

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee

-vs-

MICHAEL S. ARNOLD,

Defendant-Appellant

Case No.: 2008-1693

On Appeal From the
Franklin County Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 07AP-789

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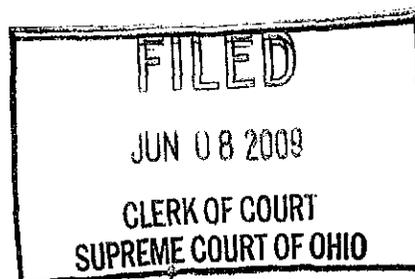
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ARGUMENT

Proposition of Law

In a criminal prosecution, the admission of out-of-court statements made by a child to an interviewer employed by a child advocacy center violates the constitutional right to confront witnesses provided by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

The Confrontation Clause Prohibits the Introduction of Testimonial Hearsay Even Without Direct and Overt Law Enforcement Participation.

In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the Supreme Court construed the Confrontation Clause and held that testimonial statements may not be introduced at trial against criminal defendants unless the declarants are unavailable and the defendants had an opportunity to cross-examine them. The Court in *Crawford* held that a person acts as a witness against another when he or she makes testimonial statements.

In its Merit Brief in this appeal, the State argues that only statements made to law enforcement personnel can be testimonial. In the State's view, a declarant's statements are testimonial when there is "direct and overt law enforcement participation in the interview when no on-going emergency exists." This argument is a misreading of *Crawford*.

In *Crawford* arrived at a narrow list of four "modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 68, 124 S.Ct. at 1374, 158 L.Ed.2d at 203. These practices included: "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and * * * police interrogations." *Crawford*, 541 U.S. at 68, 124 S.Ct. at 1374, 158 L.Ed.2d at 203.

In listing the "modern practices" to which the State refers, *Crawford* stated:

"We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (Emphasis added.)

Crawford, 541 U.S. at 68, 124 S.Ct. at 1374, 158 L.Ed.2d at 203.

This language states that the term "testimonial" applies, at a minimum, to these "modern practices." By prefacing this assertion with the phrase, "Whatever else the term covers," the Court implies that "testimonial" could include statements generated in ways other than these "modern practices." The argument that for a statement to be "testimonial" there must be direct police involvement is contrary to this analysis.

While there is language in *Crawford* emphasizing the role of government officers in creating testimony, *Crawford* imposes no per se rule that a testimonial statement must be made to a government agent. Nor does *Davis v. Washington* which specifically and expressly stated that the Court's opinion ought not to be read as implying that statements in the absence of police interrogation are "necessarily nontestimonial." *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed. 224, n. 1. See, also, *People v. Stechly* (2007), 225 Ill.2d 246, 312 Ill.Dec. 268, 870 N.E.2d 333, rejecting a similar prosecution argument.

Statements Made to Child Advocacy Center Examiners Are Testimonial Under *Davis v. Washington*

In the companion cases of *Davis v. Washington* and *Hammon v. Indiana*, the Court clarified the distinction between testimonial and non-testimonial statements. The Court drew a bright line:

“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 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.**”

Davis v. Washington, 126 S.Ct. at 2273 (Emphasis added.)

Well-reasoned authority from other jurisdictions has applied the *Davis* formulation in cases virtually identical to this appeal, and concluded the statements by children interviewed in the context of a child advocacy center were testimonial. In *Florida v. Contreras* (2008), 979 So.2d 896; *Idaho v. Hooper* (2007), 176 P.3d 911 *In re Rolandis G.* (2008), 232 Ill.2d 13, 902 N.E.2d 600, *State v. Snowden* (2005), 385 Md. 64, 867 A.2d 314; *Iowa v. Bentley* (2007), 739 N.W.2d 296, *Missouri v. Justus* (2006), 205 S.W. 3d 872, and *North Dakota v. Blue* (2006), 717 N.W.2d 558 , the statements were elicited in response to direct formal questioning at a child advocacy center much like that at issue here. Like the case at bar, *Contreras*, *Bentley*, and *Rolandis G.*, there was a statutory connection between the child advocacy center and law enforcement exactly like the statutory connection presented in this case by R.C. Sections 2151.425 through 2151.428. In these cases in which the court found the statements to be

testimonial the court relied primarily on three factors: (1) that law enforcement was present during the interview, (2) that the questioning was in a formal question-and-answer format specifically designed to elicit information about suspected criminal conduct, and (3) that the interview was memorialized on videotape and the tape was immediately turned over to police as evidence in an on-going criminal investigation. This is precisely what occurred in this case.

