Supreme Court of Kentucky

2018-14

IN RE: Proposed Amendment of Kentucky Rules of Evidence (KRE)

ORDER

This Court is advised that pursuant to KRE 1103(b), a meeting of the Evidence Rules Review Commission was called by the Chief Justice to review a proposed amendment to the Kentucky Rules of Evidence, an addition of a new section KRE 807, a copy of which is attached. Amendments to the Kentucky Rules of Evidence are governed by KRE 1102 which: in subsection (a) grants the Supreme Court of Kentucky the power to prescribe amendments or additions to the Kentucky Rules of Evidence; in subsection (b) sets out the procedure for the General Assembly to adopt amendments to the Kentucky Rules of Evidence that do not constitute rules of practice and procedure, granted solely to the Supreme Court of Kentucky in Section 116 of the Kentucky Constitution; and in subsection (c) requires that "(n)either the Supreme Court nor the General Assembly should undertake to amend or add to the Kentucky Rules of Evidence without first obtaining a review of the proposed amendments or additions from the Evidence Rules Review Commission." Said rule provides a clear amendment process agreed to in 1992 by the General Assembly in HB 241 and by the Supreme Court of Kentucky. The Supreme Court of Kentucky, by order entered May 12, 1992, adopted the portions of the Kentucky Rules of Evidence that came within the rule making power of the Court, pursuant to Ky. Const. Sec. 116. The Court did not adopt the Commentary prepared to the KRE.

Pursuant to the call of the Chief Justice, The Kentucky Evidence Rules Review Commission (KERRC) met on several occasions to consider the proposed addition of KRE 807, taking testimony from presenters and reviewing surveys of the laws and rulings of other states, before issuing a recommendation against the adoption of the proposed amendment to the Kentucky Rules of Evidence (The Recommendation of the KERRC and the Minority Report are attached hereto.) Additionally, this Court heard comment upon the proposal during the Annual Convention of the Kentucky Bar Association and received and reviewed written comment thereon.

Upon review, the Supreme Court of Kentucky hereby adopts the recommendation of the Kentucky Evidence Rules Review Commission and thereby declines to adopt the proposed amendment. This Court recognizes the concern addressed in the proposed amendment and would consider alternate approaches upon presentation of future proposals.

All sitting. All concur.

ENTERED: September 21, 2018.

CHIEF JUSTICE

KENTUCKY EVIDENCE RULES REVIEW COMMISSION
RECOMMENDATION

I. Background

The purpose of evidence law is to aid the trier of fact in the search for the truth. The Kentucky Rules of Evidence are a codification of the law of evidence, developed through a lengthy deliberative process and adopted by both the Kentucky General Assembly and the Kentucky Supreme Court for application, with limited exceptions, in all courts and all cases in the Commonwealth. The work of this Evidence Rules Review Commission is an extension of the original process for developing and adopting the Rules and is specifically sanctioned by KRE 1102(c).

The Proposed Rule brings into play two fundamental principles of the law of evidence as embodied in the KRE. The first is that all relevant, competent evidence should be admitted absent a compelling justification to deny its admission. The second, which finds its expression in the hearsay rule, is that out-of-court statements offered to prove the truth of their contents should generally be excluded.

The hearsay rule is premised on the well-founded conviction that most out-of-court statements lack sufficient trustworthiness to be admitted into evidence. They are not typically made under oath or subject to the scrutiny of cross-examination, and the trier of fact cannot observe and judge the credibility of the person making the statement. However, the numerous exceptions to the hearsay rule (there are a total of 27) bear witness to the many circumstances in which out-of-court statements are deemed sufficiently trustworthy to be admitted.

An examination of the existing exceptions reveals the following: (1) numbers can be deceiving--16 of the 27 exceptions relate to documents (e.g., business records, public records, past recollections recorded) and three of the exceptions relate to reputation (e.g., personal and family history, property boundaries); (2) except for three seldom-used exceptions relating to real estate, none of the exceptions is case or subject matter specific; (3) none of the current exceptions are premised upon the age or disability of the declarant; (4) one exception allows for the admission of former testimony that was the subject of direct, cross, and redirect examination; and (5) one exception is for statements of personal and family history.

The other six exceptions, which tend to have application in the broadest range of cases, are based upon centuries of human experience that provide strong circumstantial guarantees of trustworthiness not otherwise found in out-of-court statements. They are: present sense impressions; excited utterances; statements of then-existing mental, emotional or physical condition; statements for the purpose of medical treatment or diagnosis; statements under a belief of impending death (so-called "dying declarations"); and statements against interest. It is against this backdrop that the Proposed Rule must be evaluated.

II. The Proposed Rule

The Proposed Rule attempts to address a terrible and frightening situation--the physical and sexual abuse of young children. The targeted conduct is horrific, the victims fragile and almost always defenseless, and the harm to society great. The Proposed Rule would: apply only in situations involving the alleged physical or sexual abuse of children; allow the admission of out-of-court statements by declarants 12 years old or younger, which are determined by the court in a pretrial proceeding to have sufficient circumstantial guarantees of trustworthiness and which are not primarily testimonial in nature. The out-of-court statements would only be admitted if the child testifies, but the testimony does not include information contained in the out-of-court statements **or** if the child's testimony is not reasonably obtainable and there is corroborative evidence of the act that is the subject of the statement. The child's testimony is "not reasonably obtainable" for purposes of the exception if, among other justifications, the child claims a lack of memory of the subject matter or if the court finds that the child is unable to testify at the trial or hearing because of "infirmity, including the child's inability to communicate about the offense because of fear or a similar reason" and if that situation would not improve if the trial were delayed.

It will be noted that the proposed rule would break new ground in a number of respects. First, it is subject matter or case specific, applying only to situations of physical and sexual abuse of children, and is likely to be used only in criminal and domestic relations cases. Second, it is limited by the age of the declarant. Third, it only applies to statements made by the victim of the alleged abuse. Fourth, it creates a new concept of declarant unavailability, which according to information presented to the Commission, would most often come into play when, due to anxiety over the proceedings, fear of the defendant, or the influence of other adults, the child simply cannot bring himself or herself to testify (the child experiences "vapor lock" in the words of the prosecutors). Fifth, instead of reliance upon long-recognized guarantees of trustworthiness that underpin traditional hearsay exceptions, it places upon the trial court the responsibility for making pre-trial determinations of the trustworthiness of out-of-court statements as the avenue for admissibility. The process envisioned by this rule is presumably similar, albeit tailored to the specific type of conduct at issue, to that envisioned by the "residual hearsay rule" which the Kentucky Supreme Court rejected at the time of its initial adoption of the Rules of Evidence.

The author and the proponents of the Proposed Rule have indicated that it is modeled largely on the statute which has been in place for several years in Ohio. The application of the Ohio rule was tested and upheld by the United States Supreme Court in the case of *Ohio v. Clark*, 135 S. Ct. 2173 (2015); 192 L.Ed.2d 306. However, the Supreme Court found in that case that the out-of-court statements were not testimonial in nature (they were made in the context of an ongoing emergency involving suspected child abuse, were made to teachers aimed at identifying and ending the threat; the conversation was informal and spontaneous; the statements were made to persons not principally charged with uncovering and prosecuting criminal behavior); thus the admission of those statements into evidence did not violate the confrontation clause of the Sixth Amendment. By way of contrast, the Supreme Court of Ohio in the case of *Ohio v. Arnold*, 126 Ohio St.3d 290 (2010), held that statements of a child victim made to interviewers at a child advocacy center that served primarily a forensic or investigative purpose were testimonial such that their admission at trial violated the defendant's confrontation rights. The interview process at the child advocacy center as described in that case is remarkably similar

to the process that typically takes place at Kentucky child advocacy centers as described for the Commission. As noted above, the Proposed Rule does make provision for the exclusion of testimonial statements, but it is of concern that the process envisioned by proponents of the proposed rule may well be one that produces statements ultimately inadmissible under the Confrontation Clause of the Sixth Amendment.

The Commission was presented with a survey of laws and rulings in other states which address matters similar to the Proposed Rule. A review of the survey reflects that 10 states, including Kentucky, have not adopted a comparable rule of evidence; six states have such rule on the books, but it has yet to be challenged in a reported court decision; seven states have such a rule but require the child to be available and subject to cross-examination either at trial or at pretrial proceedings; three states have allowed the same type out-of-court statements to be admitted under other hearsay exceptions such as the residual rule or the excited utterance exception; three states have very narrow exceptions such as allowing the out-of-court statements only to support a confession or only allowing statements made by the victim to the first person he or she encounters after the alleged incident who is over 18 years of age; the rule has been struck down in a two states due to confrontation clause issues; and a significant number of states (as many as 17) have broad rules comparable to the Proposed Rule that have withstood judicial challenges.

III. Other Protective Measures for Child Victims as Witnesses

The Proposed Rule is not the first effort emanating from the Kentucky General Assembly to address the admissibility of out-of-court statements made by children who are alleged to have been the victims of sexual abuse. In *Drumm v.Commonwealth*, Ky., 783 S.W.2d 380 (1990), the Kentucky Supreme Court considered the constitutionality of KRS 421.355 which had been enacted by the legislature in 1986 and provided:

> "(1) Notwithstanding any other provision of law or rule of evidence, a child victim's out-of-court statements regarding physical or sexual abuse, or neglect of the child are admissible in any criminal or civil proceeding, including a proceeding to determine the dependency of the child, if, prior to admitting such a statement, the court determines that:
>
> (a) The general purpose of the evidence is such that the interest of justice will best be served by admission of the statement into evidence; and
>
> (b) The statements are determined by the court to be reliable based upon the court's consideration of the age and maturity of the child, the nature and duration of the abuse, the emotional or psychological effects of said abuse or neglect upon the child, the relationship of the child to the offender, the reliability of the child witness, and the circumstances surrounding the statement.
>
> (2) If the statement is admitted into evidence each party may call the child to testify and the opposing party may cross-examine the child."

The Supreme Court struck down this statute with strong language, holding:

> ". . . The present statute transgresses established procedure relating to the competency of children to testify as witnesses, usurps the power of the judiciary to control procedure, and violates Sections 27 and 28 of the Constitution of Kentucky. These Sections establish the judiciary as 'a separate body of magistracy' and constitutionalize the doctrine of separation of powers . . . The Kentucky Constitution, Sections 115 and 116, establish the judicial rulemaking power. Section 116 specifies *inter alia*, that the Supreme Court shall prescribe the 'rules of practice and procedure for the Court of Justice' . . . Fundamental guarantees to the criminally accused of due process and confrontation, established by both the United States and Kentucky constitutions, are transgressed by a statute purporting to permit conviction based on hearsay where no traditionally acceptable and applicable reasons for exceptions apply. The reasons for exceptions to the hearsay rule are grounded not just on the need, but on guarantees of trustworthiness which are the substantial equivalent of cross-examination."

The Court in *Drumm* noted that it had previously declared unconstitutional a companion statute, KRS 421.350 (which provides for out-of-the-courtroom closed circuit and videotaped testimony of child sexual abuse victims), in the case of *Gaines v.Commonwealth*, 728 S.W.2d 525 (1987). However, a reading of the *Gaines* opinion seems to indicate that the Court's decision was premised upon the use of the statutory procedure without the Court first having made a determination of the competency of the child to testify **at all**. That critical omission was deemed to be a violation of the separation of powers doctrine and the Court's authority to control its practice and procedure. Moreover, that statute has remained on the books and was cited favorably by the Kentucky Supreme Court some eight years later in *Danner v. Commonwealth*, 963 S.W.2d 632 (1998).

In 1992, perhaps in response to the *Drumm* decision, the General Assembly adopted KRS 26A.140 which, in appropriate cases, allows the use of procedures to shield children who testify from visual contact with the alleged perpetrator. The application of that statute was recently considered by the Kentucky Court of Appeals in the case of *J.E. v. Commonwealth*, 521 S.W.3d 210 (2017), in which it was held that the screening procedures implemented by the District Court violated the defendant's right of confrontation because the District Court failed to find a compelling need for such screening before allowing it to be used. That case bears full reading--it makes clear that both KRS 26A.140 and KRS 421.350 remain viable tools, under appropriate circumstances, to protect young child witnesses who are alleged to be victims of sexual abuse; and it contains an excellent review of the requirements of the confrontation clause as applied in such cases.

The above-referenced statutes and cases are attached to this memorandum for review by the Commission. Taken together, they demonstrate that the kinds of protections sought for children in the Proposed Rule are largely afforded, in compliance with the requirements of due process and the confrontation clause, by existing protective measures without the need for expanding the hearsay rule.

IV. Conclusions

The Proposed Rule is a worthy attempt to address a difficult situation that arises in a small number of instances, in a specific set of circumstances involving an especially fragile class of victims. The author and proponents of the rule have amended certain of its provisions in response to concerns raised by Commission members and are to be applauded for their efforts in that regard. Nevertheless, the Proposed Rule conflicts with the fundamental premise that the search for the truth is aided by the ability of an accused to confront and cross-examine the accuser in the presence of a jury of peers. In addition, the Proposed Rule represents a significant departure from the established framework of the hearsay rule as embodied in the current rules of evidence, introducing a number of new concepts which may not only have unintended consequences in the targeted cases but which may lay the foundation for other proposed exceptions to the hearsay rule in support of other categories of sympathetic victims in other types of difficult cases. In the end, the balance of these concerns weighs against adoption of the Proposed Rule.

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421.350 Testimony of child allegedly victim of illegal sexual activity.

(1) This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under KRS 510.040 to 510.155, 529.030 to 529.050, 529.070, 529.100, 529.110, 530.020, 530.060, 530.064(1)(a), 531.310, 531.320, 531.370, or any specified in KRS 439.3401 and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies to the statements or testimony of that child or another child who is twelve (12) years of age or younger who witnesses one of the offenses included in this subsection.

(2) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

(3) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection (3) of this section may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by subsection (3) of this section. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

   (a) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;

   (b) The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;

   (c) Each voice on the recording is identified; and

   (d) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(4) If the court orders the testimony of a child to be taken under subsection (2) or (3) of this section, the child may not be required to testify in court at the proceeding for which the testimony was taken, but shall be subject to being recalled during the course of the trial to give additional testimony under the same circumstances as with any other recalled witness, provided that the additional testimony is given utilizing

the provisions of subsection (2) or (3) of this section.

(5) For the purpose of subsections (2) and (3) of this section, "compelling need" is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence.

Effective: June 25, 2013

History: Amended 2013 Ky. Acts ch. 25, sec. 21, effective June 25, 2013. -- Amended 2008 Ky. Acts ch. 58, sec. 1, effective July 15, 2008. -- Amended 2007 Ky. Acts ch. 19, sec. 10, effective June 26, 2007. -- Amended 2006 Ky. Acts ch. 182, sec. 63, effective July 12, 2006. -- Amended 1996 Ky. Acts ch. 178, sec. 1, effective July 15, 1996. -- Amended 1986 Ky. Acts ch. 439, sec. 2, effective July 15, 1986. -- Created 1984 Ky. Acts ch. 382, sec. 19, effective July 13, 1984.

26A.140 Accommodation of special needs of children.

(1) Courts shall implement measures to accommodate the special needs of children which are not unduly burdensome to the rights of the defendant, including, but not limited to:

(a) Trained guardians ad litem or special advocates, if available, shall be appointed for all child victims and shall serve in Circuit and District Courts to offer consistency and support to the child and to represent the child's interests where needed.

(b) During trials involving child victims or child witnesses, the environment of the courtroom shall be modified to accommodate children through the use of small chairs, frequent breaks, and the use of age appropriate language.

(c) Children expected to testify shall be prepared for the courtroom experience by the Commonwealth's or county attorney handling the case with the assistance of the guardian ad litem or special advocate.

(d) In appropriate cases, procedures shall be used to shield children from visual contact with alleged perpetrator.

(2) The Supreme Court is encouraged to issue rules for the conduct of criminal and civil trials involving child abuse in which a child victim or child witness may testify at the trial.

Effective: July 14, 1992

History: Created 1992 Ky. Acts ch. 351, sec. 9 , effective July 14, 1992.

Drumm v. Commonwealth

Supreme Court of Kentucky

January 18, 1990, Decided

Nos. 87-SC-848-MR, 87-SC-849-MR

Reporter
783 S.W.2d 380 *; 1990 Ky. LEXIS 3 **

BRUCE DRUMM, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE AND KAREN DRUMM, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE

Prior History: [**1] APPEAL FROM BULLITT CIRCUIT COURT, HON. OLGA S. PEERS, SPECIAL JUDGE, INDICTMENT NOS. 86-CR-065, 070 AND 073.

APPEAL FROM BULLITT CIRCUIT COURT, HON. OLGA S. PEERS, SPECIAL JUDGE, INDICTMENT NOS. 86-CR-066, 071 AND 074.

Disposition: REVERSING

Case Summary

Procedural Posture
Defendants, father and mother, were indicted for sexually abusing their children. The Bullitt Circuit Court (Kentucky) entered judgments convicting and sentencing defendant father of first-degree rape and first-degree sodomy of his daughter, and first-degree sodomy of his son. Defendant mother was convicted and sentenced for the same offenses based on complicity. Both defendants appealed.

Overview
The major issue on both appeals was whether the admissibility of various out-of-court statements incriminating the defendants made by both children to various persons involved in their care and treatment after they were removed from defendants' home was proper. The court held that Ky. Rev. Stat. Ann. § 421.355 was unconstitutional because it denied defendants fundamental rights of due process and confrontation by permitting their convictions based upon hearsay where no traditionally acceptable and applicable reasons for exceptions applied. The court adopted the application of Fed. R. Evid. 803(4) to cases involving the admissibility of statements made by the children to treating physicians. The court held that there was little doubt, once the commonwealth conceded the evidence regarding the hearsay statements made by the daughter was inadmissible, that the use of such evidence so seriously prejudiced the case involving the offenses charged as to the son, that the trial on these charges was fundamentally unfair, and a retrial was required as to both defendants.

Outcome
Defendants' convictions on all charges were reversed, and the case was remanded to the lower court for further consideration.

Counsel: Attorneys for Appellant, Bruce Drumm: David Murrell, Public Advocate, Louisville, Kentucky.

Attorneys for Appellant, Karen Drumm: Elizabeth Shaw, Richmond, Kentucky.

Attorneys for Appellee: Frederic J. Cowan, Attorney General, Lana Grandon, Asst. Attorney General, Frankfort, Kentucky.

Judges: Opinion Of The Court By Justice Leibson. Gant, Lambert, Leibson and Wintersheimer JJ., concur. Vance, J., dissents by separate opinion in which Stephens, C.J. and

Combs, J., join.

Opinion by: LEIBSON

Opinion

[*380] Bruce Drumm has been convicted of first-degree rape and first-degree sodomy of his daughter, A.D. (then 3-years old), and first-degree sodomy of his son, S.D. (then 6-years old). Karen Drumm, his wife and the children's mother, has been convicted for the same offenses based on complicity. Both have been sentenced to life imprisonment for each of the three offenses, the sentences to run concurrently. They appeal to the Supreme Court as a matter of right.

The Commonwealth's theory of the case was that the acts charged, and other deviant sexual behavior involving the children, were part of the couple's degenerate lifestyle. The Commonwealth, **[**2]** by evidence, argument and innuendo, introduced a vast array of deviant, sordid and bizarre sexual **[*381]** activity before the jury, including the suggestion that the children were used as part of a scheme to produce and sell pornography.

One of the major problems with this case is the substantial amount of testimony devoted to deviant sexual misbehavior of all kinds, much of which classifies as uncharged collateral criminal activity. Because these convictions must be reversed on other grounds, we will not undertake in this opinion to sort out which portions of this evidence were admissible, and which were not, and wherein objection to inadmissible evidence was preserved for appellate review by appropriate contemporaneous objection. Sorting this out is probably a practical impossibility given the confused state of the record. It suffices to say that evidence should have been admitted or excluded by applying recognized rules and exceptions. The "General Rule" is "evidence of the commission of crimes other than the one that is the subject of a charge is not admissible to prove that an accused is a person of criminal disposition." Lawson, *The Kentucky Evidence Law Handbook*, 2d ed., Sec. **[**3]** 2.20(A) (1984). Before admitting such evidence the burden is on the Commonwealth to establish a reason to apply some well-defined exception. The principle involved is thus stated in Rule 404(b) of the Federal Rules of Evidence:

> "*Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Before any of these reasons for making an exception applies, it must *first* be an issue in the case.

Specifically, with reference to uncharged acts of sexual misconduct by the accused with his alleged victim, in *Pendleton v. Commonwealth*, Ky., 685 S.W.2d 549 (1985), we stated that evidence of "independent sexual acts" would be "admissible *if such acts are similar to that charged* and not too remote in time, *provided the acts are relevant to prove* intent, motive or a common plan or pattern of activity." [Emphasis added.] *Id.* at 552.

The problem in the present case is that the trial proceeded, not **[**4]** on the premise that such evidence is inadmissible unless there was reason to make an exception, but from the opposite premise. As stated in Lawson, *supra*, Sec. 2.20, pp. 42-43, before admitting such evidence the trial judge should consider:

> "*One -- Is the evidence relevant for some purpose other than to prove criminal predisposition of the accused?*
>
> . . . .
>
> *Two -- Is proof of the other crime sufficiently probative of its commission to warrant introduction of the evidence against the accused?*
>
> . . . .
>
> *Three -- Does the probative value of the evidence outweigh its potential for prejudice to the accused?*"

In the present case there was considerable comment, and some highly questionable evidence, involving sexual activity not of a similar nature to the crimes charged, which was inadmissible if properly objected to. There is extensive debate as to when, where and whether error was preserved. On retrial the court should require the Commonwealth to establish a proper basis before admitting evidence of collateral criminal activity, including a need for such evidence, and that its probative value outweighs its inflammatory effect. On the other hand, defense counsel should delineate **[**5]** what evidence is objected to and why.

The major issue on both appeals is the admissibility of various out-of-court statements incriminating the appellants made by both children to various persons involved in their care and treatment after they were removed from the appellants' home. In varying amounts these persons were also involved in investigating and preparing the various cases against the appellants, either the criminal cases, the Department of Welfare's child abuse and neglect charges, or both. The persons testifying to these incriminating statements included social **[*382]** workers, a foster parent, a police officer, two psychologists and a psychiatrist, and personnel at the Home of the Innocents where the children were lodged in public care for a portion of the time. The trial court admitted these statements pursuant to H.B. 664, Ch. 439, Ky. Acts (1986), codified as KRS 421.355, which states as follows:

> "(1) Notwithstanding any other provision of law or rule of evidence, a child victim's out-of-court statements regarding physical or sexual abuse, or neglect of the child are admissible in any criminal or civil proceeding, including a proceeding to determine the dependency of the **[**6]** child, if, prior to admitting such a statement, the court determines that:
> (a) The general purpose of the evidence is such that the interest of justice will best be served by admission of the statement into evidence; and
> (b) The statements are determined by the court to be reliable based upon the court's consideration of the age and maturity of the child, the nature and duration of the abuse, the emotional or psychological effects of said abuse or neglect upon the child, the relationship of the child to the offender, the reliability of the child witness, and the circumstances surrounding the statement.
> (2) If the statement is admitted into evidence each party may call the child to testify and the opposing party may cross-examine the child."

At the outset we note that the statute requires none of the traditional reasons for making exceptions to the hearsay rule. Further, although it contemplates a preliminary hearing and findings before a child victim's out-of-court statements are admitted, the record before us is devoid of such preliminary hearing and it is at best debatable whether the trial court made all of the findings specified in the statute. Numerous objections were made against **[**7]** the use of these statements, particularly as to statements allegedly made by the 3-year old daughter whom the court ruled incompetent to testify, although when and where the objections were sufficient to preserve a claim of error is debatable.

In many instances the out-of-court statements were made under questionable circumstances where, even utilizing the statute, even had there been a preliminary determination such as the new statute contemplates, admitting the statements would be an abuse of statutory grant of discretion. Again, we need not decide where error was sufficiently preserved, and where it was not, because the new statute is, in its entirety, an unconstitutional exercise of judicial rule-making power by the General Assembly, so the statute should not have been utilized in any event.

This new statute is a companion to KRS 421.350, which we declared unconstitutional in *Gaines v. Commonwealth*, Ky., 728 S.W.2d 525 (1987). It is unconstitutional for the same reasons. As in *Gaines*, the present statute transgresses established procedure relating to the competency of children to testify as witnesses, usurps the power of the judiciary to control procedure, and violates **[**8]** Sections 27 and 28 of the Constitution of Kentucky. These Sections establish

the judiciary as "a separate body of majistracy" and constitutionalize the doctrine of separation of powers. Whereas, prior to the new Judicial Article enacted in 1975, the line between judicial and legislative power was not clearly defined, such is no longer the case. The Kentucky Constitution, Sections 115 and 116, establish the judicial rule-making power. Section 116 specifies *inter alia*, that the Supreme Court shall prescribe the "rules of practice and procedure for the Court of Justice." As in *Gaines*, we will not extend comity to this statute because it fails the test of a "statutorily acceptable" substitute for current judicially mandated procedures. Fundamental guarantees to the criminally accused of due process and confrontation, established by both the United States and Kentucky Constitutions, are transgressed by a statute purporting to permit conviction based on hearsay where no traditionally acceptable and applicable reasons for exceptions apply. The reasons for exceptions to the hearsay rule are grounded not just on need, but on guarantees of trustworthiness which are the substantial equivalent **[**9]** **[*383]** of cross-examination. The statute presently under consideration fails to meet such essential requirements. As stated in *Commonwealth v. Willis*, Ky., 716 S.W.2d 224, 233 (1986), Leibson, J., concurring:

> "It is important to protect the sensibilities of a child, but it is more important to protect the accused's right to properly defend himself within the law as guaranteed by the Constitution. No person should be convicted of a felony and sent off to prison when he has not been able to defend himself as guaranteed by the Constitution of the United States and the Constitution of the Commonwealth of Kentucky."

In Bruce Drumm's case, the Brief for the Commonwealth concedes "that the hearsay statements of A.D. (the daughter) could not be admitted under any of the generally accepted exceptions to the rule prohibiting the admission of hearsay testimony . . . . that A.D. was not 'available' as a witness and that the various social workers and doctors should not have been allowed to testify about the hearsay statements made by A.D. pursuant to KRS 421.355."

