ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. _____

12-0582

STATE OF OHIO, Plaintiff-Appellant, v. LAVERT HALL, Defendant-Appellee.	On Appeal from the Cuyahoga County Court of Appeals, 8th Judicial District Court of Appeals Case No. 96680

MOTION FOR LEAVE TO FILE DELAYED APPEAL

Russell S. Bensing (0010602)
1370 Ontario St.
1350 Standard Bldg.
Cleveland, OH 44113
(216) 241-6650

COUNSEL FOR APPELLANT, LAVERT HALL

William D. Mason, Prosecuting Attorney
James M. Price (0073356) (COUNSEL OF RECORD)
1200 Ontario St., 9th Floor
Cleveland, OH 44113
(216) 443-7800

COUNSEL FOR APPELLEE, STATE OF OHIO

FILED
APR 09 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Now comes the Appellant, LAVERT HALL, by and through Counsel, and, pursuant to S.Ct.Prac.R. 2.2(A)(4)(a), hereby moves the Court for leave to file an appeal from the judgment and final order of the Cuyahoga County Court of Appeals, Eighth Judicial District, journalized in Court of Appeals Case No. 96680 on January 26, 2012. The court below denied a timely-filed motion for reconsideration on February 21, 2012.

Appellant submitted a Notice of Appeal and Memorandum in Support of Jurisdiction for filing with this Court on April 9, 2012. As indicated in the affidavit attached hereto, that was based upon the calculations done by counsel's case management program, Amicus Attorney, which calculated that the forty-five days from February 21, 2012, would expire on Saturday, April 7, 2012, meaning the filings would be due on April 9. Apparently, the programmers for Amicus Attorney did not understand that February has twenty-nine days in a leap year. The filings were thus due on April 6, 2012.

Counsel sincerely apologizes for the error, and requests the Court to grant leave, as the issue raised herein is one of constitutional dimensions. Counsel would also note that Mr. Hall, the appellant, filed a pro se Notice of Appeal and Memorandum in Support of Jurisdiction on March 5, 2012, which was designated as Case No. 2012-0385. Should the Court grant leave to file the delayed appeal, counsel believes Mr. Hall will dismiss the pro se filing.

As noted, the Memorandum in Support of Jurisdiction has been submitted to the Court, and will await filing, depending upon the Court's ruling upon instant motion.

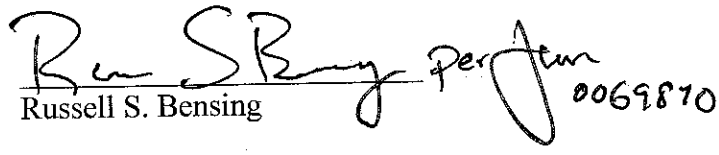
For the foregoing reasons, Appellant respectfully requests the Court to grant leave to file a delayed appeal.

Respectfully submitted,

Russell S. Bensing (0010602) 0069870
COUNSEL FOR APPELLANT
LAVERT HALL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Leave to File Delayed Appeal was hand-delivered to Offices of the Attorney for Appellee, William D. Mason, Prosecuting Attorney, and James M. Price, Assistant Prosecuting Attorney, 1200 Ontario St., 9th Floor, Cleveland, OH 44113, this 9 day of April, 2012.



Russell S. Bensing

STATE OF OHIO }
} ss.
COUNTY OF CUYAHOGA }

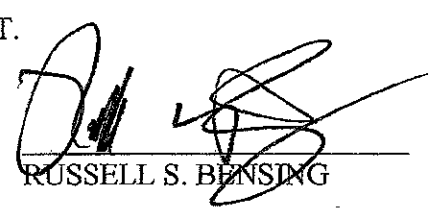
RUSSELL S. BENSING, being first duly sworn, deposes and says:

1. Affiant was appointed counsel for Lavert Hall, defendant in the above-captioned matter, on March 26, 2012, for purposes of appeal to the Ohio Supreme Court, from the decision of the Eighth District Court of Appeals rendered on January 26, 2012. A timely-filed motion for reconsideration was denied by that court on February 21, 2012.

2. Affiant uses a computerized case management program, Amicus Attorney, which includes a date calculator allowing the program to calculate due dates. Counsel used the program, on several occasions, to determine the date upon which a Notice of Appeal and Memorandum in Support of Jurisdiction would be due. The program indicated that forty-five (45) days after February 21, 2012, the date of the denial of the motion for reconsideration, would be April 7, 2012, a Saturday. Counsel prepared the appropriate filings, and submitted them to the Court for filing on the next business day, April 9, 2012.

3. Unbeknownst to affiant, the date calculator in Amicus Attorney apparently does not recognized that February has twenty-nine (29) days in a leap year, or that 2012 is a leap year, or both. The program's calculation of April 7 as being forty-five (45) days after February 21, 2012, was based on its apparent belief that there are only twenty-eight (28) days in February. The actual due date was April 6, 2012.

FURTHER AFFIANT SAYETH NAUGHT.



RUSSELL S. BENSING

SWORN TO and subscribed in my presence this 9th day of April, 2012.

NOTARY PUBLIC

JENNIFER RINN
NOTARY PUBLIC • STATE OF OHIO
Recorded in Cuyahoga County
My commission expires May 8, 2015

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96680

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAVERT HALL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-540908

BEFORE: Cooney, J., Celebrezze, P.J., and Jones, J.

