yes, your Honor.

FOGLEMEN: Your Honor, what it is, is that about -- sometime between the middle of March and the middle of February the Byers say that they went to the store, were gone about 15, 20 minutes, came home and their son Chris runs up and says, Hey, somebody was taking my picture. And describes him as having black --

STIDHAM: Your Honor, I think the jury can hear us.

FOGLEMEN: Alright. He described him as having black hair and all black clothes and matches Damiens description. Jessie said in his statement about the boys, being a picture of the boys.

THE COURT: What is your objection?

STIDHAM: Your Honor, she can't specifically identify this person and this is something that is going to be highly prejudicial.

CROW: And your Honor, Jessies statement -- thats what theyre relating it to -- thats the relevance -- it was three boys not just one picture of one boy.

FOGLEMEN: The kid didnt say who all was present. He said they took a picture.

CROW: Then thats all theyve got, your Honor --

STIDHAM: Theres a lot of speculation and stuff --

THE COURT: Im going to overrule the objection.

(RETURN TO OPEN COURT)

BY MR. FOGLEMEN:

Q: I want to direct your attention back to mid-February to mid-March.

A: Yes.

Q: Um, Was there an incident about a picture involving your son, a photograph --

CROW: Your Honor, one more objection, your Honor.

(BENCH CONFERENCE)

CROW: This is hearsay, your Honor.

FOGLEMEN: Your Honor, it meets Rule 8 --

THE COURT: -- 24

FOGLEMEN: Present sense impression.

CROW: Fifteen, twenty minutes later, your Honor?

STIDHAM: Your Honor, thats obviously hearsay.

FOGLEMEN: Let me get the rule here. Eight oh three one, your Honor, present sense impression about a declarant explaining an event immediately after the event.

CROW: It was fifteen or twenty minutes.

(inaudible)

FOGLEMEN: As soon as they got back from the store he runs up.

CROW: If they are gone fifteen minutes, it doesnt matter.

STIDHAM: Your Honor, you've got to keep in mind to that this is a young child saying this stuff.

THE COURT: I dont think it qualifies as a present sense --

FOGLEMEN: Your Honor, it says, made while he was perceiving an event or immediately thereafter. They came back --

THE COURT: Well, it's usually, usually the old concept of res gestae, an event involving a crime or the circumstances immediately thereafter. That's where the present sense impression exception

came into being, circumstances involving the crime itself or immediately --

FOGLEMEN: Can we -- it may qualify as an excited utterance. The kid runs up after the -- after they --

THE COURT: And again, that's usually contemporaneous with the, with the uh --

CROW: (inaudible)

FOGLEMEN: It is while he's under the stress and the excitement, your Honor. He runs up to say: Hey, this guy is taking my picture.

DAVIS: The way she testifies preliminarily at that point is going to gauge whether it fits or not.

FOGLEMEN: Do you want us to make a proffer and see what -- out of the presence of the jury?

THE COURT: Yeah. Yeah.

FOGLEMEN: Okay.

(RETURN TO OPEN COURT)

THE COURT: I need to ask the jury to step back in the back rooms for just a minute and we'll just stay here in the courtroom for a few minutes. And again, you're not to discuss the case.

(JURY LEAVING THE COURTROOM)

THE COURT: All right, let the record reflect that this is a proffer of proof outside of the hearing of the jury. Alright, you may proceed.

PROFFER OF PROOF

BY MR. FOGLEMEN:

Q: Ms. Byers, again, directing your attention to the last of February or the first part of March of 1993, was there an incident involving your son where he said something about a picture being taken of him?

A: Yes, he told us a man had taken a picture of him.

Q: Alright, where had you -- well, just explain the circumstances of that to the Judge, about

where you had been and how long you had been gone and that kind of thing.

A: Okay. My other son Ryan was home and I needed some milk and some cigarettes so theres a little corner store right down Barton, its about two blocks from my house. So Ryan was upstairs in his room, Christopher was playing in the carport, and I said, Well, I need to run to the store right quick. So I left Christopher at home. Ryan was there with him. And me and my husband jumped in the car, ran down to the corner store, bought cigarettes and milk and came right back. When we pulled up in the carport, Christopher come running out of the house, and he said, Mama, there was a man here and he took a picture of me. And I said, What do you mean, took a picture of you? And he said, Well, he pulled up in the driveway and he scared me so I ran out in the yard so I could get away from him and he took a picture of me. I said, What did the man look like? He said, He had black hair. He had on a black coat, he had on a black shirt, and he had on black pants and black shoes, and he drove a green car. The way he described it -- he was only an eight-year-old child -- and the way he described it to me was it was like a suit, a man in a suit.

Q: That's what you took it as?

A: Thats what I thought -- a man in a suit, and I, you know, and I didnt go any further than that.

Q: What was, when he ran out of the house, I mean --

A: He was under the carport playing.

Q: Alright. Well, when he ran out of the house to tell yall is what Im talking about. A: He had ran back into the house and had locked the door.

Q: Okay. And when he ran out to tell you about this, what was his demeanor and...?

A: He was excited. He was frightened.

Q: Okay.

A: And Ryan was upstairs and, of course, you know, was supposed to be watching his baby brother.

Q: Okay.

FOGLEMEN: Thats my proffer, your Honor.

THE COURT: You want to have any cross examination?

STIDHAM: No, your Honor. Wed just like to renew our objection as to relevancy and hearsay. We don't feel that it fits within any --

THE COURT: Well, as far as relevancy, I wouldnt have any problem in ruling and finding that the evidence is relevant. Uh --

STIDHAM: Wed also argue that its prejudicial effect outweighs any probative value. I don't think she can, she cant say who it was for sure, and the inference is very prejudicial.