Because S.D. (the son) was called as a witness and testified, the Commonwealth argues "that the out-of-court statements of S.D. were **[**10]** properly admitted at trial pursuant to KRS 421.355 and *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969)." KRS 421.355 is unconstitutional, and as to *Jett*, there are two further problems. The first is that because the case was tried pursuant to KRS 421.355 and not under *Jett*, the prosecutor failed to lay the precise foundation for the use of a witness' prior contradictory statement as required under CR 43.08. This rule requires that a party offering a prior inconsistent statement must lay a foundation, first by inquiring of the witness as to particulars of time, place and circumstance, and then by confronting the witness with the substance of the statement allegedly contradictory to his present testimony. In *Norton v. Commonwealth*, Ky., 471 S.W.2d 302, 306 (1971), we stated "the rule of *Jett* may not be applied without compliance with its plainly stated prerequisites." In *Fisher v. Duckworth*, Ky., 738 S.W.2d 810, 813 (1987), we were faced with a similar problem and stated "we have no rule of evidence that permits one to make a goulash, jumbling evidence from different rules, and thus to qualify evidence as admissible which would not otherwise qualify."

Next, **[**11]** there seems little doubt, once the Commonwealth concedes that the evidence regarding the hearsay statements made by A.D. was inadmissible, that the use of such evidence so seriously prejudiced the case involving the offenses charged as to S.D. that the trial on these charges was fundamentally unfair, and a retrial is required.

We note that while on the one hand, as to Bruce Drumm, the Commonwealth "agrees" that the case should be reversed as to the offense against the daughter, it makes no similar concession in the case against Karen Drumm, which proceeded on the same evidence. We conclude that, having conceded error as to Bruce Drumm, consistency would require a finding of the same error as to Karen Drumm.

What evidence of the children's out-of-court statements will be admissible on a retrial? Use of *Jett* is premised upon the witness, S.D., continuing to deny his previous statements, as he did at the first trial. However, there are two further bases for the use of previous out-of-court statements which were argued upon this appeal, which apply not just to S.D. but to both children, and which must be considered by the trial court in the event of a retrial. These questions involve **[**12]** what evidence was admissible under statements to a physician for the purpose of diagnoses or treatment, and what evidence from the records from the Home of the Innocents was admissible under the exception to the hearsay rule for regular entries in the course of business. Having held KRS 421.355 unconstitutional, these two evidentiary questions will be important in the event of a retrial.

The first issue involves out-of-court statements made by A.D. and S.D. to Drs. Richard K. Johnson and Edward Burla, clinical psychologists, and Dr. Daniel M. Tucker, psychiatrist. The question is which out-of-court statements by the children **[*384]** to these doctors incriminating the defendants are admissible under the exception to the hearsay rule for "statements made to a physician by a patient relating to matters which are necessarily important for him to know in order that he may make a correct diagnosis and render proper and effective treatment." *Equitable Life Ins. Soc'y v. Fannin*, 245 Ky. 474, 53 S.W.2d 703, 706 (1932). More recently, in *Souder v. Commonwealth*, Ky., 719 S.W.2d 730 (1986), referring specifically to "the admissibility of testimony from two physicians who participated in the medical **[**13]** examination and investigation of the abused child," we stated:

> "This exception is premised upon the admissibility of information . . . 'important to an effective diagnosis or treatment.' [Citation omitted]. This does not include information provided as part of a criminal investigation, nor does it usually include information identifying the name of the wrongdoer because normally the name of the wrongdoer is not essential to treatment." *Id.* at 735.

The problem is that heretofore our Kentucky cases limit the use of this exception to statements made to a treating physician. Lawson, *supra*, Sec. 8.45. In the present case, particularly with reference to Dr. Tucker who saw these children initially on reference from Social Services both to investigate for prosecutorial purposes and to diagnose and treat their emotional problem, and who thereafter had such children in his care for the better part of three years, it is difficult to differentiate which statements properly qualify as statements to a treating physician and which do not. He was partly involved in treating the children and sometimes also wearing his "detective hat."

The time has come to expand the hearsay exception for **[**14]** statements for purposes of medical diagnosis or treatment to conform to the modern approach as represented by Rule 803(4) of the Federal Rules of Evidence. Fed.R.Evid. 803(4) blurs the distinction between treating and testifying physicians while it does not completely abolish it. The Federal Rules shift the emphasis in expert testimony to a different ground, viz., whether the statement is "the kind of information which the expert customarily relies upon in the practice of his profession." *Buckler v. Commonwealth*, Ky., 541 S.W.2d 935, 939 (1976), on a slightly different subject, recognizes this shift in emphasis.

Fed.R.Evid. 803(4) includes in the list of hearsay statements admissible "even though the declarant is available as a witness":

> "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

We now adopt Fed.R.Evid. 803(4) for this and future cases.

In applying this rule to children allegedly victims of sexual offenses, Federal courts have generally **[**15]** followed a liberal approach. *See United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), cert. den., 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981); *United States v. Renville*,

779 F.2d 430 (8th Cir. 1985); and more recently, *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988). The Concurring Opinion by former Associate Justice Lewis Powell, U.S. Supreme Court retired, in *Morgan v. Foretich*, is a particularly incisive analysis of the proper application of Fed.R.Evid. 803(4) to a case where the charge is sexual abuse of a child of tender years, as in the present case. Powell states:

> "Rule 803(4) appears to have abolished the common-law distinction between those statements made while consulting a 'physician' for purposes of examination and statements made while consulting him for purposes of testifying as a witness . . . . So long as the statements made by an individual were relied on by the physician in formulating his opinion, they are admissible. [Citations omitted]. Although this holding ignores the traditional common-law prong of the rule that requires that the statements be made for **[*385]** the purposes of seeking treatment, it has clear support in the Advisory **[**16]** Committee notes to Rule 803(4)."

This approach eliminates problems in applying the rules caused by the "treating physician" restriction, problems as to which interviews are treatment and which are not, problems as to whether the child is too young to realize she is receiving treatment, and problems as to the child's present testimonial incompetence. Our approach in *Miller v. Watts*, Ky., 436 S.W.2d 515, 521 (1969), already covers this in part because it permits evidence of "history related to a treating doctor by a parent, custodian, guardian of an infant of tender years."

Under the approach taken by Justice Powell in *Morgan v. Foretich, supra*, the child's age or testimonial incompetency is not an insurmountable problem, nor need we decide whether these out-of-court statements were made exclusively for purposes of treatment. But this does not eliminate such factors from the trial court's consideration. Particularly with reference to the "treating physician" requirement, Justice Powell takes note that statements made to a doctor who is consulted solely "for purposes of testifying as a witness," "has less inherent reliability than evidence admitted under the traditional common-law **[**17]** standard underlying the physician treatment rule." 846 F.2d at 952. Justice Powell would resolve the question of admissibility by ordering the trial court to exercise its "discretion" to decide whether the evidence should be "excluded . . . on the ground its prejudicial effect outweighs its probative value. *See* Fed.R.Evid. 403." He states:

> "Rather than conclude, however, that Dr. Harrison's testimony should have been admitted into evidence, I would leave this question for reconsideration at the trial of this case, if there should be a retrial."

In the event of a retrial in the present case, we direct the trial court to decide the hearsay question regarding each of the various out-of-court statements by the children to the psychiatrist and the psychologist by making a judgment as to whether "prejudicial effect outweighs . . . probative value," taking into account that when such statements are not made for the purpose of treatment they have "less inherent reliability than evidence admitted under the traditional common-law standard underlying the physician treatment rule."

In each instance the trial court must also decide, in addition to the hearsay question, the relevancy question. **[**18]** This means only the statements that would qualify as relevant to an issue in the case if the declarant were testifying as a witness at the trial are admissible in any event. Collateral criminal activity is *not* admissible, subject to well recognized exceptions bearing specifically on some issue in the case.

Next, we turn to the business records of the Home of the Innocents. These were admitted into evidence without objection *except* as to those portions which expressed the opinions and conclusions of social workers. Those objections should have been sustained. As stated in *Cabinet for Human Resources v. E.S. and H.S.*, Ky., 730 S.W.2d 929 (1987), entries in the case record made by social workers which constituted statements of factual observations are admissible under the business entry exception to the hearsay rule, but those statements expressing opinions and conclusions are not. Also, as stated in *CHR v. E.S.*

and H.S., there is a "special problem underlying the admissibility of [the social workers'] opinion and conclusions"; such do not qualify as "expert testimony." Thus, as in *CHR v. E.S. and H.S.*, there was trial error in the admissibility of these entries "in **[**19]** toto." In the event of a retrial, the trial court must distinguish between factual observations, which may include the children's out-of-court statements depending on the circumstances, and the opinions and conclusions of the social workers, ruling out the latter.

The appellant, Bruce Drumm, further complains that he was tried in violation of his right to a speedy trial. The record shows that the delays occasioned after he asserted such right were substantially of his own making.

The appellant, Bruce Drumm, further complains that he was prejudiced because he was denied a trial separate from his **[*386]** wife, charging that evidence otherwise inadmissible relating to the "lifestyle" of Karen and Bruce Drumm was introduced at his wife's behest to show that she was a victim rather than a principal in their sexual aberrations. The simple answer to this is that no evidence of unrelated sexual activity should have been admitted, or should be admitted at a next trial, unless such evidence qualifies under recognized principles of relevancy. This means no evidence should be admitted against Bruce Drumm at a joint trial which would not be admissible at his separate trial.

The remaining issues raised **[**20]** by the appellants need not be addressed because they should not reoccur.

In both cases convictions on all charges are reversed, and the case is remanded to the trial court for further consideration in conformity with this Opinion.

Gant, Lambert, Leibson and Wintersheimer, JJ., concur.

Vance, J., dissents by separate opinion in which Stephens, C.J. and Combs, J., join.

Dissent by: VANCE

Dissent

DISSENTING OPINION BY JUSTICE VANCE

I dissent from that portion of the majority opinion which adopts Fed. R. Evid. 803(4). When, as here, we adopt a federal rule of procedure, we must recognize that the rule is not limited in application to the facts of this case. It may have wide-ranging applications to other factual situations not now before us and to which we have given no consideration at all. The question of the adoption of this federal rule has not been briefed. We have not heard argument on the question, and the adoption of a new rule of evidence in this manner flies squarely in the face of our announced policy submitting the proposed adoption of rules to a discussion by the members of the Kentucky Bar Association before they are adopted. We have just completed a two-year process concerning the proposed adoption **[**21]** of Kentucky Civil Rules of Evidence.

Contrary to our established policy, the majority has adopted a new criminal rule of evidence without any discussion or attempt to discover what ramifications may lie hidden in its adoption. Ostensibly, it is adopted to pave the way for the admission into evidence of out-of-court statements of young children and infants made to a physician who was consulted for the purpose of giving testimony at trial. The rule would apparently utilize admission of out-of-court statements insofar as they are pertinent to *diagnosis* and *treatment*, whether or not they are made for the purpose of *diagnosis* and *treatment*. Heretofore, such out-of-court statements have been admitted only when made to a treating physician, not one employed to testify. There is a good reason for this limitation.

A statement to a treating physician to make a diagnosis and to give proper treatment by a person who wants to get well and knows that his recovery may well depend on his telling the truth to his doctor, has an inherent indication of reliability. It is so likely that one would tell the truth under such circumstances that the statement is sufficiently trustworthy to **[**22]** be admitted into evidence.

The same is not true, however, when the physician wears the hat of a paid investigator who has been consulted to testify at trial. The statements made to him are not made under any urgency to tell the truth because the likelihood of recovery of one's health does not depend upon it. There may be cases where the out-of-court statements to the physician employed to testify were precipitated by the basest of motives, including a possible motive of an adult to coach an infant to make statements designed to secure the conviction of a particular accused person.

The adoption of this rule may also have implications for the future in several cases relating to statements made by an unavailable witness to a physician consulted for the purpose of testifying at trial. The purpose of such declarant might not be to insure the recovery of his health, but rather to insure the recovery of a judgment.

I think, also, that we should be particularly cautious about admitting into evidence the out-of-court statements to a physician of any child who is not competent to testify in person because a child whose **[*387]** understanding is not sufficient to allow him to testify might well also **[**23]** fail to understand that the recovery of his health is dependent upon the truth of his statements to the doctor.

The reason we exclude hearsay testimony in any case is that the declarant is not subject to cross-examination and that there is no sufficient guarantee of the trustworthiness of the out-of-court statement. That is the difficulty here. There is no way to determine the trustworthiness of the out-of-court statements of a child whose lack of understanding renders him incompetent to testify. If the out-of-court statements are not allowed in evidence, a child molester may go free. If they are allowed into evidence, an entirely innocent person may be imprisoned.

Our failure to explore the potential consequences of this ruling should preclude its adoption in such a cavalier fashion.

Stephens, C.J., and Combs, J., join in this dissent.

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Gaines v. Commonwealth

Supreme Court of Kentucky

March 12, 1987, Decided

No. 86-SC-39-MR

Reporter
728 S.W.2d 525 *; 1987 Ky. LEXIS 196 **

Paul Gaines, Appellant v. Commonwealth of Kentucky, Appellee

Subsequent History: [**1] Petition for Rehearing Denied May 21, 1987.

Prior History: Appeal from Campbell Circuit Court, Honorable George T. Muehlenkamp, Judge, 85-CR-122.

Disposition: Reversing.

Case Summary

Procedural Posture
Defendant appealed from a decision of the Campbell Circuit Court (Kentucky) convicting him for first-degree sodomy and sentencing him to 20 years imprisonment. He was also challenged his conviction for first-degree sexual abuse and sentence to five years imprisonment.

Overview

Defendant was convicted of first-degree sodomy and first-degree sexual abuse. The prosecution presented the testimony of a child-abuse worker and an employee of the county Department of Juvenile Services, who described their interview with the child. During a videotaped interview with anatomically correct dolls, the child demonstrated and told what happened with defendant, her father. The commonwealth then concluded the trial with the playing of the videotape interview. There was not any physical or medical evidence of the complained-of acts. The videotape was admitted into evidence before the jury pursuant to *Ky. Rev. Stat. Ann. § 421.350(2)*, and characterized by defendant as an unsworn out-of-court statement. On appeal, the court reversed the trial court judgment with directions to grant a new trial. The court held that the statute permitting testimony from a child who had not been declared by the trial court competent to testify as a witness was an unconstitutional infringement on the inherent powers of the judiciary, as declared in *Ky. Const. §§ 27, 28*. The court further held that this statute was a legislative interference with the orderly administration of justice.

Outcome
The court reversed the judgments of the trial court that convicted defendant for first-degree sodomy and first-degree sexual abuse with directions to grant a new trial.

Counsel: Rodney McDaniel, for appellant.

David L. Armstrong, Attorney General and Elizabeth Marshall, Asst. Attorney General, for appellee.

Judges: Stephens, C.J., and Gant, Lambert, Leibson, and Stephenson, JJ., concur. Vance, J., dissents. Wintersheimer, J., dissents and files a separate dissenting opinion.

Opinion by: STEPHENSON

Opinion

[*525] Paul Gaines was convicted of first-degree sodomy and sentenced to twenty years' imprisonment. He was also convicted of first-degree sexual abuse and sentenced to five years' imprisonment. We reverse.

The child involved here was four years of age. The prosecution presented the testimony of a child-abuse worker and an employee of the county Department of Juvenile Services, who described their interview with the child; and the videotaped interview with anatomically correct dolls where the child demonstrated and told what happened with Gaines, her father. The Commonwealth then concluded with the playing of a videotape of the interview with the other two witnesses. There was not any physical [**2] or medical evidence of the complained-of acts. The father testified, denying

committing any of the acts.

[*526] This videotape was admitted into evidence before the jury pursuant to KRS 421.350(2), which provides:

> (2) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:
> (a) No attorney for either party was present when the statement was made;
> (b) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;
> (c) The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;
> (d) The statement was not made in response to questioning calculated to lead the child to make a particular statement;
> (e) Every voice on the recording is identified;
> (f) The person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;
> (g) The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and
>
> (h) The child is available [**3] to testify. If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

This videotape is characterized by Gaines as an unsworn out-of-court statement. The videotaped interview is described by the Commonwealth as a "statutorily acceptable admission of an unsworn out-of-court statement."

Gaines unsuccessfully moved to suppress the videotape. We are of the opinion that the trial court erred when it admitted the tape into evidence. There are other issues preserved by Gaines, but in view of our holding on the tape, we will not discuss these issues.

It is fundamental to our system of jurisprudence that a witness in a case not be permitted to testify unless the proffered witness shall first undertake a solemn obligation to tell the truth. This ordinarily will be by oath or affirmation (KRS 454.170). In the case of very young children, after a determination by the trial court that the child is competent to testify, it is within the discretion of the court whether it is appropriate, in addition, to administer a formal oath.

From our review of [**4] cases in this jurisdiction relating to the competency of children to testify as witnesses, there is a common thread that the trial court should test the child to determine if the child is sufficiently intelligent to observe, recollect, and narrate the facts and has a moral obligation to speak the truth. These cases are compiled in 22 Ky. Digest 2d, Witnesses, Keys 40(1), 40(2), and 45(2). It is apparent that there has not been an issue raised in the cases as to whether a formal oath should be administered to the child after the trial court has determined the child is competent to testify. It is apparent that this has been left to the good judgment of the trial court to decide whether a solemn obligation to tell the truth is to be reinforced with a formal oath in the case of very young children. In any event, after a child has been found competent to testify, the child becomes a witness the same as any other witness who has taken an oath or affirmed.

The proposition that a witness in a court of law must take a solemn obligation to tell the truth is as old as our jurisprudence. In this jurisdiction, for example, we have said in Whitaker v. Commonwealth, 297 Ky. 279, 179 S.W.2d 448, [**5] 451 (1944), involving a five-year-old boy, that a child having sufficient natural intelligence and being so instructed as to comprehend the nature of the act of telling the truth and consequence of willful falsehood must be permitted to testify.

Also, in Jackson v. Commonwealth, 301 Ky. 562, 192 S.W.2d 480, 481-2 (1946), we said that whether a child is old enough to testify is not measurable by any unalterable rule as to age, but the court should make inquiry into the child's qualifications, [*527] and determine whether he is sufficiently intelligent to observe, recollect, and narrate the facts, and has a sense of obligation to speak the truth, and, if so, should permit the child to testify, leaving the question of weight to be given his testimony for the jury.

That these propositions rest on historical foundations as ancient as our law is found in Blackstone, *Commentaries on the Laws of England*, Blackstone, Sharswood (1878), Vol. II, Book III, Chapter 23, Private Wrongs, page 369:

> . . . This compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, are of

> excellent use in the thorough investigation [**6] of truth; and, upon the same principle, in the Athenian courts, the witnesses who were summoned to attend the trial had the choice of three things: either to swear to the truth of the fact in question, to deny or abjure it, or else to pay a fine of a thousand drachmas.

and, on page 371:

> The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the whole truth; so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury; . . . .

This illustrates the concept that before being a witness in a court of law there must be demonstrated a solemn obligation to tell the truth. This has been applied to children proffered as witnesses; for example, see *The King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202(1779) (12J) :

> The Judges assembled at Serjeants'-Inn Hall 29 April 1779, were unanimously of opinion, That no testimony whatever can be legally received except upon oath; and that an infant, though under [**7] the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath (see *White's* case, post, 430, Old Bailey October Session, 1786), for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received. The Judges determined, therefore, that the evidence of the information which the infant had given to her mother and the other witness, ought not to have been received.

We are of the opinion the statute which permits testimony from a child who has not been declared by the trial court competent to testify as a witness is an unconstitutional infringement on the inherent powers of the judiciary, as declared in *Sections 27* and *28 of the Constitution of Kentucky.*

Ky. Const. § 27 provides:

> The powers of the government [**8] of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Ky. Const. § 28 provides:

> No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

We are of the further opinion that this statute, authorizing a child to be a witness without first having undertaken a solemn obligation to tell the truth, is a legislative interference with the orderly administration of justice.

The Commonwealth's assertion that the videotape is a statutorily acceptable admission of an unsworn out-of-court statement [*528] presents the issue which we have decided impinges upon the authority of the judiciary to conduct an orderly system of justice; thus the admission of the videotape into evidence was error. See also *81 Am Jur 2d, Witnesses, §§ 1, 69, 86, 88, 89, 92, 93,* and *413,* which essentially state that a witness is a person whose [**9] statements under oath are received as evidence for some purpose -- that a young child offered as a witness must possess a sense of obligation to tell the truth, and the competency of a child is determined by the trial court after investigating the child's capacity to observe and remember the matters about which testimony is sought.

The Commonwealth speaks of exceptions to the hearsay rule and cites *McClure v. Commonwealth, Ky. App., 686 S.W.2d 469 (1985),* as authority. There, hearsay statements of a child were held to be within the res gestae rule. We point out that the witness who testified to these statements was undoubtedly sworn or affirmed to speak the truth. This line of reasoning by the Commonwealth is not in point with the issue.

Further, that the child was available for cross-examination does not cure the fatal flaw in permitting the child to testify without having the trial court first determine that the child was competent to be a witness.

In view of our holding, we do not consider the other assignments of error.

The judgment of the trial court is reversed with directions to grant a new trial.

Stephens, C.J., and Gant, Lambert, Leibson, and Stephenson, JJ., concur.

[**10] Vance, J., dissents.

Wintersheimer, J., dissents and files a separate dissenting opinion.

Dissent by: WINTERSHEIMER

Dissent

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent because I believe the statute is constitutional. I would interpret the law so as to provide that competency of the child witness be judicially determined before the evidence in question could be admitted.

In 1978 this Court adopted the federal definition of "unavailability" of a declarant for the purpose of excepting from the hearsay rule declarations against interest. *Crawley v. Commonwealth, Ky., 568 S.W. 2d 927 (1978)*; See also *Motorists Mutual Insurance Co. v. Hunt, Ky. App., 549 S.W. 2d 845 (1977)*.

The statute requires the child to be competent to stand for cross-examination. *KRS 421.350(2)* makes clear that the inability to cross-examine the child, because of unavailability renders the videotaped statement inadmissible. Therefore, the statute not only envisions but necessitates a judicial determination of the child's competency *before* admission of the videotaped statement into evidence. There is no encroachment into the judiciary's function of insuring the orderly administration [**11] of justice nor a violation of the doctrine of separation of powers. I believe the law is not constitutionally infirm.

The prosecution case was principally the unsworn, out-of-court statement made by the four-year-old victim. There was no physical or medical evidence. Two social workers testified relative to the taking of the statement. The prosecution concluded the case by the playing of the videotaped statement. The victim was present and available in court but was not called as a witness. The defense did not call her either. Gaines testified in his own defense and denied committing any of the alleged offenses. The jury found him guilty of both charges.

The statutory plan of *KRS 421.350(2)* provides ample opportunity to test the credibility of the evidence and the evidence was sufficient for the jury to find guilt in this case. The videotaped interview of the victim is a statutorily acceptable admission of an unsworn, out-of-court statement and as such is a recognized exception to the hearsay rule. The evidence presented is comparable to any other case in which the victim gives an eyewitness account of the crime. Here the child victim is an eye witness to the alleged crime and the [**12] statement was [*529] taken out of court by means of video tape. The victim was available at trial and physically present for full and complete examination. The defendant did not choose to exercise this right. The trial judge correctly overruled the motion for directed verdict. There was sufficient credibility in the statements of the victim to create a jury question between the opposing testimony of the victim and her father who totally denied the offenses.

The interview with the victim was conducted under circumstances which enhanced the believability of her statement. The videotaped interview was conducted at 4 p.m. on May 3, 1985, only five hours after the initial interview at 11 a.m. the same day. There was no evidence of any contact in the interim by the social workers so as to permit any influencing or rehearsing of the taped statement.

Gaines waived his right to cross-examine the victim. *KRS 421.350(2)(h)* provides the right to cross-examine by requiring that the child victim be available to testify upon the call of either party. The child victim was physically present and available to be sworn and called as a witness. Gaines did not choose to call her for cross-examination [**13] and consequently waived his right to claim on appeal that confrontation was denied.

I am persuaded that *Jolly v. State, Tex. App., 681 S.W. 2d 689, 695 (1984)*, is correct when it held that a defendant could not claim on appeal that he was denied the right to confront and cross-examine a child victim when the defendant had chosen not to call the child to testify at trial even though she was available. *See Also Alexander v. State, Tex. App., 692 S.W. 2d 563 (1985)*. The Texas statute is very similar to *KRS 421.350*. Additional support for the valid constitutional foundation for the statutory plan may be found in *Eastman v.*

Commonwealth, Ky. App., 720 S.W. 2d 348 (1986); "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations", *98 Harvard Law Review 806 (1985)*; and "The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?" Comment, 40 U. of Miami Law Review 245 (1985).

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taken, discretionary review would not have been granted, and this Court would not have considered the matter and rendered an opinion. A great deal of legal and judicial time could have been saved if the law and well-established Kentucky practice had been followed originally.

I respectfully dissent from the majority opinion because the mortgage in question had not been signed at the end prior to being filed for recording. The Court of Appeals was correct when it determined that First National did not have actual notice of the mortgage in controversy.

The mortgage would be enforceable as an equitable mortgage but only between the parties to the document and, thus, would have no effect on First National. The Court of Appeals correctly determined that in order to be enforceable, the first mortgage would have to be signed by the party to be charged with it pursuant to the Statute of Frauds, KRS 371.010. Any document which requires a signature is to be signed at the end of the writing. KRS 446.060. KRS 382.270 requires that a mortgage be acknowledged or proved and recorded in the proper office, which is generally considered to be the office of the county clerk. The signature at the end of Schedule C in this case was not sufficient to validate the mortgage.

It has been held that a mortgage which has not been acknowledged nor proved is not recordable and is not valid nor does it give notice to subsequent creditors. *Starr Piano Co. v. Petrey,* 168 Ky. 530, 182 S.W. 624 (1916). The trial court found that there was no valid evidence that First National had actual notice of the existence of a valid first mortgage.

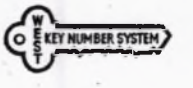
In addition, it has been previously held that an equitable mortgage cannot relate back to the date of an attempted legal mortgage and can be enforced only as of the date of a court adjudication that it was an equitable mortgage. *Borg-Warner Acceptance Corp. v. First National Bank of Prestonsburg,* Ky.App., 577 S.W.2d 29 (1979). Certainly, in certain circumstances, an equitable lien can take priority over a subsequent valid and recorded mortgage acquired by actual notice. *Tile House, Inc. v. Cumberland Federal Savings Bank,* Ky., 942 S.W.2d 904 (1997). *Tile House, Inc.* does not apply because the instrument in question was never signed in conformity with the requirements of the Statute of Frauds.

The trial judge was not clearly erroneous when he found that the mortgage document did not contain a signature at the end, was not acknowledged or proved and contained no source of title. Consequently, he determined that there was no actual notice based on the record before him.

It would appear that this case could have easily been resolved through the exercise of professional diligence in obtaining a signature at the end of the document, properly acknowledged, with a source of title.

I would affirm the Court of Appeals and the circuit court.

LAMBERT, J., joins in this dissent.



James Arthur DANNER, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

No. 96-SC-1136-MR.

Supreme Court of Kentucky.

Feb. 19, 1998.