This Court should similarly find the statements at issue to be testimonial. Without question, the overwhelming majority of courts to consider the precise type of interview and statement at issue in this case have concluded that the confrontation clause was violated.

The Mere Articulation of a Medical Purpose Does Not Render the Statements Non-Testimonial

The State argues for an interpretation that would improperly restrict or limit the *Crawford/Davis* rules. The State wants to re-write the law so that the bare articulation of a medical rationale for the interview would end the inquiry or require a conclusion that the statements were non-testimonial.

The language of *Crawford* is to the contrary. The list of testimonial statements set forth in the opinion includes "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. . ." *Crawford*, 541 U.S. At 52.

An objective witness would reasonably expect the statements at issue here to be available for use in a prosecution. The fact that the statements made by the child "may have also had a medical purpose does not change the fact that

they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial." *United States v. Bordeaux* (CA 8, 2005), 400 F.3d 548, 556. See, also, *Seely v. State* (Ark. App. 2007), 263 S.W. 3d 559. The possibility that forensic interview of child might have been intended for or designated as being for a therapeutic purpose is not determinative of the issue. See *People v. Sisavath* (Cal. App. 2004), 118 Cal. App.4th 1396, 13 Cal.Rptr.3d 753, 758; *State v. Snowden, supra*.

A Reasonable Balance: The Test Articulated by *Amicus Curiae* Ohio Public Defender

While this case presents competing policy considerations, the overarching legal principle is the Appellant's Sixth Amendment right to confront witnesses. The *Crawford/Davis* rule and cases applying it provides guidance and limits the Confrontation Clause, perhaps wisely, to testimonial statements.

The Ohio Public Defender, as *amicus curiae*, has urged the Court to adopt a two-part test to determine whether a statement to non-governmental medical personnel is testimonial:

First, the court should determine whether the statement was made in connection with a government investigation with specific attention to the level of law enforcement involvement. Second, the court should assess the formality of the statement by looking at the totality of the circumstances surrounding the making of the statement, including whether the interviewer used structured questions specifically designed to elicit information about past criminal conduct, and whether the statement was memorialized on video or audio tape for use in a future judicial proceeding.

Brief of *Amicus Curiae*, Ohio Public Defender, pages 6-7.

This test is consistent with the holdings of *Crawford, Davis*, and the holdings of the majority of jurisdictions that have addressed this specific issue. This Court should adopt it, and in applying it to the facts of this case, reverse Appellant's conviction.

The Error in Admitting Statements in Violation of Appellant's Confrontation Rights Is Not Harmless Beyond a Reasonable Doubt.

For the first time in this appeal, the State argues that any error in the admission of the child's statements is harmless. The State has waived this argument, since it was not asserted in the appellate court below or in the State's Memorandum Opposing Jurisdiction. Even if the State had preserved the argument, it is not supported on these facts.

A constitutional error can be held harmless if it was harmless beyond a reasonable doubt. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, at ¶78, citing *Chapman v. California* (1967), 386 U.S. 18, 24, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. Whether a Sixth Amendment error was harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Id.* at 23, 87 S.Ct. 824, 17 L.Ed.2d 705; *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388, 721 N.E.2d 52. The test is not whether, but for the challenged evidence, there is *some* evidence of guilt. It is whether there is *overwhelming* evidence of guilt. *State v. Williams* (1983), 6 Ohio St.3d 281, 452 N.E.2d 1323.

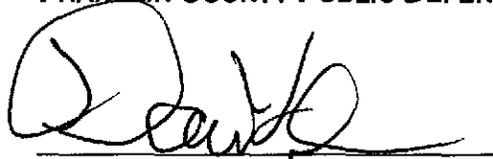
Apart from the improperly admitted statements of the child, little evidence, let alone overwhelming evidence, suggests Appellant's guilt. The child was in Appellant's bedroom in the middle of the night, Appellant's wife (who had apparently made unsupported allegations of abuse regarding another child) heard a loud noise.

CONCLUSION

For the reasons set forth herein, and for those set forth in his opening Merit Brief, Defendant-Appellant Michael S. Arnold respectfully urges this Court to reverse the judgment of the Franklin County Court of Appeals.

Respectfully submitted,

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