FOGLEMEN: Your Honor, under uh, in Mr. Halls book --

UNKNOWN: A noted defense attorney, your Honor.

FOGLEMEN: Your Honor, he said --

THE COURT: I remember when Mr. Hall was a prosecutor. (chuckle)

FOGLEMEN: He says that, The interval between the statement and an event is governed by the particular circumstances of each case. The trend is toward expansion of the time interval after an exciting event. Some courts are more liberal in expanding the time period following an exciting event when the declarant is a child. In fact, in this one it says, The morning after the event was sufficient where the declarant was three years old. The statement next day is admissible in this Coe versus State, but one four days later not. A relaxed standard for young victims is appropriate.

THE COURT: Well you know, we have eight oh three twenty-five that goes to sexual contact of a child, which is an exception to the hearsay rule. Im not sure it is quite applicable, but it is somewhat analogous to the situation.

FOGLEMEN: Your Honor, heres another one under pres -- that was under excited utterance. Under present sense impression, Mr. Hall refers to Tucker versus State where it talks about the primary justification is spontaneity -- Spontaneous statement is seen as reliable since theres not been time to fabricate or misrepresent. It doesnt require that the event be startling, but the statement must be immediate to the event. And then it says, Immediacy is not present when an identification is made three days after a robbery. Were talking about the people go to the store, come back and the child tells --

THE COURT: My understanding of that rule previous to this has been that the observation or the experience that would cause an excited utterance or present sense impression usually were those events that occurred simultaneous to or in conjunction with a crime or the event itself, part of the res gestae of it. In close proximity to the event that is the subject matter of the trial, but Im not sure that thats completely accurate.

FOGLEMEN: Your Honor, the rule doesnt say that.

THE COURT: Well, thats what Im saying. It could very well be some other event that in itself has independent relevancy to the crime itself. Y'all want to respond? You want something in the record other than the objection you made as to hearsay?

CROW: Your Honor, I think, the child was no longer -- if the child was even in danger. He had

already been inside the house. That part of the excitement over. He came out to tell mom and dad what happened. That's not, that's the whole purpose of the hearsay rule is we can't cross examine him.

THE COURT: But, well...

CROW: We can't bring out uh --

THE COURT: Well, the exception is that the declarant is not available. And obviously the declarant is not available.

CROW: Right, right, right. That's the problem, that's why the exception has to be limited in scope.

THE COURT: And the issue is, is not that there was any, even any danger at all, but the issue is whether or not contemporaneous to that event, the photograph taking, or very shortly thereafter he made that statement. Now, that, that's the question. And whether or not if, that alone if it has independent relevancy, which I am ruling it does, based upon the testimony of Inspector Gitchell from the statement of the accused. There was some reference to a briefcase and photographs. So it has relevance. I, I don't have any problem. I think what I'm going to do is I'm going to rule that it's admissible, if not as a present sense impression or excited utterance, that it falls under the gamut of eight oh three twenty-four in that the statement is more probative on the point for which it's offered than any other evidence which the proponent could procure through reasonable efforts and that the interest of justice allows it.

CROW: Your Honor, on that basis I would strenuously point out that the statement talks about one photograph of three boys. That is not what this is about.

THE COURT: Well, that is again a point of argument.

MR. CROW: I understand that, your Honor --

(THE COURT AND MR. CROW SPEAKING AT THE SAME TIME)

THE COURT: You can both argue that --

CROW: -- twenty-four argument. I think that's more apropos.

THE COURT: The only question I've got is you were aware of this potential testimony and that had been made known to you prior to today?

STIDHAM: Yes, your Honor, but its reliability was certainly an issue.

THE COURT: Well, Im going to rule that it is an exception to the hearsay rule, either eight oh three one or two or eight oh three twenty-four. Alright, want to call 'em back for me please, sir?

(JURY RETURNING TO THE COURTROOM)

(RETURN TO OPEN COURT)

CONTINUED REDIRECT EXAMINATION

BY MR. FOGLEMAN:

Q: Miss Byers, directing your attention to the end of February or early part of March of 1993, was there an incident where your child Christopher said something about his photograph being taken?

A: Yes, sir. He told us that a man had pulled up in the driveway and had taken a picture of him.

Q: Alright. Exp -- tell the jury the circumstances about where you had been and that kind of thing.

A: Okay. My older child Ryan was home and Christopher was playing out on the carport. Ryan was upstairs in his bedroom. I needed some milk and some cigarettes so me and my husband jumped in the car. Theres a little corner grocery that is like two blocks from the house. And I left Christopher playing, I know he was busy and he was playing, left him playing on the carport, Ryan was in the house upstairs in his bedroom. Ran down to the corner grocery. Got a gallon of milk and two packs of cigarettes and ran right back to the house. We werent gone fifteen minutes. When I came pulling up in the driveway, Christopher came running out of the door.

Q: Alright.

A: And he said, Mommy, there was a man here and he took a picture of me. And I said, we were asking him about it, I said Well, what did the man look like? And he said, He had on a black coat, black pants, black shoes and a black shirt and I - and he was in a green car.

Q: Did he say anything about his hair?

A: He said he had black hair.

Q: Alright. I don't have any further questions, your Honor.

STIDHAM: No questions, your Honor.

THE COURT: Alright, you may stand down. Call your next witness.

MELISSA: Thank you, your Honor.

(WITNESS EXCUSED)