Defendant was convicted in the Boyd Circuit Court, C. David Hagerman, J., of two counts of first-degree sodomy, and one count of first-degree rape, and he appealed. The Supreme Court, Lambert, J., held that court properly allowed child victim, who was defendant's daughter, to testify in camera.

Affirmed.

1. Witnesses ⇐228

Statute allowing alleged victims of illegal sexual activity who are 12 years of age or younger to testify through closed circuit television or taped video was intended to protect child victims 12 and under when crimes were committed against them and who remain children at time of trial. KRS 421.350.

2. Witnesses ⇐228

In deciding whether to allow child victim of illegal sexual activity to testify through closed circuit television or taped video, trial court must have wide discretion to consider age and demeanor of victim, nature of offense, and likely impact of testimony in court or facing defendant. KRS 421.350(2, 3).

3. Witnesses ⇐228

When making compelling need determination of whether child victim of illegal sexual activity should be allowed to testify through closed circuit television or taped video, court should consider, especially in case where child is older than 12, age of victim, and time which has elapsed from crime to date of trial. KRS 421.350(2, 3).

4. Criminal Law ⇐661, 1153(1)

Presentation of evidence is within sound discretion of trial judge, and will not be disturbed absent abuse of discretion.

5. Witnesses ⇐228

Allowing 15–year–old victim, who was defendant's daughter and was between five and ten years old at time of alleged offenses, to testify through closed circuit television was not abuse of discretion in prosecution for sodomy; court found that due to nature of testimony and age of victim that face-to-face arrangement would inhibit victim to a degree that jury's search for truth would be clouded. KRS 421.350.

Michael J. Curtis, Ashland, for Appellant.

A.B. Chandler III, Attorney General, Dina Abby Jones, Assistant Attorney General, Frankfort, for Appellee.

LAMBERT, Justice.

Appellant, James Arthur Danner, was convicted in the Boyd Circuit Court of two counts of sodomy in the first degree, and one count of rape in the first degree. He was sentenced to twenty-four years imprisonment on each count to run concurrently for a total of twenty-four years imprisonment. He appeals as a matter of right.

The victim of appellant's sex crimes was his daughter. She was between the ages of five and ten years old when appellant sexually abused her, but she was fifteen by the time appellant was brought to trial. Because the Commonwealth felt that the victim could not testify in the presence of appellant, it sought to have her testimony taken outside appellant's presence pursuant to KRS 421.350. The Commonwealth moved for an *in camera* interview with the victim so that the court could determine whether there was "compelling need" for the victim to testify through closed circuit television or taped video recording pursuant to that statute. Appellant objected, arguing that the fifteen year old victim was too old under the statute to be allowed to testify outside the courtroom, and even if not, that the Commonwealth had failed to establish the required compelling need for her testimony to be taken in that manner.

The trial court granted the Commonwealth's motion and interviewed the victim *in camera*. After the interview, the trial court determined that compelling need was shown and allowed the victim to testify through closed circuit television.

I. THE AGE PROVISION OF THE STATUTE

[1] The first issue is whether the age provisions of KRS 421.350 refer to the age of the victim when the crime was committed or when the testimony is given. *See generally, Commonwealth v. Willis*, Ky., 716 S.W.2d 224 (1986). KRS 421.350(1) defines the class of persons allowed to testify outside the presence of the accused:

421.350 Testimony of child allegedly victim of illegal sexual activity

(1) This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under KRS 510.040 to 510.150, 529.030 to 529.050, 529.070, 530.020, 530.060, 530.064, 531.310. 531.320, 531.370, and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies to the statements or testimony of that child or another child who is twelve(12) years of age or younger who witnesses one of the offenses included in this subsection.

The Commonwealth and appellant disagree on when the age determination is to be made. The Commonwealth focuses on the age of the victim at the time the crime was committed, and contends that since the victim in this case was under twelve when the crimes were committed against her, she should be allowed benefit of the statute. Appellant focuses on the age of the victim at the time of the trial, and counters that a victim who is older than twelve at the time of trial can not so testify.

As applied to the facts of this case, the statute must be regarded as ambiguous. One portion clearly refers to the age of the victim when the act is committed, but another portion refers to the age of the victim when the testimony is given. The statute assumes the age will be the same, but in fact, it often will not. Despite the ambiguity as here applied, we believe legislative intent is to protect child victims twelve and under when the crimes were committed against them and who remain children [1] at the time of trial. The statute does not preclude this interpretation and its language focuses on the age of the child when the crime was committed: "[t]his section applies ... when the act is alleged to have been committed against a child twelve years of age or younger ..." KRS 421.350(1). To hold otherwise would permit the untoward result of disallowing the protections of the statute to a child who was twelve when the sex crimes were committed, but who had turned thirteen before the trial of the accused. Such a result would be contrary to the broad protective purpose underlying the statute.[2]

II. THE TRIAL COURT'S FINDING OF COMPELLING NEED

[2, 3] The trial court's inquiry does not end with an age determination. Rather, the court must also find compelling need for such procedures, as required by KRS 421.350(2),(3) before the child victim will be allowed to testify as per the statute. This Court has enumerated certain factors a trial court should consider in making a compelling need determination: "the trial court must have wide discretion to consider the age and demeanor of the child witness, the nature of the offense and the likely impact of testimony in court or facing the defendant." *Commonwealth v. Willis*, Ky., 716 S.W.2d 224, 230 (1986) (emphasis added). Other factors a trial court should consider when making a compelling need determination, especially in a case where the child is older than twelve, are the age of the victim, and the time which has elapsed from the crime to the date of trial.

[4] The trial court has broad discretion in this area. The "presentation of evidence" is within the sound discretion of the trial judge, and will not be disturbed absent abuse of discretion. *Moore v. Commonwealth*, Ky., 771 S.W.2d 34, 38 (1989), *cert den., Moore v. Kentucky*, 494 U.S. 1060, 110 S.Ct. 1536, 108 L.Ed.2d 774 (1990). Abuse of discretion could be found where a child was allowed to testify outside the presence of the accused provided "the prosecution [was] unable to show any necessity for the use of the statute." *Willis, supra* at 229–230.

[5] In the case at bar, the trial court interviewed the child victim in camera, and

1. Although "child" is not defined for the purposes of KRS Chapter 421, "child" has been defined in other KRS sections as a person who has not yet reached her eighteenth birthday. KRS 15.900, KRS 199.011, and KRS 600.020.

2. This statute is in line with the special treatment Kentucky courts have long afforded child witnesses. *See Meredith v. Commonwealth*, 265 Ky. 380, 96 S.W.2d 1049 (1936); *Peters v. Commonwealth*, Ky., 477 S.W.2d 154 (1972); *Commonwealth v. Willis*, Ky., 716 S.W.2d 224 (1986). The statute itself was recently broadened so that now, in addition to child *victims*, child *witnesses* may also testify outside the presence of the accused. 1996 Ky. Acts ch. 178, sec. 1, effective July 15, 1996.

then determined that compelling need justified the use of KRS 421.350 procedures. The trial court considered the testimony the child would give at trial, and the age of the child in making its determination. The Court stated: "... the Court is convinced that due to the nature of the testimony and the age of the witness that face-to-face arrangement would inhibit the witness to a degree that the jury's search for the truth would be clouded." The trial court was convinced that the victim would not be able to testify in the presence of appellant, and in the interest of presenting all evidence to the jury it made the determination of compelling need:

> the compelling need is not based on convenience or comfort level of the witness so much as it is the need to be able to disclose the testimony so that the jury itself can determine whether they want to accept or reject same or what weight should be given.

This Court has similarly held that where the trial judge found that the child would not testify as to the offense and was reluctant to testify in the presence of the accused, that "... putting the child through the ordeal of testifying in open court may denigrate the reliability of her testimony. (citation omitted)." *Willis, supra* at 230.

Appellant argues that the trial court's determination of compelling need was based on an insufficient expertise in analyzing the controlling factors, because "[o]ne judge, one man alone, unqualified in behavioral sciences, made the determination, without additional facts or opinions, that the alleged victim could not testify in open court." Contrary to appellant's view, decisions such as this fall precisely within the judicial role. The trial court did not abuse its discretion in this case, and based its determination of compelling need on appropriate factors.

For the forgoing reasons, the judgment of the Boyd Circuit Court is affirmed.

All concur.

REVENUE CABINET, COMMONWEALTH OF KENTUCKY, Appellant,

v.

Michael L. WYATT and Mary Wyatt, Appellees.

Nos. 96–CA–3171–MR, 96–CA–3475–MR.

Court of Appeals of Kentucky.

Feb. 27, 1998.

In proceeding to determine income tax liability, the Circuit Court, McCracken County, R. Jeffrey Hines, J., determined that portions of corporation's sale price attributable to goodwill and a covenant not to compete were exempt from taxation under Enterprise Zone Act. Taxing authority appealed. The Court of Appeals, Schroder, J., held that: (1) portion of sale price attributable to goodwill was exempt from taxation; (2) portion of sale price attributable to covenant not to compete was not exempt from taxation; and (3) taxpayers were not entitled to attorney fee award.

Affirmed in part, reversed in part, and remanded.

1. Taxation ⇐1048.1

Goodwill was corporate asset, and, therefore, constituted an interest in the corporation; accordingly, portion of corporation's sale price attributable to goodwill was exempt from income taxation pursuant to Enterprise Zone Act. KRS 154.655(6)(c), 154.690(1) (1991).

2. Taxation ⇐1048.1

Covenant not to compete was agreement which personally bound corporation's sole shareholder, not an interest in the corporation, and, therefore, portion of corporation's sale price attributable to covenant not to compete was not exempt from income taxa-

J.E. v. Commonwealth

Court of Appeals of Kentucky

April 28, 2017, Rendered

NO. 2016-CA-000116-ME

Reporter
521 S.W.3d 210 *; 2017 Ky. App. LEXIS 99 **; 2017 WL 1533786

J.E., A CHILD UNDER EIGHTEEN, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE

Subsequent History: Released for Publication July 14, 2017.

Prior History: [**1] APPEAL FROM KENTON CIRCUIT COURT. HONORABLE GREGORY M. BARTLETT, JUDGE. ACTION NO. 15-XX-00008.

Case Summary

Overview
HOLDINGS: [1]-A district court did not abuse its discretion in finding the child victim competent to offer testimony where the victim demonstrated an understanding of the difference between truthfulness and lying and the consequences of lying in a court proceeding, and nothing in case law required an expert evaluation to determine the competency of a child witness; [2]-The district court abused its discretion and violated the juvenile's right to confrontation in erecting screens to obstruct his views of the child witness during her testimony where there was no evidence of a compelling need to modify the courtroom environment; [3]-The constitutional error was not harmless given the reasonable probability that the victim's testimony contributed to the conviction; [4]-The district court did not commit palpable error in allowing the grandmother to encourage the victim during testimony.

Outcome
Rulings affirmed in part; conviction reversed.

Counsel: BRIEF FOR APPELLANT AND AT ORAL ARGUMENTS: Kathleen K. Schmidt, Frankfort, Kentucky; Renee Sara Vanderwallbake, Frankfort, Kentucky.

BRIEF FOR APPELLEE AND AT ORAL ARGUMENTS: Andy Beshear, Attorney General of Kentucky; Christopher S. Nordloh, Assistant Attorney General, Covington, Kentucky.

Judges: BEFORE: CLAYTON, DIXON AND D. LAMBERT, JUDGES. ALL CONCUR.

Opinion by: LAMBERT, D.

Opinion

[*211] AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

LAMBERT, D., JUDGE: This matter comes before this Court for discretionary review of a decision by the Kenton Circuit Court, sitting in appellate jurisdiction of a decision by the Kenton District Court. The Appellant, J.E., a minor, seeks review of the Circuit Court's affirmation of the District Court's adjudication of his guilt of the offense of Sodomy in the First Degree where the victim was under the age of twelve years.

The Appellant (hereafter, J.E.), contends that the Kenton District Court committed several reversible errors. J.E. argues the trial court improperly found the eight-year-old victim competent to testify. He also contends that the District Court [*212] violated the *Confrontation Clause of Sixth Amendment* by placing screens [**2] between himself and victim during her testimony. He also asserts the District Court committed error in allowing the victim's grandmother to sit near her and hold her hand during testimony, though he failed to properly preserve this claim of error. J.E.'s final argument challenges the District Court's finding that the evidence was sufficient to show guilt. Having reviewed the record, we affirm the District and Circuit Courts' rulings as to the issues relating to the child victim's competency and the grandmother's alleged interference in the victim's testimony.

However, we also conclude that the screening procedures implemented by the District Court violated the *Confrontation Clause* contained in the *Sixth Amendment of the U.S. Constitution*. We further conclude that the trial court's ruling regarding the sufficiency of the evidence, in light of our conclusion regarding the confrontation issue, cannot stand. Consequently, we must reverse as it relates to those two issues.

I. FACTUAL AND PROCEDURAL HISTORY

The Cabinet for Health and Family Services ("CHFS"), removed the victim and her brother from their home, and placed them with their father on July 18, 2013. At the time, the victim was 6 years old, and the brother was 10 years old. The father's residence [**3] had two bedrooms, but housed six people, including the Appellant, age 14 at the time. The victim shared one of those bedrooms with her brother, J.E.,[1] and another boy.

During a visit by a CHFS social worker, the victim disclosed that J.E. had touched her in the genital area, and that her brother had caught J.E. in the act. The children were subsequently interviewed at the Children's Advocacy Center ("C.A.C."). The victim gave a statement that J.E. had "licked my kitty cat," (which is the name by which she referred to her vagina) and her brother gave a statement indicating that he had gone into the bedroom and pulled the covers off the bed to find J.E. stroking the victim's genitals with his fingers and digitally penetrating her. J.E. gave a statement (and later offered similar testimony at the adjudication hearing) that the victim had asked him to perform these acts, but he refused her requests. J.E. also stated that he would have told his mother about the victim's behavior, but the mother was heavily under the influence of drugs and would not have acted on this information.

CHFS subsequently removed the children from their father's home and placed them with other relatives.

The juvenile [**4] complaint alleging J.E. had committed sodomy was sworn on December 12, 2013. The Kenton District Court conducted a competency hearing for the victim and the brother on August 20, 2014. The victim gave satisfactory responses to questions regarding the difference between telling the truth and lying, but refused to answer the District Court's questions about the incident giving rise to the charges. The court stated that there was a potential issue with the victim's ability to recall facts, but deferred ruling on her competency until the date of the adjudication hearing. The court also denied the defense's request to have a psychologist examine the victim and determine her [*213] competency. The District Court found the brother competent without issue.

The District Court conducted a hearing on January 14, 2015, which related to confrontation issues. At the outset of this hearing, Commonwealth noted that the victim and her brother had not yet been evaluated by a psychologist, and consequently conceded that a compelling need for testimony by closed circuit television under KRS 421.350 could not be shown. The District Court then heard arguments from all parties, including the victim's guardian *ad litem*, regarding [**5] what procedures should be put in place under KRS 26A.140 to shield the child victim from the alleged perpetrator of the offense against her. The court noted that the victim was "extremely hesitant" to testify, and concluded that screens were necessary in order to allow the child to do so under KRS 26A.140.

The final adjudication hearing took place on March 20, 2015. Noting that the victim had "expressed apprehension" at the idea of testifying while able to see J.E. and vice versa, the District Court, pursuant to KRS 26A.140, directed that shields be set up to obstruct the view of the defense table from the witness stand during her testimony. The District Court heard the defense arguments that the *Confrontation Clause* required the Commonwealth to show compelling need for obstructing the defendant's view of the witnesses, but, relying on its earlier conclusion, ultimately allowed the shields. The victim was the only witness so screened. The district court also allowed the victim's grandmother, who was her custodian and guardian, to sit beside the victim as she testified from counsel's table.

Before the adjudication hearing commenced, the court again conducted a brief hearing to determine whether the victim possessed the competency to offer [**6] testimony. The court was satisfied with her responses to questions intended to reveal whether the victim understood the difference between telling the truth and lying. When asked about details from the alleged incident, the victim appeared hesitant to answer, but after encouragement from her grandmother, gave responses that satisfied the court that she was capable

[1] J.E. is the son of the significant other of the father of the victim, and is thus not related to the victim.

of recalling facts and relaying them to others. The district court thus found the victim competent.

The Commonwealth's case consisted of the victim's testimony and that of her brother. The victim, who was by then 8 years old, testified that J.E. had licked her genitals under the covers of the bed they shared, as well as touched her with his fingers. She testified that her brother witnessed this behavior when he entered the room and pulled the covers off the bed. Defense counsel impeached this testimony by pointing out that the victim had denied any digital contact in her C.A.C. statement. The brother testified that he had seen J.E. licking the victim's genital region "where she pees," as well as stroking her and digitally penetrating her. Defense counsel impeached this testimony using the brother's C.A.C. statement that failed [**7] to mention seeing any oral-genital contact.

J.E.'s case consisted of the testimony of himself and the investigating officer from the Erlanger Police Department. J.E. testified that on the night in question, the victim had asked him to lick her vagina, and when he refused, she went into the bedroom on her own. J.E. then testified that the brother emerged from the bedroom and informed him "Well, I did it." J.E. further testified that he would have told his mother, but for her intoxicated and unconscious state. The investigating officer testified that J.E. had maintained his innocence and that J.E.'s hearing testimony was consistent with a statement he had previously given to law enforcement.

[*214] After the close of evidence, the District Court noted that it found the testimony of the victim and her brother credible, and the testimony of J.E. lacked credibility. The District Court concluded that the evidence did not prove beyond a reasonable doubt that J.E. had engaged in deviant sexual contact by manual contact, but the evidence did prove beyond a reasonable doubt that the oral-genital contact had occurred, and such contact satisfied the elements of first-degree sodomy on a victim under the [**8] age of twelve.

The court adjudged J.E. guilty of a Class A felony sexual offense and he was committed to the custody of the Department of Juvenile Justice. The Department of Juvenile Justice conducted a juvenile sexual offender assessment, concluding that J.E. presented a low risk of re-offense, and displayed no signs of sexual preoccupation or deviant sexual fantasies.

J.E. filed a timely appeal to the Circuit Court, wherein he argued the same errors alleged before this Court. The Circuit Court affirmed the District Court. Specifically, the Circuit Court held that the District Court: did not abuse its discretion in finding the victim competent to testify, had made a finding of compelling need sufficient to justify the intrusion upon J.E's right to confrontation, did not err when allowing the grandmother to reassure the victim during her testimony, and that the District Court had correctly concluded the evidence was sufficient to support the adjudication of guilt. The Circuit Court held that although use of closed circuit television method to screen "is preferred, the limitation of the Appellant's right to confront by use of screen[s] in this matter was harmless given the totality of the circumstances." [**9]

J.E. then moved this Court to exercise discretionary review, which this Court granted.

II. ANALYSIS

A. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE VICTIM COMPETENT TO OFFER TESTIMONY

Rule 601 of the Kentucky Rules of Evidence ("KRE") provides that a witness is competent unless that witness: 1) lacks the capacity to accurately perceive the matters about which the witness proposes to testify; 2) lacks the capacity to recall facts; 3) lacks the capacity to express himself or herself so as to be understood, either directly or via interpreter; and 4) lacks the capacity to understand the obligation to tell the truth. *KRE 601(b)(1)-(4)*.

With regard to the competency of child witnesses, "[i]t seems to be rather well settled that no rule defines any particular age as conclusive of incapacity." *Thomas v. Commonwealth, 300 Ky. 480, 189 S.W.2d 686, 687 (Ky. 1945)*. This rule was echoed as recently as 2002: "Age is not determinative of competency and there is no minimum age for testimonial capacity." *Pendleton v. Commonwealth, 83 S.W.3d 522, 525 (Ky. 2002)*. Additionally, the burden of rebutting the presumption of competency is on the party seeking exclusion of the witness' testimony. *Barton v. Commonwealth, 300 S.W.3d 126, 142 (Ky. 2009)*.

The issue of competency of any witness is squarely within the discretion of the trial court. *Bart v. Commonwealth, 951 S.W.2d 576, 44 10 Ky. L. Summary 11 (Ky. 1997)*; *Wombles v. Commonwealth, 831 S.W.2d 172, 39 5 Ky. L. Summary 49 (Ky. 1992)*.

Additionally, "[c]ompetency is an ongoing determination for a trial court," which continues throughout [**10] the proceedings, even after any competency hearing has been completed. *B.B. v. Commonwealth, 226 S.W.3d 47, 49 (Ky. 2007)* (citing *Kentucky [*215] v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)*).

The Circuit Court reviewed the competency proceedings and concluded the District Court had not abused its discretion in concluding she was competent. Having reviewed the same proceedings, we agree. The victim demonstrated an understanding of the difference between truthfulness and lying, as well as the consequences of lying in a court proceeding. Despite J.E.'s insistence, based on the answer to one question, that the victim did not understand that she was not allowed to guess at the answers, the victim stated that she did not know the answers to several other questions rather than offering guesses. The victim demonstrated an ability to express herself clearly and an ability to recall facts.

J.E. nonetheless contends before this Court that in instances where a child witness' competency is in question, an expert evaluation is vital, and is even required by due process and fundamental fairness. J.E. cites *Mack v. Commonwealth, 860 S.W.2d 275 (Ky. 1993)*, to support that position. However, that case can easily be distinguished from the facts at hand. In *Mack*, the child witness had previously been treated by a psychiatrist for post-traumatic stress related [**11] to a prior incident of sexual abuse, and the defense alleged—with medical evidence in hand—that the child may have been exhibiting transference when making the allegations against the defendant. *Id. at 277-78*. The prior acts had occurred six years before the acts of which the victim complained, and the defense sought to introduce medical evidence tending to show some similarities between the prior sexual abuse of the witness and the new allegations. *Id. at 278*. The Supreme Court's ultimate ruling hinged on the Court's belief "that the circumstances in the present case indicate a substantial possibility that a defense or independent expert would provide genuinely relevant and beneficial evidence on the question of concoction or transference from the child's unfortunate past." *Id. at 277*.

We disagree with J.E.'s contention that *Mack* requires an expert evaluation to determine the competency of child witnesses. By its own language, the holding of *Mack* appears limited to the narrow set of facts presented in that case, that is, where the witness' history of mental health issues presented a legitimate risk that the witness had an inability to differentiate between one instance of abuse and another. Here, the defense lacks [**12] an allegation, let alone medical evidence, of any "unfortunate past" of this victim. Only this one incident is alleged. *Mack* cannot apply here, and we cannot conclude the District Court abused its discretion in either denying J.E.'s request for an expert evaluation.

From the record, we cannot conclude that the District Court abused its discretion in finding the victim competent to testify.

B. THE SCREENS OBSTRUCTING THE APPELLANT'S VIEW OF THE VICTIM AS SHE TESTIFIED VIOLATED HIS RIGHT TO CONFRONTATION

On this issue, this Court is tasked in this matter with examining the competing interests of the protection of child victims of sexual offenses as witnesses against the right of the accused to confront and cross-examine these children.

Mindful of the infamous 1603 English treason trial of Sir Walter Raleigh, where a wrongful conviction resulted primarily from a dubious accusatory letter, the founding fathers of our nation included in our Constitution the right of an accused [*216] to confront those making the accusations face-to-face. This right has carried forward in our justice system, but *Sixth Amendment* jurisprudence has evolved and now informs us that "while face-to-face confrontation is preferred, the primary [**13] right secured by the *Confrontation Clause* is that of cross-examination" (*Sparkman v. Commonwealth, 250 S.W.3d 667, 669 (Ky. 2008)* (citing *Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)*) and "the right to confront is not absolute and may be limited to accommodate legitimate competing interests." *Id.* (citing *Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)*).

The Supreme Court of the United States held, a factually similar case, *Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)*, that "the irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*." *Coy at 1021* (quoting *California v. Green, 399 U.S. 149, 175, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)* (Harlan, J. concurring) (emphasis in original)). The *Coy* Court did, however, "leave for another day, however, the question

whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy." *Id.*

Two years later the Supreme Court stepped back from the hardline rule of *Coy*, and fleshed out some of those exceptions envisioned in *Coy*. In *Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)*, the court held that the right to face-to-face confrontation may be denied. "In sum, our precedents establish that 'the *Confrontation Clause* reflects a *preference* for face-to-face confrontation at trial,' *[Ohio v.] Roberts, supra, 448 U.S. [56, 63, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)* (*abrogated by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177*)] (emphasis added; footnote omitted), a preference that 'must occasionally give way to considerations of public policy and the necessities of the case.' *Mattox [[**14] v. U.S., 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895)]*." *Craig at 849*.

The Kentucky legislature, by its enactment of *KRS 421.350*, saw fit to address an important public policy interest, the protection of child victims of illegal sexual activity when testifying against the alleged perpetrators. *Sparkman at 669*. The legislature has also announced a related and equally important public policy, that of accommodating the special needs of child witnesses, with the enactment of *KRS 26A.140*.

KRS 421.350 applies in prosecutions of sexual offenses where the victim or a witness is under twelve year of age. In pertinent part, it states:

> (2) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to [**15] an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in [*217] person, but shall ensure that the child cannot hear or see the defendant.
>
> (3) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under *subsection (3)* of this section may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by *subsection (3)* of this section. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:
> (a) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;
>
> (b) The recording equipment [**16] was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;
> (c) Each voice on the recording is identified; and
> (d) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.
> [...]
>
> (5) For the purpose of *subsections (2)* and *(3)* of this section, "compelling need" is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence.

KRS 421.350(2)-(3), (5).

KRS 26A.140 applies in any criminal proceedings requiring the testimony of a child witness. That section provides:

> (1) Courts shall implement measures to accommodate the special needs of children which are not unduly burdensome to the rights of the defendant, including, but not limited to:
> [...]
> (b) During trials involving child victims or child witnesses, the environment of the courtroom shall be modified to accommodate children through the use of small chairs, frequent breaks, and the use of

age appropriate language.

(c) Children expected to testify shall be prepared for the courtroom experience by the Commonwealth's or county attorney handling the case with the assistance of the guardian [**17] ad litem or special advocate.
(d) In appropriate cases, procedures shall be used to shield children from visual contact with alleged perpetrator.

KRS 26A.140(1)(b)-(d).

The Appellant contends that the actions of the District Court, in attempting to comply with KRS 26A.140, violated KRS 421.350 as well as the right to confrontation protected by the *6th Amendment of the federal Constitution* and Section 11 of the Kentucky Constitution. The Commonwealth, in its brief, as well as during oral argument in this matter, conceded that a *Confrontation Clause* violation occurred, instead arguing that the error was harmless and did not merit reversal of the conviction under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

On appeal, the Circuit Court found that no *Confrontation Clause* violation occurred, as the screening resulted from a finding that a compelling need existed to do so, but also noted that any error *in the screening method* was harmless. Specifically, the Circuit Court noted that while the [*218] closed circuit television method of separating child victims from their accusers (the method prescribed in KRS 421.350) would have served the same purpose, no harm resulted from the District Court's use of screens.

We reject the Appellant's contention that compliance with KRS 26A.140 necessarily requires implementation of the procedures set forth in KRS 421.350. The legislature has had ample opportunity to amend [**18] KRS 26A.140 if it intended the phrase "procedures shall be used to shield children from visual contact with alleged perpetrator" to mean compliance with KRS 421.350, or to amend KRS 421.350 to reference KRS 26A.140. We can only interpret the plain meaning of the words, which do not *mandate* taking of child witnesses' testimony via closed circuit television in *either* provision.

On the other hand, we interpret the phrase "not unduly burdensome to the rights of the defendant" from KRS 26A.140 to be analogous to the requirement of a finding of a "compelling need" found in KRS 421.350, as both provisions would require such finding under *Chambers*, *Craig*, and *Sparkman*, in order to comply with the *Confrontation Clause*.

We disagree with the Circuit Court in its conclusion that the District Court satisfied this requirement in finding that the victim was "extremely hesitant" to testify absent some modification of the courtroom environment. Not only did the Commonwealth concede that it had no proof of a compelling need to present during the January 2014 hearing, the District Court took no testimony at all before issuing such a finding. Instead the District Court relied on the Commonwealth's indications that the two child witnesses were apprehensive about being in the same room as [**19] J.E.

Unlike the trial judge in Danner v. Commonwealth, 963 S.W.2d 632, 45 3 Ky. L. Summary 16 (Ky. 1998), the trial court did not make a specific determination that either child witness could or would not testify as to the offense, or that their testimony would be inhibited if given in front of the accused. The compelling need language of KRS 421.350 requires a determination that the child witness would be unable to testify in open court. "'The Kentucky Statute does not provide a blanket process for taking the testimony of every child witness by TV simply because testifying may be stressful.'" Price v. Commonwealth, 31 S.W.3d 885, 894 (Ky. 2000) (quoting George v. Commonwealth, 885 S.W.2d 938, 941, 41 11 Ky. L. Summary 12 (Ky. 1994)).

The Commonwealth having failed to present satisfactory proof of a compelling need before the District Court, we must conclude that the District Court abused its discretion and violated the Appellant's right to confrontation in erecting the screens to obstruct J.E.'s view of the witness during her testimony. Consequently, we must reverse the Circuit Court in affirming the same conclusion.

The issue now becomes one of remedy for the constitutional violation. The Supreme Court held in *Chapman* that not all constitutional violations merit automatic reversal of a conviction. "Although our prior cases have indicated that there are some constitutional rights so basic to a fair [**20] trial that their infraction can never be treated as harmless error, this statement in Fahy [v. Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963)][2] itself belies any belief that all trial

[2] The statement from *Fahy* to which the *Chapman* Court refers is as follows: "The question is whether there is a reasonable

errors which violate the Constitution automatically call for reversal." *Chapman at 827-28*. A conviction may stand, despite a constitutional [*219] error, if that error is not merely harmless, but harmless beyond a reasonable doubt. *Chapman at 828*.

The Circuit Court's opinion affirming concluded that the use of screens rather than closed circuit television was merely harmless. For the purpose of this analysis, we must ignore the challenged evidence, the testimony of the victim, and examine the relative strength of the Commonwealth's case without it. Without the victim's testimony, the trial court would be limited to the testimony of the brother, who gave a prior statement which was inconsistent with his trial testimony. This is significant in that his prior statement lacked any indication of oral-genital contact, and only indicated manual contact with the victim. The brother testified during the adjudication hearing that he witness oral-genital contact. The District Court based its conclusion that J.E. committed first-degree sodomy on the finding of credibility of the victim's [**21] testimony and her brother's, and the lack of credibility of J.E.'s testimony. It is reasonable that the consistency between the victim's testimony and the brother's trial testimony provided a boost in credibility to both. Absent that extra credibility, it is equally reasonable that the inconsistent testimony of the brother would not weigh as heavily against the testimony of J.E. We must conclude that a reasonable possibility exists that the victim's testimony, taken in a situation which violated J.E.'s constitutional right to confront the witnesses against him, contributed to his conviction. It was not, therefore, harmless beyond a reasonable doubt.

C. THE DISTRICT COURT, IN ALLOWING THE GRANDMOTHER TO ENCOURAGE THE VICTIM DURING TESTIMONY, DID NOT COMMIT PALPABLE ERROR

The Court's analysis now moves to the unpreserved error relating to the grandmother's encouragement of the victim.

> Under RCr 10.26, an unpreserved error may generally be noticed on appeal *if* the error is "palpable" and *if* it "affects the substantial rights of a party." Even then, relief is appropriate only "upon a determination that manifest injustice resulted from the error." RCr 10.26. "For an error to rise to the level of palpable, 'it [**22] must be easily perceptible, plain, obvious and readily noticeable.'" *Doneghy v. Commonwealth, 410 S.W.3d 95 (Ky. 2013)* (quoting *Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky.2006)*). Generally, a palpable error affects the substantial rights of the party "only if it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth, 160 S.W.3d 744, 762 (Ky. 2005)*.

Martin v. Commonwealth, 409 S.W.3d 340, 345 (Ky. 2013).

The Appellant's argument on this issue amount to little more than speculation and self-serving conclusory allegations. He argues that the trial court found the two child witnesses, the victim in particular, more credible as the result of the "suggestive reinforcement" by the grandmother during testimony. He argues, entirely without support, that "well-meaning reassurances and reinforcement can taint a child's recollection and testimony." He extended his argument that this somehow bolstered the credibility of these witnesses and the outcome was affected because "the court is not immune to the effect of credibility bolstering any more than juror would be."

However, there is no evidence or even allegation that the grandmother fed answers to either witness or even said anything [*220] beyond comforting reassurances to the small children in her care in a stressful situation. We cannot conclude that this interference more likely than not affected the outcome of the [**23] hearing. Though irregular and something the District Court should have admonished her against doing, we cannot conclude that the grandmother's behavior rises to the level of palpable error.

D. THIS COURT'S CONCLUSION RELATING TO THE CONSTITUTIONAL VIOLATION PROHIBITS THE CONCLUSION THAT EVIDENCE WAS SUFFICIENT TO SUPPORT THE DISTRICT COURT'S FINDING OF GUILT

Appellate review of the sufficiency of the evidence in a juvenile proceeding is whether any rational finder of fact, taking the Commonwealth's evidence in the most favorable light, could find the essential elements of an offense are satisfied beyond a reasonable doubt. *R.S. v. Commonwealth, 423 S.W.3d 178, 187 (Ky. 2014)* (quoting *Jackson v. Virginia, 443 U.S. 307, 99 S.Ct.*

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possibility that the evidence complained of might have contributed to the conviction." *Fahy at 86-87*.

2781, 61 L.Ed.2d 560 (1979)).

J.E. alleges three reasons to justify finding that the evidence presented failed to meet that standard. First, he argues that the victim's competency was questionable. Second, he argues that the brother's testimony suffered from credibility issues. Third, he argues that the District Court did not believe the entirety of the evidence presented (as reflected by the conviction of sodomy based solely on the oral-genital contact and not on the digital penetration).

As discussed at length above, the District Court did not abuse its discretion in finding the victim [**24] competent, and any arguments made by the Appellant regarding that issue have been obviated by our conclusion above. Regarding his second and third arguments on this issue, questions of the weight of evidence in juvenile proceedings fall within the trial court's discretion as the fact-finder. *S.D.O. v. Commonwealth, 255 S.W.3d 517, 521 (Ky. App. 2008)* ("It is well-settled that the weight of the evidence and credibility of witnesses are functions peculiarly within the trier of fact's determination and will not be disturbed.") The Appellant had, and took advantage of, an opportunity to assail the credibility of these witnesses, and the District Court simply believed the Commonwealth's evidence more than his own. This is neither error, nor abuse of discretion.

However, because the District Court considered evidence which was introduced in violation of J.E.'s constitutional rights, the determination becomes suspect, and we can no longer conclude with the necessary confidence that the evidence was sufficient.

III. CONCLUSION

This Court having reviewed the record, we affirm the Circuit Court and District Courts' rulings relating to the competency of the child witnesses and the grandmother's alleged interference in the victim's testimony. However, after [**25] finding reversible error in the rulings of the Circuit Court and the District Court relating to the violation of J.E.'s right to confrontation, we reverse the conviction and remand for a new adjudication hearing consistent with this opinion.

ALL CONCUR

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Evidence Rules Review Commission
Minority Report

The General Assembly proposed a new Rule of Evidence creating an additional hearsay exception that would create a mechanism for admitting specific hearsay statements of children found by the Court to have sufficient guarantees of trustworthiness and reliability. Following the proposal of this rule, the Supreme Court reactivated the dormant Evidence Rules Review Commission, as set forth in KRE 1102 and 1103. The Proposed Rule changed materially throughout the process to account for legal and practical concerns raised by Commission members. While neither KRE 1102 nor 1003 call for the Commission to vote on a proposed rule, the Commission did, and the proposed rule was narrowly defeated, 5-4. The following, by request of the Chair of the Commission, is a minority report on the Proposed Rule.

Under the Proposed Rule, hearsay statements made by children 12 and under may be admissible under certain circumstances based on findings following a pre-trial hearing, wherein the proponent establishes that the totality of the circumstances indicate the statement is inherently reliable and trustworthy. The Court shall consider "all of the circumstances surrounding the making of the statement, including, but not limited to, spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement." Critically, there is no mechanism under current law to permit the admission of the kind of evidence targeted by the Proposed Rule. Without this rule, the admission of relevant, probative, trustworthy, and reliable evidence is precluded, which should never be the desired outcome.

Several other states have similar provisions, but the proposed rule most closely resembles Ohio's, which has been in effect for many years. The Ohio rule was challenged and ultimately upheld by the United States Supreme Court in *Ohio v. Clark*, 135 S. Ct. 2173 (2015). The Supreme Court held in *Clark* that the out-of-court statements of the victim were non-testimonial in nature, created in the context of an ongoing emergency of suspected child abuse. and the statements were made to identify and put an end to the threat. In *Clark*, the disclosure to the teacher was not in a formalized setting and not disclosed to someone charged with the role of uncovering or prosecuting criminal behavior, such as a police officer. The statements were made in the context of an ongoing emergency involving suspected child abuse, to teachers aimed at identifying and ending the threat. The conversation was informal and spontaneous. The nontestimonial nature of the child's statement, the Court decided, rendered the admission of the statement constitutional under the Sixth Amendment.

The Proposed Rule aims to provide an opportunity to admit evidence that does not fall under an existing exception to the hearsay rule. Such hearsay statements often come days, weeks, or even months after the fact, ruling out the use of the excited utterance exception. When attempts were made to admit hearsay evidence that named the assailant under the medical diagnosis exception, the Kentucky Supreme Court in *Colvard v. Commonwealth,* 309 S.W.3d 239 (Ky. 2010), rightly ruled that such statements, regardless of their reliability and trustworthiness, fail the first part of the two-step test set forth in *Morgan v. Foretich*, 846 F.2d 941, 949 (4th Cir. 1988). In *Colvard*, the Court reiterated that the motive of the patient to obtain care (the source of credibility of statements to medical professionals) does not extend to statements that name the assailant, as the statements do not strictly relate to the diagnosis of a medical condition by the medical professional.

The majority opinion on the Proposed Rule expresses concern that the rule violates the right to confrontation, but by its own terms, the rule cannot. Testimonial statements are precluded and inadmissible under the proposed hearsay exception. The majority further argues that the rule "represents a significant departure from the established framework of the hearsay rule," but *Colvard* has closed the only door to this evidence that was remotely ajar. No existing rule of evidence permits even the consideration, much less the admission, of evidence that is otherwise relevant, probative, reliable, and trustworthy. The Proposed Rule seeks to create the safest environment in which to consider the admissibility of such evidence, consistent with the U.S. Supreme Court's guidance in *Clark*. Under these circumstances, a thoughtful, careful departure from the "established framework" of hearsay evidence is overdue.

Respectfully submitted,

Whitney Westerfield
State Senator, 3rd District

Joe Fischer
House of Representatives, 68th District

Jackie Steele
Commonwealth's Attorney, 27th Judicial Court

AN ACT relating to the Kentucky Rules of Evidence.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔SECTION 1. A NEW SECTION OF THE KENTUCKY RULES OF EVIDENCE 801 TO 806 IS CREATED TO READ AS FOLLOWS:

(a) An out-of-court statement made by a child with a physical, mental, emotional, or developmental age of twelve (12) years or less at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under KRE 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement;

(2) Either:

(A) The child testifies but his or her testimony does not include information contained in the out-of-court statement; or

(B) The child's testimony is not reasonably obtainable by the proponent of the statement and there is corroborative evidence of the act that is the subject of the statement;

(3) The primary purpose of the child's statement was not to create an out-of-court substitute for trial testimony; and

(4) At least ten (10) days before the trial or hearing, a proponent of the

statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(b) (1) The child's testimony is "not reasonably obtainable by the proponent of the statement" under subsection (a)(2)(B) of this rule if one (1) or more of the following apply:

(A) The child claims a lack of memory of the subject matter of the statement;

(B) The court finds:

(i) The child is absent from the trial or hearing;

(ii) The proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good-faith effort to do so; and

(iii) It is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time; or

(C) The court finds:

(i) The child is unable to testify at the trial or hearing because of:

a. Death;

b. Physical or mental illness; or

c. Infirmity, including the child's inability to communicate about the offense because of fear or a similar reason; and

(ii) The illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.

(2) The proponent of the statement has not established that the child's

testimony or attendance is not reasonably obtainable if the child's claim of lack of memory, absence, or inability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.

(c) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.

(d) If any provision of this rule should conflict with Article VIII of these rules, this rule shall prevail.

KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. Williams, Kan., April 21, 2017

135 S.Ct. 2173
Supreme Court of the United States

OHIO, Petitioner
v.
Darius CLARK.

No. 13–1352.
|
Argued March 2, 2015.
|
Decided June 18, 2015.

Synopsis

Background: Defendant was convicted in the Ohio Court of Common Pleas, Cuyahoga County, of felonious assault, child endangerment, and domestic violence arising out of his alleged physical abuse of his girlfriend's three-year-old son and 18–month old daughter. Defendant appealed, and the Ohio Court of Appeals, 2011 WL 6780456, reversed and remanded on the ground that introduction of three-year-old victim's out-of-court statements violated the Confrontation Clause. State appealed, and the Ohio Supreme Court, 137 Ohio St.3d 346, 999 N.E.2d 592, affirmed the Court of Appeals. Certiorari was granted.

Holdings: The United States Supreme Court, Justice Alito, held that:

[1] three-year-old victim's statements to his preschool teachers identifying defendant as the person who had caused his injuries were not testimonial, and

[2] fact that Ohio law barred incompetent children from testifying did not make it fundamentally unfair for trial court to admit three-year-old victim's statements.

Reversed and remanded.

Justice Scalia filed an opinion concurring in the judgment, in which Justice Ginsburg joined.

Justice Thomas filed an opinion concurring in the judgment.

West Headnotes (14)

[1] **Criminal Law**
Out-of-court statements and hearsay in general

Under the "primary purpose" test for determining whether out-of-court statements are testimonial for Confrontation Clause purposes, the existence vel non of an ongoing emergency is not the touchstone of the testimonial inquiry; instead, whether an ongoing emergency exists is simply one factor that informs the ultimate inquiry regarding the "primary purpose" of an interrogation. U.S.C.A. Const.Amend. 6.

20 Cases that cite this headnote

[2] **Criminal Law**
Out-of-court statements and hearsay in general

One factor in the determination of whether out-of-court statements are testimonial for Confrontation Clause purposes is the informality of the situation and the interrogation; a formal station-house interrogation is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. U.S.C.A. Const.Amend. 6.

17 Cases that cite this headnote

[3] **Criminal Law**
Out-of-court statements and hearsay in general

In determining whether an out-of-court statement is testimonial for Confrontation Clause purposes, standard rules of hearsay, designed to identify some statements

as reliable, will be relevant. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[4] **Criminal Law**
Out-of-court statements and hearsay in general

Under the "primary purpose" test for determining whether an out-of-court statement is testimonial for Confrontation Clause purposes, the question is whether, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. U.S.C.A. Const.Amend. 6.

75 Cases that cite this headnote

[5] **Criminal Law**
Out-of-court statements and hearsay in general

A statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial; where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause. U.S.C.A. Const.Amend. 6.

61 Cases that cite this headnote

[6] **Criminal Law**
Out-of-court statements and hearsay in general

The fact that an out-of-court statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test; the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. U.S.C.A. Const.Amend. 6.

46 Cases that cite this headnote

[7] **Criminal Law**
Out-of-court statements and hearsay in general

The "primary purpose" test for determining whether an out-of-court statement is testimonial for Confrontation Clause purposes is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause. U.S.C.A. Const.Amend. 6.

50 Cases that cite this headnote

[8] **Criminal Law**
Out-of-court statements and hearsay in general

Three-year-old domestic abuse victim's statements to teachers at his preschool identifying defendant, who was his mother's boyfriend, as the person who had caused his injuries were not testimonial, and thus Confrontation Clause did not bar admission of the statements at defendant's trial on charges including felonious assault and domestic violence, at which victim did not testify because he had been deemed incompetent due to his age; primary purpose of the statements was not to create evidence for defendant's prosecution, but rather statements occurred in the context of an ongoing emergency involving suspected child abuse, and were aimed at identifying and ending the threat. U.S.C.A. Const.Amend. 6; Rules of Evid., Rules 601(A), 807.

5 Cases that cite this headnote

[9] **Criminal Law**
Out-of-court statements and hearsay in general

Statements by very young children will rarely, if ever, implicate the Confrontation Clause. U.S.C.A. Const.Amend. 6.

13 Cases that cite this headnote

[10] **Criminal Law**

Out-of-court statements and hearsay in general

Courts determining whether out-of-court statements are testimonial for purposes of the Confrontation Clause must evaluate challenged statements in context, and part of that context is the questioner's identity; statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. U.S.C.A. Const.Amend. 6.

37 Cases that cite this headnote

[11] **Criminal Law**

Out-of-court statements and hearsay in general

Fact that preschool teachers to whom three-year-old domestic abuse victim made statements identifying defendant, who was his mother's boyfriend, as the person who caused his injuries had mandatory reporting obligations with respect to child abuse did not make victim's statements testimonial for Confrontation Clause purposes, even if teachers' questions and their duty to report had a natural tendency to result in defendant's prosecution; teachers' primary concern was to protect victim, and teachers would undoubtedly have acted with same purpose regardless of their duty to report. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[12] **Criminal Law**

Out-of-court statements and hearsay in general

Mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution, so as to make the student's statements testimonial for Confrontation Clause purposes. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[13] **Criminal Law**

Out-of-court statements and hearsay in general

Criminal Law

Availability of declarant

Fact that Ohio law barred incompetent children from testifying did not make it fundamentally unfair for trial court in prosecution on charges including felonious assault and domestic violence to admit, as non-testimonial under the Confrontation Clause, three-year-old victim's statements to teachers at his preschool identifying defendant, who was his mother's boyfriend, as the person who caused his injuries; any Confrontation Clause case would involve an out-of-court statement admissible under a hearsay exception and probative of defendant's guilt made by an unavailable in-court witness, and fact that witness was unavailable due to a different rule of evidence did not change the analysis. U.S.C.A. Const.Amend. 6; Rules of Evid., Rules 601(A), 807.

4 Cases that cite this headnote

[14] **Criminal Law**

Out-of-court statements and hearsay in general

Alleged fact that jury at trial on charges including felonious assault and domestic violence treated as the functional equivalent of testimony three-year-old victim's out-of-court statements to preschool teachers identifying defendant, who was his mother's boyfriend, as person who caused his injuries did not make such statements testimonial for Confrontation Clause purposes; argument would lead to conclusion that virtually all out-of-court statements offered by prosecution were testimonial, and question was not whether jury would view a statement as equivalent to in-court testimony, but whether statement was given with primary purpose

of creating out-of-court substitute for trial testimony. U.S.C.A. Const.Amend. 6.

42 Cases that cite this headnote

***2175** *Syllabus* *

Respondent Darius Clark sent his girlfriend away to engage in prostitution ***2176** while he cared for her 3–year–old son L.P. and 18–month–old daughter A.T. When L.P.'s preschool teachers noticed marks on his body, he identified Clark as his abuser. Clark was subsequently tried on multiple counts related to the abuse of both children. At trial, the State introduced L.P.'s statements to his teachers as evidence of Clark's guilt, but L.P. did not testify. The trial court denied Clark's motion to exclude the statements under the Sixth Amendment's Confrontation Clause. A jury convicted Clark on all but one count. The state appellate court reversed the conviction on Confrontation Clause grounds, and the Supreme Court of Ohio affirmed.

Held: The introduction of L.P.'s statements at trial did not violate the Confrontation Clause. Pp. 2179 – 2183.

(a) This Court's decision in *Crawford v. Washington,* 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177, held that the Confrontation Clause generally prohibits the introduction of "testimonial" statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A statement qualifies as testimonial if the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Michigan v. Bryant,* 562 U.S. 344, 369, 131 S.Ct. 1143, 179 L.Ed.2d 93. In making that "primary purpose" determination, courts must consider "all of the relevant circumstances." *Ibid.* "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.,* at 359, 131 S.Ct. 1143. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. The Court has recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. See *Giles v. California,* 554 U.S. 353, 358–359, 128 S.Ct. 2678, 171 L.Ed.2d 488; *Crawford,* 541 U.S., at 56, n. 6, 62, 124 S.Ct. 1354. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause. Pp. 2179 – 2181.

(b) Considering all the relevant circumstances, L.P.'s statements were not testimonial. L.P.'s statements were not made with the primary purpose of creating evidence for Clark's prosecution. They occurred in the context of an ongoing emergency involving suspected child abuse. L.P.'s teachers asked questions aimed at identifying and ending a threat. They did not inform the child that his answers would be used to arrest or punish his abuser. L.P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation was informal and spontaneous. L.P.'s age further confirms that the statements in question were not testimonial because statements by very young children will rarely, if ever, implicate the Confrontation Clause. As a historical matter, moreover, there is strong evidence that statements made in circumstances like these were regularly admitted at common law. Finally, although statements to individuals other than law enforcement officers are not categorically outside the Sixth Amendment's reach, the fact that L.P. was speaking to his teachers is highly relevant. Statements to individuals who are not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than those given to law enforcement officers. Pp. 2180 – 2182.

***2177** (c) Clark's arguments to the contrary are unpersuasive. Mandatory reporting obligations do not convert a conversation between a concerned teacher and her student into a law enforcement mission aimed at gathering evidence for prosecution. It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. And this Court's Confrontation Clause decisions do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. Instead, the test is whether a statement was given with the "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant, supra,* at 358, 131 S.Ct. 1143. Here, the answer is clear: L.P.'s statements to his teachers were not testimonial. Pp. 2182 – 2183.

137 Ohio St.3d 346, 2013–Ohio–4731, 999 N.E.2d 592, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined. THOMAS, J., filed an opinion concurring in the judgment.

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Opinion

Justice ALITO delivered the opinion of the Court.

Darius Clark sent his girlfriend hundreds of miles away to engage in prostitution and agreed to care for her two young children while she was out of town. A day later, teachers discovered red marks on her 3–year–old son, and the boy identified Clark as his abuser. The question in this case is whether the Sixth Amendment's Confrontation Clause prohibited prosecutors from introducing those statements when the child was not available to be cross-examined. Because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial.

I

Darius Clark, who went by the nickname "Dee," lived in Cleveland, Ohio, with his girlfriend, T.T., and her two children: L.P., a 3–year–old boy, and A.T., an 18–month–old girl. [1] Clark was also T.T.'s pimp, and he would regularly send her on trips to Washington, D.C., to work as a prostitute. In March 2010, T.T. went on ***2178** one such trip, and she left the children in Clark's care.

The next day, Clark took L.P. to preschool. In the lunchroom, one of L.P.'s teachers, Ramona Whitley, observed that L.P.'s left eye appeared bloodshot. She asked him " '[w]hat happened,' " and he initially said nothing. 137 Ohio St.3d 346, 347, 2013–Ohio–4731, 999 N.E.2d 592, 594. Eventually, however, he told the teacher that he " 'fell.' " *Ibid.* When they moved into the brighter lights of a classroom, Whitley noticed " '[r]ed marks, like whips of some sort,' " on L.P.'s face. *Ibid.* She notified the lead teacher, Debra Jones, who asked L.P., " 'Who did this? What happened to you?' " *Id.*, at 348, 999 N.E.2d, at 595. According to Jones, L.P. " 'seemed kind of bewildered' " and " 'said something like, Dee, Dee.' " *Ibid.* Jones asked L.P. whether Dee is "big or little," to which L.P. responded that "Dee is big." App. 60, 64. Jones then brought L.P. to her supervisor, who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about the suspected abuse.

When Clark later arrived at the school, he denied responsibility for the injuries and quickly left with L.P. The next day, a social worker found the children at Clark's mother's house and took them to a hospital, where a physician discovered additional injuries suggesting child abuse. L.P. had a black eye, belt marks on his back and stomach, and bruises all over his body. A.T. had two black eyes, a swollen hand, and a large burn on her cheek, and two pigtails had been ripped out at the roots of her hair.

A grand jury indicted Clark on five counts of felonious assault (four related to A.T. and one related to L.P.), two counts of endangering children (one for each child), and two counts of domestic violence (one for each child). At trial, the State introduced L.P.'s statements to his teachers as evidence of Clark's guilt, but L.P. did not testify. Under Ohio law, children younger than 10 years old are incompetent to testify if they "appear incapable of receiving just impressions of the facts and

transactions respecting which they are examined, or of relating them truly." Ohio Rule Evid. 601(A) (Lexis 2010). After conducting a hearing, the trial court concluded that L.P. was not competent to testify. But under Ohio Rule of Evidence 807, which allows the admission of reliable hearsay by child abuse victims, the court ruled that L.P.'s statements to his teachers bore sufficient guarantees of trustworthiness to be admitted as evidence.

Clark moved to exclude testimony about L.P.'s out-of-court statements under the Confrontation Clause. The trial court denied the motion, ruling that L.P.'s responses were not testimonial statements covered by the Sixth Amendment. The jury found Clark guilty on all counts except for one assault count related to A.T., and it sentenced him to 28 years' imprisonment. Clark appealed his conviction, and a state appellate court reversed on the ground that the introduction of L.P.'s out-of-court statements violated the Confrontation Clause.

In a 4–to–3 decision, the Supreme Court of Ohio affirmed. It held that, under this Court's Confrontation Clause decisions, L.P.'s statements qualified as testimonial because the primary purpose of the teachers' questioning "was not to deal with an existing emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution." 137 Ohio St.3d, at 350, 999 N.E.2d, at 597. The court noted that Ohio has a "mandatory reporting" law that requires certain professionals, including preschool teachers, to report suspected child abuse to government authorities. See ***2179** *id.*, at 349–350, 999 N.E.2d, at 596–597. In the court's view, the teachers acted as agents of the State under the mandatory reporting law and "sought facts concerning past criminal activity to identify the person responsible, eliciting statements that 'are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.' " *Id.*, at 355, 999 N.E.2d, at 600 (quoting *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 310–311, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); some internal quotation marks omitted).

We granted certiorari, 573 U.S. ——, 135 S.Ct. 43, 189 L.Ed.2d 896 (2014), and we now reverse.

II

A

The Sixth Amendment's Confrontation Clause, which is binding on the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), we interpreted the Clause to permit the admission of out-of-court statements by an unavailable witness, so long as the statements bore "adequate 'indicia of reliability.' " Such indicia are present, we held, if "the evidence falls within a firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Ibid.*

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), we adopted a different approach. We explained that "witnesses," under the Confrontation Clause, are those "who bear testimony," and we defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.*, at 51, 124 S.Ct. 1354 (internal quotation marks and alteration omitted). The Sixth Amendment, we concluded, prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.*, at 54, 124 S.Ct. 1354. Applying that definition to the facts in *Crawford*, we held that statements by a witness during police questioning at the station house were testimonial and thus could not be admitted. But our decision in *Crawford* did not offer an exhaustive definition of "testimonial" statements. Instead, *Crawford* stated that the label "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*, at 68, 124 S.Ct. 1354.

Our more recent cases have labored to flesh out what it means for a statement to be "testimonial." In *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), which we decided together, we dealt with statements given to law enforcement officers by the victims of domestic abuse. The victim in *Davis* made statements to a 911 emergency operator during and shortly after her boyfriend's violent attack. In *Hammon*, the victim, after being isolated from her abusive husband, made statements to police that were

memorialized in a " 'battery affidavit.' " *Id.*, at 820, 126 S.Ct. 2266.

We held that the statements in *Hammon* were testimonial, while the statements in *Davis* were not. Announcing what has come to be known as the "primary purpose" test, we explained: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial ***2180** when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*, at 822, 126 S.Ct. 2266. Because the cases involved statements to law enforcement officers, we reserved the question whether similar statements to individuals other than law enforcement officers would raise similar issues under the Confrontation Clause. See *id.*, at 823, n. 2, 126 S.Ct. 2266.

[1] In *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011), we further expounded on the primary purpose test. The inquiry, we emphasized, must consider "all of the relevant circumstances." *Id.*, at 369, 131 S.Ct. 1143. And we reiterated our view in *Davis* that, when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." 562 U.S., at 358, 131 S.Ct. 1143. At the same time, we noted that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Ibid.* "[T]he existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry." *Id.*, at 374, 131 S.Ct. 1143. Instead, "whether an ongoing emergency exists is simply one factor ... that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.*, at 366, 131 S.Ct. 1143.

[2] **[3]** **[4]** One additional factor is "the informality of the situation and the interrogation." *Id.*, at 377, 131 S.Ct. 1143. A "formal station-house interrogation," like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. *Id.*, at 366, 377, 131 S.Ct. 1143. And in determining whether a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.*, at 358–359, 131 S.Ct. 1143. In the end, the question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Id.*, at 358, 131 S.Ct. 1143. Applying these principles in *Bryant*, we held that the statements made by a dying victim about his assailant were not testimonial because the circumstances objectively indicated that the conversation was primarily aimed at quelling an ongoing emergency, not establishing evidence for the prosecution. Because the relevant statements were made to law enforcement officers, we again declined to decide whether the same analysis applies to statements made to individuals other than the police. See *id.*, at 357, n. 3, 131 S.Ct. 1143.

[5] **[6]** **[7]** Thus, under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.*, at 359, 131 S.Ct. 1143. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. We have recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. See *Giles v. California*, 554 U.S. 353, 358–359, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008); *Crawford*, 541 U.S., at 56, n. 6, 62, 124 S.Ct. 1354. Thus, the primary purpose test is a necessary, but ***2181** not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.

B

[8] In this case, we consider statements made to preschool teachers, not the police. We are therefore presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be

testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L.P.'s statements clearly were not made with the primary purpose of creating evidence for Clark's prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.

L.P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse. When L.P.'s teachers noticed his injuries, they rightly became worried that the 3–year–old was the victim of serious violence. Because the teachers needed to know whether it was safe to release L.P. to his guardian at the end of the day, they needed to determine who might be abusing the child.[2] Thus, the immediate concern was to protect a vulnerable child who needed help. Our holding in *Bryant* is instructive. As in *Bryant,* the emergency in this case was ongoing, and the circumstances were not entirely clear. L.P.'s teachers were not sure who had abused him or how best to secure his safety. Nor were they sure whether any other children might be at risk. As a result, their questions and L.P.'s answers were primarily aimed at identifying and ending the threat. Though not as harried, the conversation here was also similar to the 911 call in *Davis*. The teachers' questions were meant to identify the abuser in order to protect the victim from future attacks. Whether the teachers thought that this would be done by apprehending the abuser or by some other means is irrelevant. And the circumstances in this case were unlike the interrogation in *Hammon,* where the police knew the identity of the assailant and questioned the victim after shielding her from potential harm.

There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect L.P. At no point did the teachers inform L.P. that his answers would be used to arrest or punish his abuser. L.P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation between L.P. and his teachers was informal and spontaneous. The teachers asked L.P. about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized station-house questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon*.

[9] L.P.'s age fortifies our conclusion that the statements in question were not ***2182** testimonial. Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. Rather, "[r]esearch on children's understanding of the legal system finds that" young children "have little understanding of prosecution." Brief for American Professional Society on the Abuse of Children as *Amicus Curiae* 7, and n. 5 (collecting sources). And Clark does not dispute those findings. Thus, it is extremely unlikely that a 3–year–old child in L.P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.

As a historical matter, moreover, there is strong evidence that statements made in circumstances similar to those facing L.P. and his teachers were admissible at common law. See Lyon & LaMagna, The History of Children's Hearsay: From Old Bailey to Post-*Davis,* 82 Ind. L.J. 1029, 1030 (2007); see also *id.*, at 1041–1044 (examining child rape cases from 1687 to 1788); J. Langbein, The Origins of Adversary Criminal Trial 239 (2003) ("The Old Bailey" court in 18th-century London "tolerated flagrant hearsay in rape prosecutions involving a child victim who was not competent to testify because she was too young to appreciate the significance of her oath"). And when 18th-century courts excluded statements of this sort, see, *e.g., King v. Brasier,* 1 Leach 199, 168 Eng. Rep. 202 (K.B. 1779), they appeared to do so because the child should have been ruled competent to testify, not because the statements were otherwise inadmissible. See Lyon & LaMagna, *supra,* at 1053–1054. It is thus highly doubtful that statements like L.P.'s ever would have been understood to raise Confrontation Clause concerns. Neither *Crawford* nor any of the cases that it has produced has mounted evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding. Certainly, the statements in this case are nothing like the notorious use of *ex parte* examination in Sir Walter Raleigh's trial for treason, which we have frequently identified as "the principal evil at which the Confrontation Clause was directed." *Crawford,* 541 U.S., at 50, 124 S.Ct. 1354; see also *Bryant,* 562 U.S., at 358, 131 S.Ct. 1143.

[10] Finally, although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. See *id.*, at 369, 131 S.Ct. 1143. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. See, *e.g.*, *Giles*, 554 U.S., at 376, 128 S.Ct. 2678. It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality. In light of these circumstances, the Sixth Amendment did not prohibit the State from introducing L.P.'s statements at trial.

III

[11] **[12]** Clark's efforts to avoid this conclusion are all off-base. He emphasizes Ohio's mandatory reporting obligations, in an attempt to equate L.P.'s teachers with the police and their caring questions with ***2183** official interrogations. But the comparison is inapt. The teachers' pressing concern was to protect L.P. and remove him from harm's way. Like all good teachers, they undoubtedly would have acted with the same purpose whether or not they had a state-law duty to report abuse. And mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.

[13] It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. The statements at issue in *Davis* and *Bryant* supported the defendants' convictions, and the police always have an obligation to ask questions to resolve ongoing emergencies. Yet, we held in those cases that the Confrontation Clause did not prohibit introduction of the statements because they were not primarily intended to be testimonial. Thus, Clark is also wrong to suggest that admitting L.P.'s statements would be fundamentally unfair given that Ohio law does not allow incompetent children to testify. In any Confrontation Clause case, the individual who provided the out-of-court statement is not available as an in-court witness, but the testimony is admissible under an exception to the hearsay rules and is probative of the defendant's guilt. The fact that the witness is unavailable because of a different rule of evidence does not change our analysis.

[14] Finally, Clark asks us to shift our focus from the context of L.P.'s conversation with his teachers to the jury's perception of those statements. Because, in his view, the "jury treated L.P.'s accusation as the functional equivalent of testimony," Clark argues that we must prohibit its introduction. Brief for Respondent 42. Our Confrontation Clause decisions, however, do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. The logic of this argument, moreover, would lead to the conclusion that virtually all out-of-court statements offered by the prosecution are testimonial. The prosecution is unlikely to offer out-of-court statements unless they tend to support the defendant's guilt, and all such statements could be viewed as a substitute for in-court testimony. We have never suggested, however, that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case. Instead, we ask whether a statement was given with the "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, *supra*, at 358, 131 S.Ct. 1143. Here, the answer is clear: L.P.'s statements to his teachers were not testimonial.

IV

We reverse the judgment of the Supreme Court of Ohio and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice GINSBURG joins, concurring in the judgment.

I agree with the Court's holding, and with its refusal to decide two questions quite unnecessary to that holding: what effect Ohio's mandatory-reporting law has in transforming a private party into a state actor for Confrontation Clause purposes, and whether a more permissive Confrontation Clause test—one less likely

to hold the statements testimonial—should apply to interrogations by private actors. The statements here would not be testimonial ***2184** under the usual test applicable to informal police interrogation.

L.P.'s primary purpose here was certainly not to invoke the coercive machinery of the State against Clark. His age refutes the notion that he is capable of forming such a purpose. At common law, young children were generally considered incompetent to take oaths, and were therefore unavailable as witnesses unless the court determined the individual child to be competent. Lyon & LaMagna, The History of Children's Hearsay: From Old Bailey to Post–*Davis,* 82 Ind. L.J. 1029, 1030–1031 (2007). The inconsistency of L.P.'s answers—making him incompetent to testify here—is hardly unusual for a child of his age. And the circumstances of L.P.'s statements objectively indicate that even if he could, as an abstract matter, form such a purpose, he did not. Nor did the teachers have the primary purpose of establishing facts for later prosecution. Instead, they sought to ensure that they did not deliver an abused child back into imminent harm. Nor did the conversation have the requisite solemnity necessary for testimonial statements. A 3–year–old was asked questions by his teachers at school. That is far from the surroundings adequate to impress upon a declarant the importance of what he is testifying to.

That is all that is necessary to decide the case, and all that today's judgment holds.

I write separately, however, to protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). For several decades before that case, we had been allowing hearsay statements to be admitted against a criminal defendant if they bore " 'indicia of reliability.' " *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Prosecutors, past and present, love that flabby test. *Crawford* sought to bring our application of the Confrontation Clause back to its original meaning, which was to exclude unconfronted statements made by *witnesses—i.e.,* statements that were *testimonial.* 541 U.S., at 51, 124 S.Ct. 1354. We defined testimony as a " 'solemn declaration or affirmation made for the purpose of establishing or proving some fact,' " *ibid.*—in the context of the Confrontation Clause, a fact "potentially relevant to later criminal prosecution," *Davis v. Washington,* 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

Crawford remains the law. But when else has the categorical overruling, the thorough repudiation, of an earlier line of cases been described as nothing more than "adopt[ing] a different approach," *ante,* at 2179 —as though *Crawford* is only a matter of twiddle-dum twiddle-dee preference, and the old, pre-*Crawford* "approach" remains available? The author unabashedly displays his hostility to *Crawford* and its progeny, perhaps aggravated by inability to muster the votes to overrule them. *Crawford* "does not rank on the [author of the opinion's] top-ten list of favorite precedents—and ... the [author] could not restrain [himself] from saying (and saying and saying) so." *Harris v. Quinn,* 573 U.S. ——, ——, 134 S.Ct. 2618, 2652–2653, 189 L.Ed.2d 620 (2014) (KAGAN, J., dissenting).

But snide detractions do no harm; they are just indications of motive. Dicta on legal points, however, can do harm, because though they are not binding they can mislead. Take, for example, the opinion's statement that the primary-purpose test is merely *one* of several heretofore unmentioned conditions ("necessary, but not always sufficient") that must be satisfied before the Clause's protections apply. *Ante,* at 2180 – 2181. That is absolutely ***2185** false, and has no support in our opinions. The Confrontation Clause categorically entitles a defendant *to be confronted with the witnesses against him* ; and the primary-purpose test sorts out, among the many people who interact with the police informally, *who is acting as a witness and who is not.* Those who fall into the former category bear testimony, and are therefore acting as "witnesses," subject to the right of confrontation. There are no other mysterious requirements that the Court declines to name.

The opinion asserts that future defendants, and future Confrontation Clause majorities, must provide "evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding." *Ante,* at 2182. This dictum gets the burden precisely backwards—which is of course precisely the idea. Defendants may invoke their Confrontation Clause rights once they have established that the state seeks to introduce testimonial evidence against them in a criminal case without unavailability of the witness and a previous

opportunity to cross-examine. The burden is upon the prosecutor who seeks to introduce evidence *over* this bar to prove a long-established practice of introducing *specific* kinds of evidence, such as dying declarations, *see Crawford, supra,* at 56, n. 6, 124 S.Ct. 1354, for which cross-examination was not typically necessary. A suspicious mind (or even one that is merely not naïve) might regard this distortion as the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause—in other words, an attempt to return to *Ohio v. Roberts.*

But the good news is that there are evidently not the votes to return to that halcyon era for prosecutors; and that dicta, even calculated dicta, are nothing but dicta. They are enough, however, combined with the peculiar phenomenon of a Supreme Court opinion's aggressive hostility to precedent that it purports to be applying, to prevent my joining the writing for the Court. I concur only in the judgment.

Justice THOMAS, concurring in the judgment.

I agree with the Court that Ohio mandatory reporters are not agents of law enforcement, that statements made to private persons or by very young children will rarely implicate the Confrontation Clause, and that the admission of the statements at issue here did not implicate that constitutional provision. I nonetheless cannot join the majority's analysis. In the decade since we first sought to return to the original meaning of the Confrontation Clause, see *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), we have carefully reserved consideration of that Clause's application to statements made to private persons for a case in which it was squarely presented. See, *e.g., Michigan v. Bryant,* 562 U.S. 344, 357, n. 3, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011).

This is that case; yet the majority does not offer clear guidance on the subject, declaring only that "the primary purpose test is a necessary, but not always sufficient, condition" for a statement to fall within the scope of the Confrontation Clause. *Ante,* at 2180 – 2181. The primary purpose test, however, is just as much "an exercise in fiction ... disconnected from history" for statements made to private persons as it is for statements made to agents of law enforcement, if not more so. See *Bryant, supra,* at 379, 131 S.Ct. 1143 (THOMAS, J., concurring in judgment) (internal quotation marks omitted). I would not apply it here. Nor would I leave the resolution of this important question in doubt.

***2186** Instead, I would use the same test for statements to private persons that I have employed for statements to agents of law enforcement, assessing whether those statements bear sufficient indicia of solemnity to qualify as testimonial. See *Crawford, supra,* at 51, 124 S.Ct. 1354; *Davis v. Washington,* 547 U.S. 813, 836–837, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (THOMAS, J., concurring in judgment in part and dissenting in part). This test is grounded in the history of the common-law right to confrontation, which "developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.,* at 835, 126 S.Ct. 2266 (internal quotation marks omitted). Reading the Confrontation Clause in light of this history, we have interpreted the accused's right to confront "the witnesses against him," U.S. Const., Amdt. 6, as the right to confront those who "bear testimony" against him, *Crawford,* 541 U.S., at 51, 124 S.Ct. 1354 (relying on the ordinary meaning of "witness"). And because "[t]estimony ... is ... a solemn declaration or affirmation made for the purpose of establishing or proving some fact," *ibid.* (internal quotation marks and brackets omitted), an analysis of statements under the Clause must turn in part on their solemnity, *Davis, supra,* at 836, 126 S.Ct. 2266 (opinion of THOMAS, J.).

I have identified several categories of extrajudicial statements that bear sufficient indicia of solemnity to fall within the original meaning of testimony. Statements "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" easily qualify. *White v. Illinois,* 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., concurring in part and concurring in judgment). And statements not contained in such materials may still qualify if they were obtained in "a formalized dialogue"; after the issuance of the warnings required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); while in police custody; or in an attempt to evade confrontation. *Davis, supra,* at 840, 126 S.Ct. 2266 (opinion of THOMAS, J.); see also *Bryant,* 562 U.S., at 379, 131 S.Ct. 1143 (same) (summarizing and applying test). That several of these factors seem inherently inapplicable to statements

made to private persons does not mean that the test is unsuitable for analyzing such statements. All it means is that statements made to private persons rarely resemble the historical abuses that the common-law right to confrontation developed to address, and it is those practices that the test is designed to identify.

Here, L.P.'s statements do not bear sufficient indicia of solemnity to qualify as testimonial. They were neither contained in formalized testimonial materials nor obtained as the result of a formalized dialogue initiated by police. Instead, they were elicited during questioning by L.P.'s teachers at his preschool. Nor is there any indication that L.P.'s statements were offered at trial to evade confrontation. To the contrary, the record suggests that the prosecution would have produced L.P. to testify had he been deemed competent to do so. His statements bear no "resemblance to the historical practices that the Confrontation Clause aimed to eliminate." *Ibid.* The admission of L.P.'s extrajudicial statements thus does not implicate the Confrontation Clause.

I respectfully concur in the judgment.

All Citations

135 S.Ct. 2173, 192 L.Ed.2d 306, 83 USLW 4484, 15 Cal. Daily Op. Serv. 6248, 2015 Daily Journal D.A.R. 6760, 25 Fla. L. Weekly Fed. S 366

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Like the Ohio courts, we identify Clark's victims and their mother by their initials.

2 In fact, the teachers and a social worker who had come to the school *were* reluctant to release L.P. into Clark's care after the boy identified Clark as his abuser. But after a brief "stare-down" with the social worker, Clark bolted out the door with L.P., and social services were not able to locate the children until the next day. App. 92–102, 150–151.

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309 S.W.3d 239
Supreme Court of Kentucky.

Fred Lee COLVARD, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2007–SC–000477–MR.
|
March 18, 2010.
|
As Corrected April 9, 2010.
|
Rehearing Denied May 20, 2010.

Synopsis

Background: Defendant was convicted in the Circuit Court, Jefferson County, Judith E. McDonald–Burkman, J., of first-degree sodomy, first-degree rape, first-degree burglary, and of being a second-degree persistent felony offender (PFO II). Defendant appealed.

Holdings: The Supreme Court, Venters, J., held that:

[1] the identity of the perpetrator of sexual abuse is not admissible under exception to hearsay rule for statements made for purposes of medical treatment or diagnosis, even where a family or household member is the perpetrator of sexual abuse against a minor of that household, overruling *Edwards v. Commonwealth*, 833 S.W.2d 842, *J.M.R. v. Commonwealth of Kentucky, Cabinet for Health and Family Services*, 239 S.W.3d 116, and *Plotnick v. Commonwealth*, 2008 WL 162881;

[2] medical professionals' testimony that children identified defendant as the perpetrator of sexual abuse against them was inadmissible hearsay;

[3] admission of other hearsay testimony was improper;

[4] admission of hearsay testimony was not harmless;

[5] defendant's prior attempted rape conviction was admissible to show modus operandi; and

[6] burglary instruction failed to properly correspond to statutory elements.

Reversed and remanded.

Minton, C.J., concurred in part, dissented in part, and filed statement.

Scott, J., concurred in part, dissented in part, and filed opinion, in which Abramson, J., joined.

West Headnotes (17)

[1] **Criminal Law**

Statements as to and expressions of personal injury or suffering

The identity of the perpetrator of sexual abuse is not relevant to medical treatment or diagnosis, for purposes of exception to hearsay rule for statements made for purposes of medical treatment or diagnosis, even where a family or household member is the perpetrator of sexual abuse against a minor of that household; overruling *Edwards v. Commonwealth*, 833 S.W.2d 842, *J.M.R. v. Commonwealth of Kentucky, Cabinet for Health and Family Services*, 239 S.W.3d 116, and *Plotnick v. Commonwealth*, 2008 WL 162881. Rules of Evid., Rule 803(4).

11 Cases that cite this headnote

[2] **Criminal Law**
Statements as to and expressions of personal injury or suffering

Admissibility of a statement under hearsay rule for statements made for purposes of medical treatment or diagnosis is governed by a two-part test: (1) the declarant's motive in making the statement must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis. Rules of Evid., Rule 803(4).

8 Cases that cite this headnote

[3] **Criminal Law**
Statements as to and expressions of personal injury or suffering

Medical professionals' testimony that children, during medical examination, identified defendant as the perpetrator of sexual abuse against them was not admissible under hearsay rule for statements made for purposes of medical treatment or diagnosis, even though defendant lived in same apartment complex with children and had recently been engaged to marry the children's grandmother; regardless of whether medical professionals might use the information to protect the children from further abuse, the statements identifying defendant were not motivated by children's desire for effective treatment. Rules of Evid., Rule 803(4).

7 Cases that cite this headnote

[4] **Criminal Law**
Statements as to and expressions of personal injury or suffering

Rule that a child's identification of

the perpetrator of sexual abuse to a medical professional is not admissible under exception to hearsay rule for statements made for purposes of medical treatment or diagnosis does not impede or limit the ability of medical personnel to report suspected child abuse, including information regarding the identity of a suspected abuser to the appropriate authorities. Rules of Evid., Rule 803(4).

12 Cases that cite this headnote

[5] **Criminal Law**
Acts or conduct

Child's nonverbal conduct in pointing at defendant following uncle's asking child who touched her was the equivalent of a verbal assertion by child that defendant touched her, and thus the nonverbal assertion fell under the normal hearsay rules for the admission of evidence. Rules of Evid., Rule 801.

Cases that cite this headnote

[6] **Criminal Law**
Identity

Child's uncle's hearsay testimony that child identified defendant when uncle asked child who touched her was not admissible in sexual abuse prosecution under rule governing prior statements of witnesses; while child did testify at trial, child was not examined concerning the statement, there was no proper foundation laid, and uncle testified prior to child. Rules of Evid., Rule 801A(a)(3).

1 Cases that cite this headnote

[7] **Witnesses**
Former statements corresponding with testimony

Defendant's question to children's mother in sexual abuse prosecution, seeking to impeach mother by asking whether she had used vulgar language in asking the children regarding whether defendant had raped them, did not open the door to mother's testimony that child's report of abuse to a medical professional had used "children's" terminology, as opposed to the vulgar terminology allegedly used by mother; fact that child used children's terminology did not affect credibility of mother's denial that she asked the children a question using vulgar terminology, and mother's repeating medical professional's hearsay statement improperly bolstered children's

testimony.

Cases that cite this headnote

[8] **Criminal Law**
Statements as to and expressions of personal injury or suffering

Social worker's testimony, that children made disclosures of sexual abuse to her during interviews and identified defendant as the perpetrator, was hearsay and was not admissible in rape prosecution.

Cases that cite this headnote

[9] **Criminal Law**
Statements as to and expressions of personal injury or suffering

There is no recognized exception to the hearsay rule for social workers or the results of their investigations.

1 Cases that cite this headnote

[10] **Criminal Law**
Prejudice to rights of party as ground of review

A non-constitutional evidentiary error may be deemed harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. Rules Crim.Proc., Rule 9.24.

2 Cases that cite this headnote

[11] **Criminal Law**
Prejudice to rights of party as ground of review

The harmless error inquiry is not simply whether there was enough evidence to support the result, apart from the phase affected by the error; it is rather, even so, whether the error itself had substantial influence, and if so, or if one is left in grave doubt, the conviction cannot stand. Rules Crim.Proc., Rule 9.24.

2 Cases that cite this headnote

[12] **Criminal Law**
Hearsay

Improper admission of hearsay testimony in child rape prosecution, including medical professionals' hearsay testimony identifying defendant as the perpetrator, was not harmless error; there was no DNA or other physical evidence linking

defendant to the crimes, and improper hearsay evidence vouching that children had previously identified defendant as the perpetrator multiplied the bolstering effect and resulted in a parade of witnesses vouching for the Commonwealth's theory of the case.

Cases that cite this headnote

[13] **Criminal Law**
Similar means or method; modus operandi

Defendant's prior conviction for attempting to rape a ten-year old child was sufficiently similar to charged crimes to be admissible to demonstrate a modus operandi in prosecution for child rape; offenses involved prepubescent girls, defendant knew victims and gained access to their homes by romantic involvement with an adult female in the household, victims were quietly assaulted while others were in the home, and sexual acts were of brief duration and involved only partial vaginal and anal penetration. Rules of Evid., Rule 404(b).

Cases that cite this headnote

[14] **Criminal Law**
Unanimity as to facts, conduct, methods, or theories

A jury instruction which presents an alternative theory of guilt is proper and does not violate the constitutional requirement of jury unanimity if every alternate theory contained in the instruction was reasonably supported by evidence presented at trial. Const. § 7.

Cases that cite this headnote

[15] **Criminal Law**
Requisites and sufficiency

While alternative theories of criminal liability may properly be combined in a single instruction, the instruction must accurately present the elements of each alternative theory.

Cases that cite this headnote

[16] **Burglary**
Instructions

Jury instruction that defendant could be found guilty of first degree burglary if, among the other elements, he "threatened to kill the victim's mother," did not properly correspond to elements of burglary

statute which requires the jury to find, not simply a threat to kill another, but a threat to use a deadly weapon against another person. KRS 511.020(1)(c).

Cases that cite this headnote

[17] **Infants**
Carnal knowledge; rape and sodomy
Sex Offenses
Sex offenses against minors in general
Sex Offenses
Identity of accused

Child victims' testimony describing the alleged sexual assaults and identifying defendant as the perpetrator was sufficient to support convictions for sodomy and rape.

Cases that cite this headnote

Attorneys and Law Firms

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Jack Conway Attorney General, Julie Scott Jernigan, Assistant Attorney General, Office of the Attorney General, Frankfort, KY, Counsel for Appellee.

Opinion

Opinion of the Court by Justice VENTERS.

Appellant, Fred Colvard, was convicted by a Jefferson Circuit Court jury of one count of first-degree sodomy, two counts of first-degree rape, one count of first-degree burglary, and of being a second-degree persistent felony offender (PFO II). For these crimes, Appellant was sentenced to life imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.

Among other things, Appellant argues on appeal that certain testimony from medical personnel was improperly admitted through the hearsay exception under KRE 803(4). Because we find that our previous interpretation of the hearsay exception for "statements for purposes of medical treatment or diagnosis" was too broad, we find that the testimony was inappropriate. In addition, several other hearsay statements from other witnesses were improperly admitted. Because, in combination, the errors were not harmless, we reverse Appellant's conviction and remand this matter for a new trial. We will address Appellant's other arguments which may arise in his new trial to provide guidance to the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

On March 2, 2006, Appellant allegedly sexually assaulted two girls, D.J. and D.Y., in their bedroom. D.J. and D.Y. were six and seven years old, respectively, at the time of the events. Appellant knew the children because not only did he live in the same apartment complex as them, but just a few months before, he was engaged to marry their grandmother. The grandmother ended the engagement when she learned that Appellant was convicted of attempting to rape a ten-year-old girl in 1994.

When D.J. and D.Y. told their mother that they had just been sexually assaulted by Appellant, she immediately reported it to the authorities. The girls were then medically examined and interviewed by several medical professionals. The medical examinations turned up no DNA or other physical evidence connecting Appellant to the crime. However, the examinations were not inconsistent with the girls' allegation of sexual assault.

A jury trial was conducted and the jury found Appellant guilty of two counts of first-degree rape, one count of first-degree sodomy, and one count of first-degree burglary. He was also convicted of PFO II and the jury recommended sentences of twenty years for the burglary and life on each of the sex offenses. Those sentences were all enhanced to life imprisonment as a result of the PFO II conviction. Additional facts will be developed further below, as needed.

I. HEARSAY TESTIMONY WAS IMPROPERLY ADMITTED UNDER KRE 803(4); EDWARDS V. COMMONWEALTH IS OVERRULED

Jennifer Polk, Dr. Cole Condra, and Dr. Lisa Pfitzer are medical personnel who testified at trial that the victims identified ***243** Colvard as the perpetrator of the crimes committed against them. Because the testimony of each of these medical personnel implicates KRE 803(4)[1] and the ongoing viability of the extension of that rule created in *Edwards v. Commonwealth,* 833 S.W.2d 842 (Ky.1992) (overruled on other grounds by *B.B. v. Commonwealth,* 226 S.W.3d 47 (Ky.2007)), we consider Colvard's allegations of error as it relates to these medical witnesses together.

1 KRE 803 provides in pertinent part: "The following are not excluded by the hearsay rules ... (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

A. Jennifer Polk

Polk, an EMT who responded to the emergency call, was called by the Commonwealth to testify about the events of March 2, 2006. Over Colvard's objection, Polk was allowed to testify that the first child to whom she spoke said that "Fred from number seven [Appellant] ... stuck his 'dick' in her." Polk also testified that the second child to whom she spoke told her, in substance, that Appellant had "hurt" her anus. Appellant timely objected to the testimony, but the trial court overruled the

objection upon the basis that it was admissible under KRE 803(4).

B. Dr. Condra

Appellant argues that Dr. Condra improperly gave testimony about statements DJ made to the triage nurse at the hospital. Dr. Condra testified from notes made by the nurse on March 2, 2006, when the children were initially admitted into the hospital for evaluation. Among other things, Dr. Condra testified that D.J. told the triage nurse that Appellant sexually abused her. He also testified that D.J. told the nurse that "Fred has been f* * *ing her, putting his weenie in her private parts."

Dr. Condra also testified that D.J. and D.Y. informed him that they were sexually assaulted that day "and over the past months."[2]

2 Based upon this testimony Appellant moved for a mistrial for failure of the Commonwealth to give notice of its intent to introduce prior acts pursuant to KRE 404(c). The motion was denied.

C. Dr. Pfitzer

Appellant argues that Dr. Pfitzer, a treating pediatrician providing follow-up examination and treatment to D.Y. and D.J., should not have been permitted to testify as to the medical history provided by G.W., the girls' mother. Appellant timely objected to the evidence, but his objection was overruled.

Dr. Pfitzer testified that she saw the children as a result of sexual abuse allegations made against "a neighbor" named "Fred" and that the allegations involved vaginal and anal penetration. Dr. Pfitzer also testified that D.J.'s mother reported that D.J. told her that "Fred was f* * *ing us."

D. KRE 803(4) and Edwards v. Commonwealth

[1] As previously noted, the testimony of these medical personnel implicates KRE 803(4), the medical diagnosis exception to the hearsay rule. KRE 803(4) provides that "[s]tatements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis" ***244** are not excluded by the hearsay rule even though the declarant is available as a witness. However, the general rule is that the identity of the perpetrator is not relevant to treatment or diagnosis. *Souder v. Commonwealth,* 719 S.W.2d 730, 735 (Ky.1986) (overruled on other grounds by *B.B.,* 226 S.W.3d at 47).

However, in *Edwards,* this Court recognized an exception to the identification rule in cases where a family or household member is the perpetrator of sexual abuse against a minor of that household. *See also J.M.R. v. Commonwealth of Kentucky, Cabinet for Health and Family Services,* 239 S.W.3d 116 (Ky.App.2007) (applying exception). In *Edwards,* we relied on *United States v. Renville,* 779 F.2d 430 (8th Cir.1985), as persuasive authority for the family, or

household member, exception to the general rule. Therein, we acknowledged:

> In *Renville,* the Court made this exception to the general rule that physicians rarely have reason to rely on statements of identity because of two important aspects involved in the case: (1) the physician was not merely diagnosing and treating the child/patient for physical injuries but psychological injuries as well, and (2) the abuser was a *family,* household member.
>
> The physician in that case testified that he was treating the child for her emotional and physical trauma. He also said that the identity of the abuser was extremely important to him in helping the child work through her problems. The identity was also particularly important if the abuser lived with the child, because the abuse would likely continue as long as the child remained in the household with the abuser.

Edwards, 833 S.W.2d at 844 (citing *Renville,* 779 F.2d at 438).

The Commonwealth, citing the Court of Appeals' unpublished opinion *Plotnick v. Commonwealth,* No.2007–CA–000160–MR, 2008 WL 162881 (Ky.App. Jan.18, 2008), argues that this exception applies since the children may have considered Appellant a member of the family or household, as Appellant had only recently ended his relationship with their grandmother. Therefore, if Appellant is treated as a family or household member, and the perpetrator's identity is necessary for purposes of medical treatment, then the *Edwards* exception to the general rule would apply, allowing Polk's testimony about the origin of the children's injuries to be properly admitted under KRE 803(4) as statements reasonably pertinent to D.J.'s and D.Y.'s treatment or diagnosis.

Upon reconsideration of the plain language of KRE 803(4) and its underlying purpose, we have come to the view that the identification exception we adopted in *Edwards* and the Court of Appeals applied in *J.M.R.* were based upon an ill-advised and unsound extension of a traditional exception to the hearsay rule. We accordingly overrule *Edwards* and *J.M.R.*

The hearsay rule developed over hundreds of years of Anglo–American experience in jury trials. That jurisprudential experience taught that statements of witnesses repeating what they had heard from others out of court was inherently unreliable and unworthy of belief. To protect the integrity of the trial and its truth—finding mission, such out-of-court statements were forbidden. We also learned, however, that certain kinds of out-of-court statements, because of the circumstances in which they were uttered, were highly reliable.

> [Hearsay evidence] was later excluded for lack of oath and cross-examination, two devices for assuring trustworthiness, of which the latter is primary and ***245** came finally to be controlling. Therefore, the hearsay rule and its exceptions in outline, though not in detail, form a logically coherent whole.

> Each exception is justified, for the hearsay received thereunder was uttered with attendant conditions which furnish a sufficient guaranty of its trustworthiness to enable the jury to value it.

See Edmund M. Morgan and John MacArthur Maguire, *Looking Backward and Forward at Evidence,* 50 Harv. L.Rev. 909, 920–921 (1937).

Among the several exceptions to the hearsay rule that developed is the one now codified as KRE 803(4), "statements for purposes of medical treatment or diagnosis."

We know that an ill or injured person seeking to be healed or cured is ordinarily highly motivated to give truthful information to the physician or medical provider treating that illness or injury. The essential element that lends credence to the statement is that the patient, the "declarant" in hearsay law parlance, believes that the doctor must have that information to render effective treatment. The doctor's actual need, use, or reliance upon the declarant's information is less meaningful than the declarant's belief that the information is essential to effective treatment. The declarant's belief makes the out-of-court statement inherently trustworthy.

[2] As expressed in *Willingham v. Crooke,* 412 F.3d 553, 561–562 (4th Cir.2005):

> Rule 803(4) of the Federal Rules of Evidence [the federal counterpart of KRE 803(4)] allows the admission of hearsay statements "made for purposes of medical diagnosis or treatment and describing ... present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." This exception to the hearsay rule is premised on the notion that a declarant seeking treatment "has a selfish motive to be truthful" because "the effectiveness of medical treatment depends upon the accuracy of the information provided." 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 803.06[1] (Joseph M. McLaughlin, ed., 2d ed.2004); *see Morgan v. Foretich,* 846 F.2d 941, 949 (4th Cir.1988). Admissibility of a statement pursuant to Rule 803(4) is governed by a two-part test: "(1) the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and, (2) the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." *Morgan,* 846 F.2d at 949.

(internal quotation marks & footnote omitted).

Hence, we except from the hearsay rule statements made by a patient to medical personnel for the purpose of medical treatment or diagnosis. In the *Edwards* case, we enlarged that exception to include statements of a patient identifying the perpetrator of sexual abuse when that perpetrator is a member of the family or household of the victim, not because the utterance of the statement was motivated by the victim's desire for effective treatment,

but because the medical professional might use that information to protect the victim from further abuse by a member of the victims family or household. *Edwards,* 833 S.W.2d at 844. In so doing, we failed to recognize that it is the patient's desire for treatment, not the doctor's duty to treat, that gives credibility to the patient's out-of-court statement. There is no inherent trustworthiness to be found in a hearsay statement identifying the perpetrator ***246** when that statement did not arise from the patient's desire for effective medical treatment. As Professor Lawson notes, in Section 8.55(6) of the *Kentucky Evidence Law Handbook* (4th ed.2003) (quoting Mueller & Kirkpatrick, *Federal Evidence,* § 442 (2d ed. 1994)): "(T)his expansion [the *Edwards/Renville* decisions] of the exception is troubling ... admitting such statements because doctors rely on them in diagnosis is highly questionable."

The *Renville* rule has also received other scholarly criticism. *State v. Jones,* 625 So.2d 821, 825 (Fla.1993), for example, sets forth learned authorities which criticize the rule and the reasonings therefor:

> However, the trend to adopt a *Renville*—type analysis also has been harshly criticized. As the Maryland Court of Special Appeals noted in a scholarly opinion:
>
> > In stretching outward their list of a physician's responsibilities and in pushing forward with their definition of "medical treatment and diagnosis," the expansionists have left behind, abandoned and forgotten, the state of mind of the declarant.... Physical self-survival dictates revealing even embarrassing truth to avoid the risk of the wrong medicine or the needless operation. Presupposing a declarant conscious of the probable consequences of his assertions, the imperative to speak truthfully is not nearly so strong when the anticipated result is a social disposition. The temptation to influence the result may, indeed, run in quite the opposite direction. Truthful answers as to the identity of its abuser may well wrench a child from the reassuring presence of its mother or father or both. It is highly unlikely that there operates in an infant declarant a compelling desire to bring about such a result. *Cassidy v. State,* 74 Md.App. 1, 536 A.2d 666, 684 (1988), cert. denied, 312 Md. 602, 541 A.2d 965 (1988).

Moreover, many commentators have expressed concern that in the course of laudable efforts to combat child abuse, prosecutors, courts, and others have occasionally overreached. See, e.g., Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship,* 72 Minn.L.Rev. 523, 529 n. 26 (1988) ("The successful prosecution of child sexual abuse cases should not be permitted to distort the hearsay exception for statements for medical diagnosis or treatment. Almost anything is relevant to the diagnosis or treatment of psychological well being, and far too many untrustworthy statements are relevant to preventing repetition of the abuse."); Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical*

Diagnosis or Treatment, 67 N.C.L.Rev. 257, 258 (1989) (Applications of medical diagnosis or treatment exception in child abuse cases "have tended to expose the thinness of the justification for extending the exception to statements made without any view toward treatment.")

[3] As reflected by the foregoing discussion, we have carefully considered the *Renville* rule, its merits and de merits, and now conclude that our adoption of the rule was an unwise departure from the traditional hearsay rule that has served our system of justice well for many generations. One cannot reasonably conclude that the statements identifying the perpetrator, such as those at issue in this case, were made by young children "for the purpose of medical treatment or diagnosis." The *Renville* rule is inconsistent with the plain language of KRE 803(4), and, as the above authorities explain, the ***247** reliability of a child's identification of the perpetrator of the abuse to a medical professional contains the same tangible risks of unreliability generally inherent in all hearsay testimony. Accordingly, *Edwards, J.M.R.,* and other cases applying the exception to the hearsay rule are overruled. In so deciding, we do not hold that statements of a child victim to medical personnel identifying an abuser are always inadmissible. There may be circumstances in which such statements will be found to comport with the requirements of KRE 803(4) or other exceptions to the hearsay rule. This, however, is not such a case.

Based upon the above discussion, we conclude that it was error for the trial court to have permitted Polk, Dr. Condra, and Dr. Pfitzer to testify under the *Renville* construction of the medical treatment exception to the hearsay rule.[3] Moreover, because the testimony served to bolster the children's testimony and the Commonwealth's theory of the case, the testimony was highly prejudicial. As further discussed below, in combination with other inadmissible hearsay statements let into trial, reversible error occurred.

3 Even under the *Renville* rule it would have been error to have admitted Polk's testimony. Polk, as an EMT, was treating D.J. and D.Y. for purely physical injuries, without addressing the emotional/psychological trauma. An emergency medical responder, unlike a treating physician ordinarily does not have the medical training, or the expertise, to engage in, or plan for, psychological evaluation and treatment. Thus, the identity of the perpetrator is not something an EMT would reasonably rely upon in composing a course of emergency treatment. Thus, the *Edwards* and *Renville* exception was inapplicable in this instance.

[4] This opinion does not alter or limit the traditional hearsay exception allowing medical providers to testify to a patient's out-of-court statements as to what was done to the patient and how he or she was injured. Nor, as the dissent implies, does this opinion impede or limit the ability of medical personal to report suspected child abuse, including information regarding the identity of a suspected abuser to the appropriate authorities. We simply state that we no longer recognize a special exception to the hearsay rule which allows medical providers to testify in court to the hearsay statements of a victim of sexual offenses which identify the alleged perpetrator because that identification is not pertinent to the medical treatment being provided.

II. OTHER HEARSAY TESTIMONY

In addition to the medical testimony hearsay discussed above, Appellant also complains of hearsay statements introduced at trial through J.W., the victims' uncle; G.W., the victims' mother; and Valleri Mason, a children's forensic interviewer. For the reasons stated below, we conclude that each of these witnesses was permitted to repeat statements made by the children identifying Appellant as the perpetrator, and that the statements were not subject to any hearsay exception.

A. J.W.—(Victims' Uncle)

[5] [6] Appellant argues the trial court erred by permitting testimony from the victims' uncle, J.W. The uncle, a prosecution witness, testified that he asked D.Y. "what happened, who touched her," and D.Y. pointed to Appellant. Appellant objected, claiming the testimony was hearsay, but the trial court determined the uncle was being asked about what he said and saw, not what a third-party said, and allowed him to testify to his recollection.

KRE 801 defines a statement as: "(1) An oral or written assertion; or (2) *Nonverbal* ***248** *conduct of a person, if it is intended by the person as an assertion.*" (Emphasis added). We have no difficulty in concluding that D.Y.'s nonverbal conduct pointing at Appellant following J.W.'s question was the equivalent of a verbal assertion by D.Y. that "Fred Colvard touched me." Thus, the nonverbal assertion falls under the normal hearsay rules for the admission of evidence.

In support of the statement's admission, the Commonwealth cites us to KRE 801A(a)(3), *Preston v. Commonwealth,* 406 S.W.2d 398, 403 (Ky.1966), and our previous ruling in *Owens v. Commonwealth,* 950 S.W.2d 837, 839 (Ky.1997), to the effect that "once a witness is allowed to testify that he made an identifying statement, further proof by other witnesses that he did in fact make it is just as relevant and competent as would be defensive proof to the effect that he did not make it." (internal citations omitted).

KRE 801A(a)(3) provides as follows:

> Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing *and is examined concerning the statement, with a foundation laid as required by KRE 613,* and the statement is: ... (3) One of identification of a person made after perceiving the person.

(emphasis added).

While D.Y. did testify at trial, the Commonwealth fails to cite us to D.Y.'s testimony wherein she was "examined concerning the statement" she made to her uncle, and our review of the testimony discloses no such examination of the child. Nor do we find compliance with the foundation requirements contained in KRE

613. Further, the uncle testified prior to D.Y. Accordingly, the elements for admissibility under the rule are not met, and the uncle's testimony relating the statement was admitted in error.

B. G.W.—(Victims' Mother)

[7] At trial, Appellant asked the children's mother on cross-examination whether she had asked the children "Did he put his dick in you?" The apparent purpose of the question was to impeach the mother by portraying her as vulgar. Appellant then had the mother read a report prepared by Polk that stated that the mother had, in fact, asked the children that question.

On redirect, the Commonwealth attempted to ask the mother about a statement made by D.Y. to Polk to the effect that Appellant "took his weenie out of his zipper and put it in her, but not all the way." The Commonwealth first attempted to argue that the statement was admissible as a statement made for medical diagnosis under KRE 804(a) as extended under *Edwards.* The trial court ultimately ruled that the question and answer could come in for the purpose of showing that the children used "children's" terminology as opposed to the vulgar terminology allegedly used by the mother.

Appellant now claims that allowing the mother to so testify improperly bolstered the victims' testimony. We agree.

While Appellant's inquiry of the mother about her question to the children opened the door to further inquiry regarding that event, and perhaps other conversations she had with the children, we fail to perceive how that would have opened the door for the mother to repeat D.Y.'s statement to Polk. Because D.Y. used children's terminology does not impeach the mother's denial that she asked the children a question using vulgar terminology. Moreover, the purported impeachment was impeachment on a collateral matter that permitted a hearsay statement not subject to an exception ***249** implicating Appellant as guilty of the charges to be heard by the jury.

The mother's questioning of the children is too attenuated from D.Y.'s statement to Polk for questioning concerning the former to have opened the door to the latter. We discern no other hearsay exception which would have permitted the statement to be admitted, and accordingly conclude that it was admitted in error.

C. Valleri Mason

[8] Lastly, Appellant objects to various statements made by Valleri Mason, a forensic interviewer for Family and Children First.[4] Mason, a self-described child interview specialist, interviewed D.Y. and D.J. the day after the reported assault and testified about that interview at trial. She testified that D.Y. and D.J. made disclosures of sexual abuse and that they circled anatomically correct drawings indicating where they had been violated. In addition, she testified to the following discussion she had with D.J.:

4 Appellant also objects to Mason's testimony that D.J. stayed on task better, followed questioning, and was less easily distracted than D.Y., her older sister; her testimony that she had not testified as a witness in court

for each interview she has done, because not all cases go to court; and her testimony that she does not make recommendations to the prosecutor, that some cases settle, and sometimes the touching alleged is not illegal or improper touching.

> You told me that Fred, that he put his peanuts [D.J.'s term for penis] in you. She said, "Yeah." I said, well can you show me on here. Does this boy, does he have peanuts? She said, "yes".... I asked her to circle where the peanuts are on that boy and she circled the penis.

[9] Though Mason's title is that of a "forensic interviewer," she is, in effect, a social worker. "It is well-settled that '[t]here is no recognized exception to the hearsay rule for social workers or the results of their investigations.' " *B.B.,* 226 S.W.3d at 51. It follows that there is no hearsay exception which would allow Mason to testify to the children's identification of Appellant as having sexually assaulted them.[5]

5 This claim of error was not properly preserved by objection. We have factored this into our harmless error review in considering whether reversible error occurred as a result of the multiple recitations of impermissible hearsay identifying Appellant as having perpetrated a sexual assault on the children.

As with the medical testimony, the above hearsay was prejudicial because the testimony served to bolster the children's testimony and the Commonwealth's theory of the case. As further discussed below, in combination with the medical hearsay statements admitted into evidence at trial, reversible error occurred.

III. THE HEARSAY ERRORS WERE NOT HARMLESS

[10] [11] RCr 9.24 requires us to disregard an error if it is harmless. A non-constitutional evidentiary error may be deemed harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The inquiry is not simply "whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 765, 66 S.Ct. 1239; *Winstead v. Commonwealth,* 283 S.W.3d 678, 688–89 (Ky.2009).

***250** [12] In light of the lack of DNA or other physical evidence linking Appellant to the crimes, the multiple instances of hearsay testimony described above which bolster the Commonwealth's theory was of sufficient consequence such that we cannot say with fair assurance that the judgment was not substantially swayed by the error. The improper hearsay evidence vouching that the children had previously identified Appellant as the perpetrator multiplied the bolstering effect and resulted in a parade of witnesses vouching for the Commonwealth's theory of the case.

In sum, we are persuaded that the multiple instances of hearsay evidence bolstering the Commonwealth's case were not harmless error. We accordingly are constrained to vacate the trial court's judgment of conviction, and remand for a new trial.

IV. EVIDENCE REGARDING APPELLANT'S PRIOR CONVICTION IS ADMISSIBLE

[13] Appellant contends that the trial court erroneously permitted the Commonwealth to introduce evidence that he was convicted of attempting to rape a ten-year old child in 1994. Because the issue is likely to arise again upon retrial, we address the argument on the merits.

At trial, the Commonwealth introduced evidence that Appellant was convicted of attempting to rape a ten-year old girl in 1994. The victim, who is now twenty-three years old, testified at trial. Appellant argues that this testimony was error per KRE 404(b) because the circumstances surrounding the 1994 conviction were too dissimilar to the instant case. Generally, a defendant's prior bad acts are inadmissible. However, KRE 404(b)(1) provides that evidence of prior crimes or wrongs is admissible if offered for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." As recognized in *Tamme v. Commonwealth,* 973 S.W.2d 13, 29 (Ky.1998), this list of exceptions is illustrative, not exclusive. "Among the non-enumerated exceptions we have recognized to KRE 404(b)'s general prohibition on the introduction of prior bad acts evidence is ... *modus operandi" Clark v. Commonwealth,* 223 S.W.3d 90, 95 (Ky.2007). The modus operandi exception requires that:

> [t]he facts surrounding the prior misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea.* If not, then the evidence of prior misconduct proves only a criminal disposition and is inadmissible.

Id. (citing *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky.1999)).

> "It is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates *modus operandi* So, as a prerequisite to the admissibility of prior bad acts evidence, we now require that the proponent of the evidence to 'demonstrate that there is a factual commonality between the prior bad act and the charged conduct that is simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual.' Thus, '[a]lthough it is not required that the facts be identical in all respects, 'evidence of other acts of sexual deviance ... must be so similar to the crime on trial as to constitute a so-called signature crime.' "

Id. at 97.

The circumstances of the present offenses

are sufficiently similar to the 1994 crime to satisfy the standard we have established for admission under KRE 404(b). ***251** The prior offense indicated a sexual interest in prepubescent girls, such as the victims here. In both the prior crime and the current offenses, Appellant knew the victims and gained access to their homes by his involvement in a romantic relationship with an adult female in the household. All of the victims had second floor bedrooms and were quietly assaulted while others were in the home. The nature of the sexual act itself was similar in that each incident was of brief duration, the perpetrator said nothing to the victim during the assault, the perpetrator did not ejaculate, and avoided vaginal or anal tearing of the victims by penetrating only partially.

Faced with those striking similarities between Appellant's prior conviction and the current alleged crimes, the trial court did not abuse its discretion in admitting under KRE 404(b) the evidence of Appellants prior conviction for attempted rape. At retrial, should the same facts be developed, the trial court will be well within its discretion to admit evidence regarding Appellant's prior conviction.

V. THE BURGLARY INSTRUCTION GIVEN TO THE JURY WAS ERRONEOUS

Finally Appellant argues that the jury instruction given on the burglary charge was improper because it allowed the jury to convict him of that crime if they believed he either caused physical injury to the girls, a violation of KRS 511.020(1)(b), or threatened the girls with harm to their mother if they told anyone about what he did. KRS 511.020(1)(c). We address the issue because it may arise upon retrial.

[14] Appellant argues that the instruction as written presented alternate theories of guilt, violating his right to a unanimous verdict. A jury instruction which presents an alternative theory of guilt is proper and does not violate the requirement of unanimity found in Section 7 of the Kentucky Constitution, if every alternate theory contained in the instruction was reasonably supported by evidence presented at trial. *Hayes v. Commonwealth,* 625 S.W.2d 583, 584 (Ky.1981).

[15] [16] While alternative theories of criminal liability may properly be combined in a single instruction, the instruction must accurately present the elements of each alternative theory. Guilt under KRS 511.020(1)(c) requires that one "uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime." The corresponding instruction given by the trial court stated that Appellant could be found guilty of first degree burglary if, among the other elements, he "threatened to kill the victim's mother, [G.W.]." It is clear that the instruction does not accurately reflect the requirement of the statute. If upon retrial, the Commonwealth pursues a conviction on the alternate theories of liability under KRS 511.020(1)(b) and (1)(c), and appropriate evidence is offered to support same, the instruction must correspond to the statutory element by requiring the jury to find, not simply a threat to kill another, but a threat to

use a deadly weapon against another person.

VI. OTHER ISSUES

Appellant also argues that prejudicial error occurred by the trial court's failure to strike two jurors for cause. Because the case is reversed on other grounds and the issue is unlikely to recur upon retrial, we decline to address it.

[17] Appellant also argues that the evidence presented at trial was insufficient to support the convictions. We disagree. The testimony of D.J. and D.Y. describing the events of March 2, 2006, and identifying Appellant as the perpetrator was sufficient ***252** to defeat his motion for a directed verdict. *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky.1991). The trial court did not err in overruling Appellant's motions for directed verdicts.

CONCLUSION

For the reasons stated herein, the judgment of the Jefferson Circuit Court is reversed, and the cause is remanded for additional proceedings consistent with this opinion.

All sitting. CUNNINGHAM, NOBLE, and SCHRODER, JJ., concur.

MINTON, C.J., concurs in part and dissents in part and would not allow introduction of 1994 attempted rape conviction because the facts of the current case are not sufficiently similar to satisfy KRE 404(b). He concurs in all other respects.

SCOTT, J., concurs in part and dissents in part by separate opinion in which ABRAMSON, J., joins.

SCOTT, Justice, Concurring in Part and Dissenting in Part Opinion:

Although I concur with the majority on the other issues, I must respectfully dissent from the majority's opinion that this Court's decision in *Edwards v. Commonwealth,* 833 S.W.2d 842 (Ky.1992) (*overruled on other grounds by B.B. v. Commonwealth,* 226 S.W.3d 47 (Ky.2007)) was "based upon an ill-advised and unsound extension of a traditional exception to the hearsay rule." Op. at 244.

I. Edwards and Renville

Edwards, id. at 844, was premised on *United States v. Renville,* 779 F.2d 430 (8th Cir.1985), wherein the logic of the rule as applied to young children was explained, to wit:

> Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household *are* reasonably pertinent to treatment.

> Statements of this kind differ from the statements of fault ... and properly excluded under our past decisions in a crucial way: they are reasonably relied on by a physician in treatment or diagnosis. First, child abuse involves more than physical injury; the physician must be attentive to treating the emotional and psychological injuries which accompany this crime. The exact nature and extent of the psychological problems which ensue from child abuse often depend on the identity of the abuser. The general rule banning statements of fault is premised on the assumption that the injury is purely somatic. This is evident from the examples put forth by the courts and commentators discussing the rule. In each example, the medical treatment contemplated was restricted to the physical injuries of the victim; there is no psychological component of treatment which could relate to the identity of the individual at fault. Furthermore, in each example the statement of fault is not relevant to prevention of recurrence of the injury. Sexual abuse of children at home presents a wholly different situation.
>
> Second, physicians have an obligation, imposed by state law, to prevent an abused child from being returned to an environment in which he or she cannot be adequately protected from recurrent abuse. This obligation is most immediate where the abuser is a member of the victim's household, as in the present case. Information that the abuser is a member of the household is therefore "reasonably pertinent" to a course of treatment which includes removing the child from the home.

***253** *Id.* at 436–438 (internal citations and footnotes omitted); *see also J.M.R. v. Commonwealth of Kentucky, Cabinet for Health and Family Services,* 239 S.W.3d 116 (Ky.App.2007).

As our predecessor Court noted in *Edwards:*

> In *Renville,* the Court made this exception to the general rule that physicians rarely have reason to rely on statements of identity because of two important aspects involved in the case: (1) the physician was not merely diagnosing and treating the child/patient for physical injuries but psychological injuries as well, and (2) the abuser was a *family,* household member.
>
> The physician in that case testified that he was treating the child for her emotional and physical trauma. He also said that the identity of the abuser was extremely important to him in helping the child work through her problems. The identity was also particularly important if the abuser lived with the child, because the abuse would likely continue as long as the child remained in the household with the abuser.

833 S.W.2d at 844. And, as was noted by the Court in *J.M.R.:*

> The therapists testified that the boys feared their stepfather would harm them in the future and that they did not want to reunify with their mother because of her inability or unwillingness to leave their stepfather. While the

> mother contends that these statements were inadmissible hearsay, we conclude that these statements qualified as hearsay exceptions pursuant to KRE 803(4) because the statements were made to therapists who were determining what happened to the children and what treatment they needed to receive and the statements were made for the purpose of receiving medical treatment.

239 S.W.3d at 119 –120; *see also Gadd v. Commonwealth,* 2005–SC–000880–MR, 2007 WL 858811 (Ky.2007). *Gadd,* in turn, led to an expansion in *Plotnick v. Commonwealth,* 2007–CA–000160–MR, 2008 WL 162881 at *3 (Ky.App.2008), wherein the Court recognized:

> While not a "family member" in the traditional sense, D.R. called Plotnick "daddy," D.R. had a half-sibling fathered by Plotnick, D.R. had resided with Plotnick at times, and the victim's mother had an ongoing relationship with Plotnick from which it may be inferred that there would be ongoing contact between the victim and the alleged perpetrator. Therefore, we believe the *Edwards* exception applies, and that the physician's assistant properly repeated D.R.'s identification of Plotnick as the perpetrator.

Each of these opinions are based on common ground—that it is medically relevant to the health and safety of young children that their injuries not only be recognized and treated, but also that further injury prevented—i.e., their perpetrators, if connected with the children's home life, could be identified and reported so that the child would be made safe.

Moreover, even *State v. Jones,* 625 So.2d 821, 824–25 (Fla.1993), upon which the majority bases its logic, admits that "[t]he *majority* of state courts confronted with this issue have followed *Renville* and permitted medical personnel to testify regarding statements of identity made by child victims of abuse." *Id.* at 824–25 (emphasis added) (citations omitted).

II. The Occurrence

The relevant events precipitating this analysis occurred on March 2, 2006, in Louisville, Kentucky, when the victims, D.J. and D.Y., were six and seven years old, respectively. That day, their mother, ***254** G.W., met them as they got off the school bus and was told by the bus driver that the girls had misbehaved on the trip home. She then took them home, ordering them to their room and bed as punishment for their behavior on the bus. G.W., who was seven

months pregnant at the time, then went to the kitchen to fix her daughters a snack, but became ill and went to the bathroom.

During this time, Appellant entered the home and went to D.Y. and D.J.'s bedroom. D.J. testified that Appellant climbed onto the top bunk where she was lying and used belts to tie her arms and legs to the bed. He then hit her in the face and raped her. Though D.J. could not remember what he said, Appellant threatened her. In addition, Appellant raped D.Y. He told D.Y. that he would kill her mother and the baby her mother was carrying if she told anyone what he was doing. Appellant then climbed out the window.

While in the bathroom, G.W. heard a door close and shouted to her daughters, asking who was in the house. D.Y., the older of the two victims, then asked to come into the bathroom to wash herself. D.Y. initially refused to tell her mother why, but she was holding herself. On undressing her, G.W. noticed that D.Y.'s vagina was red, and had a strong odor. G.W. then went to her daughter's room and noticed an odor of feces. After briefly questioning the children, G.W. realized that both her daughters had been raped. At her insistence, both girls identified Appellant as their attacker.

G.W. then looked out the window and saw Appellant leaving. She grabbed a butcher knife from the kitchen, left the apartment, and confronted Appellant. Initially, he denied the allegations, but became silent when G.W.'s mother, W.D., Appellant's former fiancee, confronted and physically attacked him.

The police and EMS were then called to G.W.'s apartment. No injuries or blood was seen on the girls and EMS left the scene. G.W. and W.D. then took the girls to the hospital. Dr. Condra, who saw the children at the hospital, testified that D.J.'s examination showed some mild redness between the vulva and vagina, but there was no evidence of tears or bruising to the vagina. An abnormality of the hymen was also noted. Dr. Condra concluded that D.J.'s examination was consistent with her complaint of sexual assault and was consistent with some type of penetration, although he could not specify the nature of the penetration.

D.Y.'s examination showed some mild redness or inflammation at the opening of the vagina, but there were no tears or bruising. The history D.Y. gave Dr. Condra, along with his examination, was consistent with a sexual assault. D.Y. also had anal dilatation of about 1.5 centimeters. Such a dilatation was consistent with a penetrating trauma.

Vaginal swabs, anal swabs, and a vaginal smear of the panties did not disclose the presence of any seminal fluid or sperm cells on D.J. or D.Y. However, an unidentified 11–inch, light brown, Caucasian head hair was found in D.Y.'s anal region that did not belong to Appellant, an African–American. No semen, pubic hair or body hair was found on any of the bed clothing or the towel removed from the girl's bedroom. Rape kits taken from the children did not contain any semen that could be examined or analyzed as Appellant had not ejaculated.

III. The Medical Testimony

A. Dr. Condra

Prior to seeing Dr. Condra at the hospital, D.J. and D.Y. were interviewed by the ***255** triage nurse. Dr. Condra relied upon these notes in treating the victims. The notes reflected that D.J. told the triage nurse that Appellant sexually abused her. Dr. Condra also testified that D.J. told him and the nurse what Appellant had been doing to her. He also testified that both D.J. and D.Y. informed him that they were sexually assaulted that day "and over the past months."

B. Dr. Pfitzer

Dr. Pfitzer was a treating pediatrician who provided follow-up examination and treatment to D.J. and D.Y. She testified that she saw the children as a result of sexual abuse allegations made against "a neighbor" named "Fred" and that the allegations involved vaginal and anal penetration.

IV. The Majority's Departure From Edwards

In discarding *Edwards'* precedent of eighteen years, the majority asserts that it "cannot reasonably conclude that the statements identifying the perpetrator, such as those at issue in this case, were made by young children 'for the purpose of medical treatment or diagnosis.' " Op. at 246. The majority further asserts "the reliability of a child's identification of the perpetrator of the abuse to a medical professional contains the same tangible risk of unreliability generally inherent in all hearsay testimony." *Id.* at 246–47. Outside the medical field, one could assert this conclusion to be valid as long as it rested "on the obvious assumption that the declarant is responding under the impression that [he or she] is being asked to make an accusation that is not relevant to the physician's diagnosis or treatment." *Renville,* 779 F.2d at 438. However,

> [t]his assumption does not hold where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding. In such circumstances, the victim's motivation to speak truthfully is the same as that which insures reliability when he recounts the chronology of events or details symptoms of somatic distress.

Id. Here, there is nothing in the record to indicate "that the child's motive in making these statements to medical personnel was other than as a patient responding to a physician questioning for prospective treatment." *Id.* at 439 (*citing United States v. Iron Shell,* 633 F.2d 77, 84 (8th Cir.1980));

see also U.S. v. Kappell, 418 F.3d 550, 557 (6th Cir.2005) ("The record supports the district court's finding that 'there is sufficient indicia that these statements were made for the purpose of medical diagnosis or treatment ... to be admissible under 803(4).' ").

The reasoning for retaining the *Edwards/Renville* exception was also aptly noted by the Supreme Court of Arkansas in *Hawkins v. State,* 348 Ark. 384, 72 S.W.3d 493, 498 (2002):

> R.T.'s identification of appellant as her abuser allowed Dr. Hawawini to take steps to prevent further abuse by her stepfather, who was a member of her household. Additionally, R.T.'s identification of appellant as her abuser allowed Dr. Hawawini to take steps to treat the emotional and psychological injuries which accompanied the rape. Moreover, we note that based on R.T.'s statements, Dr. Hawawini referred her to a physician at Children's Hospital who specialized in treating children who are sexually abused. Finally, R.T.'s identification of appellant as her abuser permitted Dr. Hawawini to fulfill her legislatively imposed duty of calling the child-abuse hotline and reporting the crime.

***256** And, the Court in *Morgan v. Foretich,* also noted that "[w]e agree with the judgment of the Eighth Circuit [in *Renville*] that '[s]exual abuse of children at home presents a wholly different situation' from that normally encountered in Rule 803(4) cases and that situation requires great caution in excluding highly pertinent evidence." 846 F.2d 941, 949 (4th Cir.1988) (*citing Renville,* 779 F.2d at 437). In *State v. Tracy,* 482 N.W.2d 675 (Iowa 1992), the Iowa Supreme Court agreed, noting that "[b]ecause of the nature of child sexual abuse, the only direct witnesses to the crime will often be the perpetrator and the victim. Consequently, much of the State's proof will necessarily have to be *admissible* hearsay statements made by the victim to relatives and medical personnel." *Id.* at 682. Thus, " '[i]nformation that the abuser is a member of the household is therefore 'reasonably pertinent' to a course of treatment which includes removing the child from the home.' " *Id.* at 681–82 (*quoting Renville* 779 F.2d at 438); *see also State v. Robinson,* 153 Ariz. 191, 735 P.2d 801, 810 (1987) ("[I]n child sexual abuse cases, we therefore join the growing number of jurisdictions which recognize that statements regarding the abuser's identity fall within Rule 803(4) whenever, as here, identity is relevant to proper diagnosis and treatment."); *State v. Aguallo,* 318 N.C. 590, 350 S.E.2d 76, 80 (1986) ("[I]n the context of a child sexual abuse or child rape, a victim's statements to a physician as to an assailant's identity are pertinent to diagnosis and treatment."); *Goldade v. State,* 674 P.2d 721, 725 (Wyo.1983) ("[T]he function of the court must be to pursue the transcendent goal of addressing the most pernicious social ailment which afflicts our society, family abuse, and more specifically, child abuse."); *U.S. v. George,* 291 Fed.Appx. 803, 805 (9th Cir.2008) ("The district court also did not abuse its discretion by admitting D.B.'s statement to a nurse practitioner that George touched her inappropriately because the statement was made for the purposes of a medical diagnosis."); *People of Territory of*

Guam v. Ignacio, 10 F.3d 608, 613 (9th Cir.1993) ("Thus, a child victim's statements about the identity of the perpetrator are admissible under the medical treatment exception *when they are made for the purposes of medical diagnosis and treatment.*") (emphasis added).

V. Conclusion

For these reasons, I cannot so easily cast away an exception wisely adopted by our predecessor Court for the protection of the children of Kentucky and thus I must dissent.

ABRAMSON, J., joins.

All Citations

309 S.W.3d 239

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by U.S. v. Joe, 10th Cir.(N.M.), November 3, 1993

846 F.2d 941
United States Court of Appeals,
Fourth Circuit.

Elizabeth MORGAN, M.D., Plaintiff–Appellant,
v.
Eric A. FORETICH; Vincent Foretich;
Doris Foretich, Defendants–Appellees.
Hilary FORETICH, an Infant who sues
Through her mother and next friend, Elizabeth
MORGAN, M.D., Plaintiff–Appellant,
v.
Eric A. FORETICH; Vincent Foretich;
Doris Foretich, Defendants–Appellees.
Elizabeth MORGAN, M.D., Plaintiff–Appellee,
v.
Eric A. FORETICH; Vincent Foretich;
Doris Foretich, Defendants–Appellants.
Hilary FORETICH, an Infant who sues
Through her mother and next friend,
Elizabeth MORGAN, M.D., Plaintiff–Appellee,
v.
Eric A. FORETICH; Vincent Foretich;
Doris Foretich, Defendants–Appellants.

Nos. 87–2549, 87–2550, 87–2558 and 87–2559.
|
Argued Jan. 6, 1988.
|
Decided May 17, 1988.
|
Rehearing and Rehearing In
Banc Denied July 21, 1988.

Synopsis

Four-year-old child and her mother brought action against father and his parents for damages arising out of alleged sexual abuse of child. The United States District Court for the Eastern District of Virginia, Richard L. Williams, J., entered judgment on jury verdict for defendants, and appeal was taken. The Court of Appeals, Donald Russell, Circuit Judge, held that: (1) exclusion of evidence that child's older sister had also been abused was abuse of discretion, and (2) child's statements to her mother and psychiatrist were admissible.

Reversed and remanded in part and affirmed in part.

Powell, Associate Justice, United States Supreme Court (Retired), concurred in part and dissented in part and filed opinion.

West Headnotes (8)

[1] **Evidence**
Right to prove specific facts
Evidence
Similar wrongful acts
Evidence
Similar transactions

Evidence of other crimes or acts is admissible even absent clear and convincing proof of those other crimes or acts if proffered evidence is relevant to issue other than defendant's character and its probative value substantially outweighs its prejudicial effect. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

7 Cases that cite this headnote

[2] **Assault and Battery**
Admissibility in general
Evidence
Tendency to mislead or confuse

Evidence that four-year-old sexual abuse plaintiff's older sister suffered similar abuse during visitation periods with defendants was admissible on issue of identity, in that only defendants had access to both girls; possible prejudice was outweighed by probative value of evidence where case turned on issue of parties' credibility. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

10 Cases that cite this headnote

[3] **Evidence**
Acts and Statements Accompanying or Connected with Transaction or Event

Although child is incompetent to testify, testimony as to his spontaneous declarations or res gestae statements is nevertheless admissible under excited utterance exception to hearsay rule. Fed.Rules Evid.Rule 803(2), 28 U.S.C.A.

30 Cases that cite this headnote

[4] **Evidence**
Acts and Statements Accompanying or Connected with Transaction or Event

To qualify as excited utterance, within meaning of exception to hearsay rule, declarant must have experienced startling event or condition and reacted under stress or excitement of that event and not from reflection and fabrication. Fed.Rules Evid.Rule 803(2), 28 U.S.C.A.

22 Cases that cite this headnote

[5] **Evidence**
Acts and Statements of Person Sick or Injured

Four-year-old sexual abuse plaintiff's statements to her mother regarding abuse occurring during visitation with father were admissible under excited utterance exception to hearsay rule where statements were made within three hours of plaintiff's first opportunity to speak with her mother, plaintiff was nearly hysterical in moments immediately preceding statements, and statements were corroborated by substantial physical evidence and medical testimony. Fed.Rules Evid.Rule 803(2), 28 U.S.C.A.

17 Cases that cite this headnote

[6] **Evidence**
Statements made for purpose of medical diagnosis or treatment

Out-of-court statements made by four-year-old sexual abuse plaintiff to her psychologist were admissible under medical diagnosis or treatment exception to hearsay rule, though plaintiff was incompetent to testify as witness where statements were pertinent to plaintiff's treatment, and were reasonably relied upon by psychiatrist in treating plaintiff. Fed.Rules Evid.Rule 803(4), 28 U.S.C.A.

70 Cases that cite this headnote

[7] **Evidence**
Statements made for purpose of medical diagnosis or treatment

Fact that physician is consulted in order to testify as witness rather than for treatment is irrelevant to determination of whether statements made to physician are admissible under medical diagnosis exception to hearsay rule. Fed.Rules Evid.Rule 803(4), 28 U.S.C.A.

50 Cases that cite this headnote

[8] **Damages**
Mental suffering and emotional distress

Allegation of four-year-old child's sexual abuse was sufficient to state cause of action by mother for intentional infliction of emotional distress, even if she was not present when acts of abuse were allegedly perpetrated.

10 Cases that cite this headnote

Attorneys and Law Firms

***942** Mark Mitchell Katz (James E. Sharp, V. Thomas Lankford, Sharp, Green & Lankford, Washington, D.C., on brief), for appellants.

Robert B. Machen, Fairfax, Va., for appellees.

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and RUSSELL and ERVIN, Circuit Judges.

Opinion

DONALD RUSSELL, Circuit Judge.

The plaintiffs, Dr. Elizabeth Morgan and her minor daughter Hilary Foretich, brought this action against the defendants, Dr. Eric Foretich and his parents,

for damages arising out of the defendants' alleged sexual abuse of Hilary. Dr. Foretich counter-claimed for defamation and other damages caused by this lawsuit. The jury found for Dr. Foretich on Dr. Morgan's claims and for Dr. Morgan on Dr. Foretich's counter-claims. Plaintiffs appealed, defendants cross-appealed, and the appeals were consolidated for oral argument. Jurisdiction is based on diversity of citizenship.

The determinative issue in this appeal is whether the district court erred in excluding evidence that Hilary's sister had been sexually abused and in excluding all out-of-court statements made by the plaintiff, Hilary Foretich. We conclude that the district court abused its discretion by excluding this evidence and we reverse and remand that portion of its judgment. However, the district court committed no error with regard to defendants' counter-claims and we affirm that part of its judgment.

I.

Hilary Foretich was born in August 1982, the daughter of Dr. Eric Foretich and his third wife from whom he is now divorced, Dr. Elizabeth Morgan. Heather Foretich is three years older than Hilary and is the minor daughter of Dr. Foretich and his second wife. Dr. Foretich was awarded visitation rights with both children and the girls have frequently visited the Foretich home simultaneously.

In the summer of 1983, Dr. Morgan received a call from Heather's mother who expressed concern that the girls were possibly being abused during visitation periods with Dr. Foretich and his parents. Dr. Morgan became further alarmed when signs of physical abuse became apparent on Hilary and later when Hilary displayed an age-inappropriate understanding of sexual matters and began to make sexually explicit statements. After consulting specialists in the field of child sexual abuse, Dr. Morgan became convinced that Hilary was being abused during the visitation ***943** periods with Dr. Foretich and his parents. This action followed.

At trial, plaintiffs attempted to introduce out-of-court evidence showing that Hilary's sister, Heather, displayed similar signs of sexual abuse. Plaintiffs also sought to introduce statements made by Hilary to her mother and to a child psychologist. The district court excluded all evidence of this nature.

Plaintiffs contend that the district court committed reversible error in its evidentiary rulings. First, plaintiffs assert that evidence of Heather's abuse should have been admitted to show the identity of the perpetrator and to rebut claims that Hilary's injuries were accidental or self-inflicted. Second, plaintiffs argue that statements made by Hilary to her mother after Hilary returned from visitation with Dr. Foretich were admissible as excited utterances. Finally, plaintiffs contend that statements made by Hilary to her psychologist were admissible as statements made for purposes of medical diagnosis or treatment.

Defendants respond by arguing evidence of sexual abuse suffered by Heather Foretich was properly excluded because of its potential for prejudicing the jury. Defendants further assert that all out-of-court statements made by Hilary Foretich were properly excluded because of hearsay considerations and because Hilary's age made her incompetent to testify as a witness.

II.

General

Reported cases of child abuse in this country have increased dramatically in recent years. An estimated one in five females suffers from sexual abuse as a child.[1] Figures from 1976 to 1983 reflect an 852% increase in the number of child sexual abuse cases reported.[2] However, in two-thirds of child abuse cases, the incident is never even reported.[3] Even when the incident is reported, prosecution is difficult and convictions are few.

Much of this difficulty stems from the fact that methods of proof in child abuse cases are severely lacking. Often, the child is the only witness. Yet age may make the child incompetent to testify in court, and fear, especially when the perpetrator is a family member, may make the child unwilling or unable to testify.

Courts and legislatures alike have struggled with this deeply troubling problem. The courts have often been criticized for expanding existing hearsay exceptions beyond recognition[4] while several state legislatures have

undertaken to create altogether new hearsay exceptions for the victims of child abuse. [5]

In the form of a civil suit, the instant case squarely presents this Court with many of these difficult issues. In rendering this judgment, we are mindful of the common-sense admonition that "[w]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without." Fed.R.Evid. art. VIII advisory committee's note.

III.

Evidence of Abuse Suffered by Hilary's Sister, Heather Foretich

At trial, plaintiffs sought to introduce testimony by Dr. Charles Shubin, a pediatrician who was qualified as an expert in the field of child sexual abuse. Dr. Shubin had examined both Hilary and Heather Foretich and was prepared to testify that both girls had suffered sexual injuries and that the mechanism of injury was essentially the same in both cases. Plaintiffs also had numerous other professionals and lay ***944** witnesses who were prepared to testify that Heather had been sexually abused during visitation periods with the defendants.

The district court excluded all evidence of sexual abuse suffered by Heather Foretich concluding that such evidence was prejudicial and could not be allowed without a full scale trial on the allegations made by Heather. We disagree.

[1] As a preliminary matter, the district court erred in concluding that a full scale trial would be required into allegations made by Heather Foretich. This Court has held that in applying Rule 404(b) of the Federal Rules of Evidence, evidence of other crimes need not be established by the "clear and convincing evidence" standard which some other courts have seen fit to apply. [6] Instead, "we have not imposed any 'clear and convincing evidence' standard in our application of Rule 404(b)" and "we decline to adopt such a requirement." *United States v. Martin*, 773 F.2d 579, 582 (4th Cir.1985). Rather, evidence of other crimes or acts will be admissible even absent clear and convincing proof of those other crimes or acts if the proffered evidence can meet the threshold requirements of Rule 404(b).

Rule 404(b) of the Federal Rules of Evidence provides that

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This Court has held Rule 404(b) to be an "inclusionary rule" which " 'admits all evidence of other crimes [or acts] relevant to an issue in a trial except that which tends to prove *only* criminal disposition.' " *United States v. Masters*, 622 F.2d 83, 85 (4th Cir.1980) (emphasis added) (quoting J. Weinstein & M. Berger, *Weinstein's Evidence* § 404[08] at 404–41 and 404–42 (1979)).

The threshold requirements for admitting evidence under Rule 404(b) were recently stated by this Court in *United States v. Lewis*, 780 F.2d 1140 (4th Cir.1986). In *Lewis*, we stated the determinative questions to be (a) whether the proffered evidence is relevant to an issue other than the defendant's character, and (b) whether the probative value is *substantially* outweighed by its prejudicial effect. *Id.* at 1142.

[2] The proffered evidence of sexual abuse suffered by Heather is admissible under the standard set forth in *Lewis*. First, the evidence was not offered to show the depravity of the defendants' character. Rather, this evidence was highly relevant to disputed issues in this case. Fundamentally, this evidence was essential in that it tended to identify the defendants as the perpetrators of the crime against Hilary since only the defendants had access to both girls. No other piece of evidence could have had a comparable probative impact as to the identity of Hilary's assailants. This evidence also negated several defenses raised by the defendants: Hilary's injuries were caused by Dr. Morgan; were fabricated by Dr. Morgan; or were caused by self-infliction. It has been suggested by some that, in child abuse cases, the inquiry should end here: "When prior acts are admitted to prove disputed

issues in the case, such as the identity of the defendant, the absence of mistake or accident, or the defendant's intent, no violation of the other crimes evidence rule exists." Comment, *Other Crimes Evidence to Prove the 'Corpus Delicti' of a Child Sexual Offense,* 40 U. Miami L.Rev. 217, 220 (1985).

However, after determining that other acts are relevant to an issue besides character, the question then becomes whether the probative value of the evidence is *substantially* outweighed by its prejudicial effect. This question has previously been addressed by this Court in the analogous case of *United States v. Woods,* 484 F.2d 127 (4th Cir.1973), *cert. denied,* 415 U.S. 979, 94 S.Ct. 1566, 39 L.Ed.2d 875 (1974). ***945** In *Woods,* a case allowing criminal prosecution for the suffocation death of a young child, we allowed the government to introduce evidence of abuse suffered by other children whom the defendant had access to even though the defendant was not accused of abusing the other children. We noted "when the crime is one of infanticide or child abuse, evidence of repeated incidents is especially relevant because it may be the only evidence to prove the crime." *Id.* at 133. We further found "the evidence [of other crimes or acts] is so persuasive and so necessary in case of infanticide or other child abuse by suffocation if the wrongdoer is to be apprehended, that we think its relevance clearly outweighs its prejudicial effect on the jury." *Id.* at 135. We find the need for other act evidence to be equally compelling in the context of child sexual abuse. By the very nature of the crime, there are seldom any eyewitnesses. Therefore, as in this case, the defendant's word is pitted against that of a young child and the older defendant will almost certainly have an edge in credibility.

In this case, the jury was left to choose between believing the story of a young girl as related by several witnesses or believing the testimony of her father, the doctor, who offered several plausible explanations for the child's injuries. However, had the jury been allowed to hear of the other sister's very similar injuries, the doctor's explanations would no longer have been so plausible. Given the similarity of the injuries and the fact that only the defendants had access to both girls, the identity of the perpetrators becomes clearer. And given this evidence, the defenses of self-infliction, fabrication, or abuse by Dr. Morgan become quite implausible.

We have stated previously that the possibly prejudicial effect of evidence can " 'require exclusion only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence.' " *Masters* at 87 (quoting Trautman, *Logical or Legal Relevancy—A Conflict in Theory,* 5 Vand.L.Rev. 385, 410 (1951–52)). This is not that case. While we are cognizant of the potential for prejudice in this case, we are also mindful of the fact that the trial judge could have issued a limiting instruction. *Id.* To simply exclude this evidence which went not to the character of the accused but rather to essential issues on trial and which was highly probative of the defendants' guilt was an abuse of discretion.

IV.

Hilary's Statements to Her Mother

Immediately after returning home from visitation periods with her father, Hilary would often appear extremely excited and agitated and would begin to describe to her mother sexual activities that had occurred during the visits. On the advice of her attorney, Dr. Morgan began to keep a diary recording Hilary's statements.

The district court originally ruled that Dr. Morgan could not testify to what Hilary had told her. The court reasoned that if the diary itself were to be admitted into evidence then any such testimony by Dr. Morgan would merely be cumulative. However, at the conclusion of trial, the court refused to admit the diary or excerpts into evidence finding that they were self-serving and full of irrelevancies. Without ever reaching the merits of whether Dr. Morgan's testimony or diary would fit within one of the exceptions to the hearsay rule, the district court effectively excluded all reports of what had transpired during visitation.

Plaintiffs contend that five statements made by Hilary to Dr. Morgan should be admitted under the excited utterance exception to the hearsay rules. Fed.R.Evid. 803(2). There follows a synopsis of the five statements offered by the plaintiffs:

March 25, 1985

Hilary was returned home by Dr. Foretich to Dr. Morgan's housekeeper at 3:35 p.m. Dr. Morgan arrived at 4:35 to find Hilary running around the house yelling and shrieking excitedly. At 5:00, Hilary was calmed down enough to talk and began to describe how she had been sexually abused by the defendants.

***946** *May 20, 1985*

Hilary was returned at 3:30, Dr. Morgan returned home at 4:45. By 6:00, Hilary began to describe sexual assaults that had been perpetrated on her by the defendants.

October 21, 1985

Hilary was returned by her grandfather at 4:00 and was again in a highly excited state. By 7:00, she had settled down enough to report that she had been sexually assaulted by the defendants.

January 20, 1986

Hilary was returned by her father at 7:00 p.m. and began to tell her mother of sexual abuse that had occurred the night before by her father.

July 20, 1986

Hilary was watching television with Dr. Morgan and viewed a scene which prompted her to describe sexual acts that had been performed on her by the defendants.

Defendants argue that these out-of-court statements made by Hilary to her mother were properly excluded because Hilary's age would have made her incompetent to testify as a witness and because the statements do not meet the requirements of the excited utterance exception to the hearsay rule.

Rule 803 of the Federal Rules of Evidence provides in pertinent part

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... (2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The basis for this rule, which creates a hearsay exception even when the declarant is available as a witness is the assumption that an excited declarant will not have had time to reflect on events and to fabricate. J. Weinstein & M. Berger, *Weinstein's Evidence* § 803(2)[01] (1984).

Defendant's first and strongest objection to the admission of Hilary's out-of-court statements under the excited utterance exception is that Hilary would have been incompetent to testify at trial and should not, therefore, be allowed to testify out of court.[7] This argument is without merit.

[3] We agree with the majority of courts that have studied this issue and have reached the conclusion that "although a child is incompetent to testify, testimony as to his spontaneous declarations or *res gestae* statements is nevertheless admissible." Annotation, *Admissibility of Testimony Regarding Spontaneous Declarations Made by One Incompetent to Testify at Trial,* 15 A.L.R. 4th 1043 (1982).[8] This issue has seldom been raised before the federal courts of appeals. However, those that have examined the issue are in agreement with our holding today.[9]

Likewise, the leading commentators have concluded that "an excited utterance is admissible despite the fact that the declarant was a child and would have been incompetent as a witness for that reason." McCormick, *McCormick on Evidence* § 297 at 858 (3d Edition 1984). *See also* 6 *Wigmore on Evidence* § 1751 (Chadbourn Rev.1976). Therefore, should Hilary's out-of-court statements to her mother otherwise qualify ***947** as excited utterances, her youthful incompetency will not bar the admission of this testimony.

[4] To qualify as an excited utterance, the declarant must (1) have experienced a startling event or condition and (2) reacted while under the stress or excitement of that event and not from reflection and fabrication. J. Weinstein & M. Berger, *Weinstein's Evidence* § 803(2)[01] at 803–87–91.[10]

There appears to be little doubt but that Hilary has been subjected to a startling condition. Testimony of

the doctors and other witnesses was sufficient to justify a finding that Hilary has been sexually abused. The question, then, is whether Hilary reacted while under the stress of this condition.

To answer this question, several factors must be considered, including: (1) The lapse of time between the event and the declarations; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements. *United States v. Iron Shell,* 633 F.2d 77, 85–86 (8th Cir.1980), *cert. denied,* 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981).

In *Iron Shell,* the Eighth Circuit held in a child sexual abuse case that "[t]he lapse of time between the startling event and the out-of-court statement although relevant is not dispositive in the application of rule 803(2)." *Id.* at 85. Indeed, much criticism has been directed at courts which place undue emphasis on the spontaneity requirement in child sexual abuse cases. [11] It has been argued that children do not necessarily understand sexual contact by adults to be shocking, especially when the adult is a parental figure from whom the child desires love and affection. [12] Even if the child is aware of the nature of the abuse, significant delays in reporting this abuse may occur because of confusion, guilt, and fear on the part of the child. [13]

[5] One attempt to deal with this problem has been a recognition that the time lapse to be considered in these cases is not simply the time between the abuse and the declaration. Rather, courts must also be cognizant of the child's first real opportunity to report the incident. [14] Plaintiff's declaration of July 20, 1986 has been proffered with absolutely no reference to the time of abuse or the child's first opportunity to speak of the abuse and therefore cannot qualify as an excited utterance. However, the first four statements proffered by the plaintiffs were made within three hours of the child's first opportunity to speak with her mother.

In determining whether a statement qualifies as an excited utterance, courts have varied greatly as to just how much of a time lapse is too much. [15] Given all of the other factors of trustworthiness present in this case, we find that three hours is well within the bounds of reasonableness and Hilary's statements were spontaneous declarations.

In addition to the time lapse consideration, numerous other factors of trustworthiness cited as important by the Court in ***948** *Iron Shell* are present in this case. All of the statements offered by plaintiffs were made before Hilary was four years old, and it is virtually inconceivable that a child of this age would have either the extensive knowledge of sexual activities or the desire to lie about sexual abuse that would be required to fabricate a story such as the one told by Hilary. [16] Hilary's tender years greatly reduce the likelihood that reflection and fabrication were involved. An examination of Hilary's physical and mental state shows that she was nearly hysterical in the moments immediately preceeding most of these statements. There can be little doubt but that she was acting under the stress of the situation. Hilary's method of giving these statements consisted of touching herself sexually and speaking in a vocabulary that definitely belonged to a child which adds a "ring of verity to her declarations." *Nick,* 604 F.2d at 1204. Finally, Hilary's story is corroborated by substantial physical evidence and doctors' testimony. All of these factors lead to the conclusion that Hilary's out-of-court statements to her mother are trustworthy and should have been admitted into evidence.

On the whole, this case bears remarkable similarity to *United States v. Nick,* 604 F.2d at 1204 in which the Ninth Circuit admitted statements made by a sexually abused boy to his mother as excited utterances because of the following "significant guarantees of trustworthiness":

> The statement was made while the child was still suffering pain and distress from the assault. The childish terminology has the ring of verity and is entirely appropriate to a child of his tender years. The child's statement was corroborated by physical evidence ... it is extremely unlikely that the statement under these circumstances was fabricated. The statement was unquestionably material, and it was more probative as to the identity of the assailant than any other evidence, except [defendant's] confession. The declaration to his mother [after arriving home and being questioned] was more, rather than less probative than testimony that he might have been able to give months after the event even if the district court would have found him competent. (Fed.R.Evid., Rule 601) The interests of justice were served by admitting the declaration of this child, who

was the victim of a sexual assault, and far too young to appreciate the implications of that assault.

Finally, that portion of the statement identifying [defendant] as the assailant is inherently trustworthy under all of the circumstances of this case. Extrinsic evidence established that [defendant] had the opportunity to commit the crime. The child knew [defendant] well, and he was not likely to mistake his assailant. The mother was not likely to have had any faulty recollection of the child's simple, shocking ... statement. Moreover, she herself was subject to rigorous cross-examination on that score.

The above could well have been written for the case at hand. We agree with the judgment of the Ninth Circuit and conclude that based on the facts of this case, the district court abused its discretion in not admitting Hilary's four statements to her mother under the excited utterance exception to the hearsay rule.

V.

Hilary's Statements to Her Psychologist

Plaintiffs introduced the testimony of Dr. Dennis Harrison who had been qualified as an expert in psychology and child abuse and who had spent over one hundred hours examining and working with Hilary Foretich. The district court permitted Dr. Harrison to give his opinion as to Hilary's abuse but excluded all out-of-court statements which Hilary had made to him.

[6] Plaintiffs contend that Dr. Harrison should have been allowed to repeat statements made by Hilary as statements for purposes of medical diagnosis or treatment. Fed.R.Evid. 803(4).

Defendants respond that this testimony was properly excluded because of Hilary's incompetence to testify as a witness and because Dr. Harrison was sought more for the purpose of his testimony than his treatment. Defendant's arguments are without merit.

***949** The hearsay exception for statements made for purposes of medical diagnosis or treatment is based on the rationale that "the declarant's motive guarantees [the statements'] trustworthiness" since treatment will depend on what is reported. Weinstein & Berger, *supra*, at 803–144. The two-part test set forth for admitting these hearsay statements is (1) "the declarant's motive in making the statement must be consistent with the purposes of promoting treatment"; and, (2) "the content of the statement must be such as is reasonably relied on by a physician [17] in treatment or diagnosis." *United States v. Renville*, 779 F.2d 430, 436 (8th Cir.1985).

In *Renville*, the Court applied Rule 803(4) to an intrafamily child abuse case such as the one at hand and permitted the physician to testify both to the victim's statements of abuse and to the victim's identity of her assailant. *Id.* The Court concluded that not only would the young victim have a motive consistent with the purpose of treatment, but also, "Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household *are* reasonably pertinent to treatment." *Id.* at 436. We agree with the judgment of the Eighth Circuit that "[s]exual abuse of children at home presents a wholly different situation" from that normally encountered in Rule 803(4) cases and that situation requires great caution in excluding highly pertinent evidence. *Id.* at 437.

Defendants contend that Hilary's incompetence to testify as a witness in court renders her statements made for the purposes of diagnosis or treatment inadmissible. This argument must fail.

An individual's statements made for purposes of medical diagnosis or treatment have frequently been admitted into evidence regardless of whether that individual was competent to testify at trial. For instance, a physician has been allowed to testify to statements made by a victim of child abuse even though the child was only three years old and "could not have been subjected to cross-examination." *Nick*, 604 F.2d at 1201–1202. *See also United States v. Shaw*, 824 F.2d 601 (8th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1033, 98 L.Ed.2d 997 (1988) (Physician allowed to testify to statements made by nine year old victim); *United States v. DeNoyer*, 811 F.2d 436 (8th Cir.1987) (Social workers allowed to testify under 803(4) to statements made by a five year old victim); *Renville*, 779 F.2d 430 (Physician allowed to testify to statements made by eleven year old victim); *Iron Shell*, 633 F.2d 77 (Physician allowed to testify to statements made by nine year old victim).

The fact that a young child may be incompetent to testify at trial affects neither prong of the two-part test for admitting evidence under 803(4). First, a young child will have the same motive to make true statements for the purposes of diagnosis or treatment as an adult. Indeed, at least one court has been influenced by the notion that this motive may be stronger on the part of the child: "The age of the patient [nine] also mitigates against a finding that [her] statements were not within the traditional rationale of the rule." *Iron Shell,* 633 F.2d at 84.

Second, the statements of a child are "reasonably relied on by a physician in treatment or diagnosis." *Renville,* at 436. A physician certainly does not cease to listen to a patient's complaints simply because that patient is a child. In fact, as noted by the court in *Renville,* a physician ***950** in determining treatment may rely on factors in child abuse cases such as an assailant's identity that would not be relied on were the patient an adult.

Hilary's statements for purposes of diagnosis or treatment should have been admitted into evidence regardless of her competency to testify at trial.

[7] Defendant's contention that Hilary's statements to Dr. Harrison are inadmissible because Dr. Harrison was consulted in order to testify as a witness rather than for treatment is without merit. Rule 803(4) "abolished the [common-law] distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only: the latter usually refers to a doctor who is consulted only in order to testify as a witness." *Iron Shell,* 633 F.2d at 83. [18] Dr. Harrison's testimony to statements made by Hilary are therefore admissible regardless of why he was consulted.

We find no reason to justify the exclusion of statements made by Hilary to Dr. Harrison. Such statements should have been admitted as statements made for the purposes of medical diagnosis or treatment under 803(4).

VI.

Defendants' Counter-claims and Cross-appeals

Defendants filed counter-claims against Dr. Morgan for defamation, publication of private facts, false light publicity, and intentional infliction of emotional distress arising out of publicity surrounding this litigation. The jury found for Dr. Morgan on defendants' counter-claims and defendants have appealed this judgment. Defendants have pointed to no error committed by the district court and the judgment in favor of Dr. Morgan on defendants' counter-claims is affirmed.

[8] Additionally, defendants have cross-appealed from the district court's refusal to dismiss Dr. Morgan's claim for the intentional infliction of emotional distress. Defendants argue that Dr. Morgan failed to state a cause of action since she was never present when acts of abuse were perpetrated on Hilary.

The requisite elements for a cause of action for the intentional infliction of emotional distress are delineated in *Womack v. Eldridge,* 215 Va. 338, 210 S.E.2d 145 (1974). *Womack* does not require, and defendants have pointed to no Virginia case, which would require that a plaintiff such as Dr. Morgan be present during the outrageous conduct in order to recover for the intentional infliction of emotional distress. The district court acted properly in refusing to dismiss this cause of action.

Finally, defendants have cross-appealed from the district court's refusal to grant a directed verdict in favor of the grandmother, Doris Foretich. As counsel for plaintiffs agreed at oral argument that Doris Foretich could be dismissed from this action, this issue need not be further addressed.

Accordingly, the judgment of the district court is reversed and remanded in part and affirmed in part.

REVERSED AND REMANDED IN PART and AFFIRMED IN PART.

POWELL, Associate Justice, United States Supreme Court (Retired), concurring in part and dissenting in part. I join Parts I–IV and Part VI of the court's well-reasoned opinion. As I have ***951** some doubt as to the admissibility of the testimony of the psychologist, Dr. Harrison, I write separately on that question. At the outset, I refer to the applicable standard of review when a district court's decision to exclude evidence is at issue.

A

Few cases are more difficult to try than one of child abuse where the child is very young and does not testify in court. Moreover, there is rarely a non-party witness to alleged child abuse, with the result that rulings on admissibility of evidence on behalf of the child are particularly sensitive. This was such a case, and it was tried by an able and experienced district court judge. It must be remembered that, in addition to assuring the fair presentation of a plaintiff's case, the district court has the responsibility of shielding defendants from the admission of unduly prejudicial evidence. This Circuit has recognized that a district court's determination to admit or exclude evidence is not to be disturbed unless it has "abused its discretion." *United States v. MacDonald,* 688 F.2d 224, 227-28 (4th Cir.1982), *cert. denied,* 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983). Accordingly, our review on this appeal is limited to a determination of whether the district court abused its discretion in excluding certain evidence offered on behalf of the appellants Hilary Foretich ("Hilary") and her mother, Dr. Elizabeth Morgan. As noted above, I am in complete agreement with the court's analysis and conclusion that the district court should have admitted evidence of the physical abuse of Hilary's half-sister Heather and certain out-or-court "excited utterances" made by Hilary to her mother. The district court's decision not to admit statements made by Hilary to the psychologist, Dr. Dennis Michael Harrison, Ph.D., presents a closer question. I write to address it.

B

The leading cases relied on by the court today are *United States v. Renville,* 779 F.2d 430 (8th Cir.1985) and *United States v. Iron Shell,* 633 F.2d 77 (8th Cir.1980), *cert. denied,* 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). In these cases, and all the other cases cited by the court on this issue, the Eighth Circuit upheld the district court's evidentiary rulings. In this case the court disagrees with the court's evidentiary rulings below.

The court's holding that the district court abused its discretion in excluding statements made to Dr. Harrison by Hilary is based on an application of the analysis used by the *Renville* and *Iron Shell* courts in applying Fed.R.Evid. 803(4). Rule 803(4) contains a hearsay exception applicable to statements made to a physician for purposes of diagnosis or treatment.[1] At common law, this exception traditionally was based on a dual rationale. First, the declarant's purpose in making the statement normally assures its trustworthiness because diagnosis and treatment may depend on what the patient tells the physician. Secondly, a fact reliable enough to serve as a basis for a physician's diagnosis or treatment generally is considered sufficiently reliable to escape hearsay proscription. Thus, if the declarant's motive in making the statement is consistent with the purpose of promoting treatment, and the content of the statement is reasonably relied on by a physician in formulating a diagnosis or mode of treatment, then the statement presumptively is admissible.

Although the courts in *Iron Shell* and *Renville* would appear to allow the admission of statements made to a physician who is seeking a diagnosis in preparation for litigation, they explicitly hold that "the declarant's motive in making the statement must be consistent with the purposes of promoting treatment...." *Renville,* 779 F.2d at 436. *See also Iron Shell,* 633 F.2d at 84. In *Renville,* the court found that:

> Before questioning the child, [the physician] explained to her that the examination and his prospective questions were necessary to obtain information to treat ***952** her and help her overcome any physical and emotional problems which may have been caused by the recurrent abuse.

779 F.2d at 438. Therefore, "in the circumstances of this case, there were sufficient indicia of the declarant's proper motivation to ensure the trustworthiness of her statements to the testifying physician." *Id.* at 439. In *Iron Shell,* the court stated that "[w]e find no facts in the record to indicate that [the child's] motive in making these statements was other than as a patient seeking treatment." 633 F.2d at 84. Therefore, in each of these cases the court found that the statements met both prongs of the traditional common-law test.

A significant difference found in this case is that, at the time Hilary was questioned and examined by Dr. Harrison, she was only four years of age. There is no evidence in the record that her frame of mind was comparable to a patient seeking treatment. Moreover,

in contrast to the circumstances in *Renville,* there is no evidence that Dr. Harrison ever explained to Hilary that his questions and relationship with her arose, at least in part, from a desire to treat her. Thus, an important element contributing to the reliability of "physician treatment" statements that was explicitly found to be present in both *Renville* and *Iron Shell,* i.e. the strong motive for the declarant to tell the truth in order to promote treatment, has not been established in this case. Absent a finding that Hilary made her statements believing they would be used by Dr. Harrison to help her, I am reluctant to rest my decision on the cases relied on by the court.

In light of the facts before the court in this case, I think it is preferable to rely on a strict application of Rule 803(4) of the Federal Rules of Evidence. Rule 803(4) appears to have abolished the common-law distinction between those statements made while consulting a "physician" for purposes of examination and statements made while consulting him for purposes of testifying as a witness. The Second Circuit has held that, in light of the Advisory Committee Notes to Rule 803(4), so long as the statements made by an individual were relied on by the physician in formulating his opinion, they are admissible. *O'Gee v. Dobbs Houses, Inc.*, 570 F.2d 1084, 1089 (2d Cir.1978). *See also* Weinstein & Berger, Evidence ¶ 803(4) [01]. Although this holding ignores the traditional common-law prong of the rule that requires that the statements be made for the purposes of seeking treatment, it has clear support in the Advisory Committee Notes to Rule 803(4). [2]

It is appropriate to recognize, however, that evidence admitted under the standard discussed by the Second Circuit and the Advisory Committee Notes has less inherent reliability than evidence admitted under the traditional common-law standard underlying the physician treatment rule. The professional objectivity of a physician responsible for treatment may well be greater than that of a witness employed and paid to testify as an expert. More importantly, the veracity of the declarant's statements to the physician is less certain where the statements need not have been made for purposes of promoting treatment or facilitating diagnosis in preparation for treatment. In my view, an appellate court should be reluctant to disturb the discretion of a district court that has excluded such testimony on the ground that its prejudicial effect outweighs its probative value. *See* Fed.R.Evid. 403. But in this case, the reasons for exclusion by the district court are not clear. In excluding Dr. Harrison's testimony as to what Hilary told him, the court appeared to rely, without further elaboration, only on the facts that "[Hilary] isn't here and her age and the circumstances of the case." (J.A. at 115). In light of ***953** Rule 803(4), and the importance of these statements to appellants' case, these reasons are insufficient to justify exclusion of the evidence.

Rather than conclude, however, that Dr. Harrison's testimony should have been admitted into evidence, I would leave this question for reconsideration at the retrial of this case, if there should be a retrial.

All Citations

846 F.2d 941, 56 USLW 2669, 25 Fed. R. Evid. Serv. 881

Footnotes

1 D. Finkelhor, *Sexually Victimized Children* 53 (1979), *cited in* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations,* 98 Harv.L.Rev. 806 (1985).

2 Comment, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition,* 34 Cath.U.L.Rev. 1021, n. 1 (1985).

3 Note, *supra,* note 1, at 806, n. 7.

4 *See, e.g.,* Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse,* 18 J. Marshall L.Rv. 1 (1984); Comment, *The Sexually Abused Infant Hearsay Exception: A Constitutional Analysis,* 8 J.Juv.L. 59 (1984); Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases,* 83 Colum.L.Rev. 1745 (1983).

5 *E.g.,* Wash.Rev.Code Ann. § 9A.44.120 (Supp.1982); Kan.Stat.Ann. § 60–460(dd) (Supp.1982).

6 *See United States v. Wormick,* 709 F.2d 454 (7th Cir.1983); *United States v. Leisure,* 807 F.2d 143 (8th Cir.1986). *But see, United States v. Beechum,* 582 F.2d 898 (5th Cir.1978), *cert. denied,* 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979).

7 Rule 601 of the Federal Rules of Evidence states that "[e]very person is competent to be a witness except as otherwise provided in these rules." However, since Hilary was never called as a witness, we are not directly faced with the issue of whether she would have been competent to testify at trial. Rather, we find that her statements are admissible regardless of her competency to testify in court.

8 *See also* Comment, *supra,* note 4 at 65 ("[T]he preponderance of authority is to the effect that admissibility of excited utterances is not affected by the declarant's incompetence due to infancy or other legal unavailability because the nature of the utterance is such that it obviates the usual sources of untrustworthiness in children's testimony.").

9 *See United States v. Nick,* 604 F.2d 1199, 1202 (9th Cir.1979) (Three year old "could not have been subjected to cross-examination even if he had been called as a witness by reason of his tender years," yet his statements were admissible under the spontaneous declaration exception.); *Jones v. United States,* 231 F.2d 244 (D.C.Cir.1956) (Five year old was incompetent to testify as a witness but statements to her mother were admissible as spontaneous declarations.)

10 *See also* J. Bulkley, *Child Sexual Abuse and the Law,* 155 (1982).

11 Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases,* 83 Colum.L.Rev. 1745, 1756 (1983).

12 *Id.*

13 *Id.* at 1757.

14 *See Nick, supra,* Note 7, at 1201 (assault occurred sometime during the day. The defendant and the child were asleep when mother arrived to pick the child up and the child reported the assault only after getting home and being questioned by his mother); *Kilgore v. State,* 177 Ga.App. 656, 340 S.E.2d 640, 643 (1986) (assault occurred sometime between 3:30 p.m. and 12:15 a.m. The child reported the assault only after being taken home and awakened. The court noted that the report was made at "the first real opportunity.")

15 *See Carter v. States,* 44 Tex.Crim. 312, 70 S.W. 971 (1902) (Statement made by child within five minutes of the assault found to lack spontaneity); *People v. Gage,* 62 Mich. 271, 28 N.W. 835 (1886) (Child's statement to her mother three months after the assault was admissible); Annotation, *Time Element As Affecting Admissibility of Statement or Complaint Made by Victim of Sex Crime as Res Gestae, Spontaneous Exclamation, or Excited Utterance,* 89 ALR3d 102 (1979).

16 *See* Note, *supra,* note 11 at 1751.

17 Statements to psychiatrists or psychologists are admissible under 803(4) the same as statements to physicians. The advisory committee note to Rule 803(4) states that "[u]nder the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." Fed.R.Evid. 803(4) advisory committee's note. There is no reason to exclude psychiatrists or psychologists from this list and the courts have not done so. *See,* Annotation, *Admissibility of Statements Made for Purposes of Medical Diagnosis or Treatment As Hearsay Exception Under Rule 803(4) of the Federal Rules of Evidence,* 55 A.L.R.Fed. 689, 699 (1981); *United States v. LeChoco,* 542 F.2d 84, 89, n. 6 (D.C.Cir.1976) ("The defendant's statements to his psychiatrist fall within the statement to a physician exception to the hearsay rule embodied in Rule 803(4)").

18 *See also O'Gee v. Dobbs Houses, Inc.,* 570 F.2d 1084, 1089 (2d Cir.1978) ("Rule 803(4) clearly permits" statements made to a non-treating physician); Fed.R.Evid. 803(4) advisory committee's note ("Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation"); Weinstein & Berger, *supra,* at 803–146 ("Rule 803(4)) rejects the distinction between treating and nontreating physicians"); Annotation, *supra,* note 17 at 692, ("[S]tatements made to a physician consulted only for the purpose of allowing him to testify are now admissible under the Rule.")

1 No distinction has been made where the statements in question were made to a psychologist rather than a physician. *See* Fed.R.Evid. 803(4) advisory committee's note.

2 These Notes explain that, at common law, statements made to a physician consulted only for the purpose of enabling him to testify were not admissible as substantive evidence. Rule 803(4) rejects this limitation because a physician, as an expert, is allowed to state the basis of his opinion, including statements of this kind. This calls for a distinction that juries are unlikely to make, and therefore the limitation has been abolished.

In a civil case, where there is no Confrontation Clause problem, it was within Congress' discretion to approve a rule authorizing the admission of whatever evidence it thought appropriate, absent a due process violation.

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