RELEASED AND JOURNALIZED: January 26, 2012

ATTORNEY FOR APPELLANT

Russell S. Bensing
1350 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Oscar E. Albores
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)

JAN 26 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

COLLEEN CONWAY COONEY, J.:

Defendant-appellant, Lavert Hall ("Hall"), appeals his convictions of felonious assault and improperly discharging a firearm at a habitation. We find some merit to the appeal but affirm.

Hall was indicted on four counts of felonious assault and four counts of improperly discharging a firearm at a habitation. All charges included one-, three-, and five-year firearm specifications. The case proceeded to jury trial where the following evidence was presented.

Hall was dating Michelle Flowers ("Michelle") in the summer of 2010. On the evening of July 24, 2010, the two had an argument. Witnesses testified that Hall pushed and beat Michelle.

The following evening, Michelle's brother, David Flowers ("David"), was sitting on the porch of the family home on East 90th Street, when he observed two vehicles approach the house with guns pointed at him through the vehicle windows. He heard four gunshots as he ran into the house. David testified that Hall was one of the gunmen. David immediately called 911, and Anthony, his father, reported that Hall was one of the shooters.

Det. Darryl Johnson ("Johnson") testified that he found five spent casings in the street and one 9-millimeter casing on the front porch. However, Johnson testified that there was no physical evidence linking Hall to the crime.

Michelle testified that about one-half hour after the shooting, Hall called her and confessed to shooting the house on East 90th Street where her family lived. The State provided phone records to corroborate her statement that he called her, but there was no recording of the actual conversation to verify what was said. Michelle's father, Anthony Flowers, testified that he was upstairs when the shots were fired and he heard Hall's laughter after the shots were fired.

The defense called the lead detective, Artara Adams ("Adams"). Hall's lawyer used the police report to examine Adams over the State's objection. The State used the same police report to cross-examine Adams, who admitted that Hall was the only named suspect in the report. The State offered the police report as an exhibit over defense counsel's objection. The court later allowed the police report to go to the jury for its deliberation.

The court granted Hall's motion to dismiss two of the eight counts pursuant to Crim.R. 29. At the conclusion of the trial, the jury found Hall guilty on all remaining counts, including the one-, three-, and five-year specifications. The court sentenced him to four years on each of the underlying counts, with the felonious assault counts merging with the improper discharge counts. The court also merged the one-year firearm specification with the three-year firearm specification and ran them consecutive to the underlying offenses and

consecutive to the five-year specification for a total sentence of 12 years on each count.

Hall now appeals, raising two assignments of error.

In the first assignment of error, Hall argues the trial court violated his due process rights and abused its discretion when it admitted the police report into evidence in violation of Evid.R. 803(8). In the second assignment of error, Hall argues the court violated his Sixth Amendment right of confrontation by admitting the police report, which contained testimonial statements. Because these assigned error are closely related, we will discuss them together.

A trial court has broad discretion in the admission and exclusion of evidence, and an appellate court must not interfere with that determination "[u]nless the trial court has clearly abused its discretion." *State v. Apanovitch*, 33 Ohio St.3d 19, 25, 514 N.E.2d 394 (1987). An abuse of discretion "'implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 19, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Police reports are generally inadmissible hearsay and should not be submitted to the jury. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229; *State v. Ward*, 15 Ohio St.3d 355, 358, 474 N.E.2d 300 (1984). Evid.R. 803(8), which governs hearsay exceptions, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, ***excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.*** (Emphasis added.)

The admission of the police report allowed the State to introduce hearsay from witnesses who never appeared at trial. The police report not only allowed the State to improperly corroborate Michelle's testimony (where there was no express or implied charge against her of recent fabrication or improper influence or motive),[1] but also allowed the State to present hearsay statements that were never subject to cross-examination and were potentially more damaging than testimony from live witnesses.

For example, on the second page of the report, under the heading "Details of Offense," the report stated, "ON 7.24.2010, THE ABOVE MALE TOLD M. FLOWERS THAT HE WAS GOING TO KILL HER." Michelle never testified that Hall threatened her before the shooting incident.

---

[1] Evid.R. 801(D)(1)(b) permits the admission of a prior consistent statement of a witness if it is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

Further, in the "Original Narrative," the report stated:

> Speaking with the reporting person #1 [David Flowers], stated his sister and suspect recently had a physical fight, suspect called stated, "I'm going to shoot up your house," and hung up the phone.
>
> FURTHER INVEST REVEALS
>
> Suspect called 2130 hours, advising — after the police leave he's returning to do more shooting.

There was no testimony that Hall ever called David Flowers to communicate his intention to shoot the house either before or after the incident. This evidence was presented to the jury for the first time during deliberations. As such, Hall did not have an opportunity to cross-examine the witnesses who made those statements.

Furthermore, the admission of the police report violated Hall's right to confront witnesses. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Confrontation Clause applies to exclude "testimonial" as opposed to "non-testimonial" evidence. Although the *Crawford* court did not define "testimonial," it discussed three possible definitions of that term, which include: (1) ex parte in-court testimony or its functional equivalent, such as affidavits and prior testimony that the defendant was unable to cross-examine, or pretrial statements that declarants would reasonably be expected to be used in a

prosecution; (2) extrajudicial statements contained in formal testimonial materials such as depositions, prior testimony, or confessions; and (3) statements made under circumstances that would lead an objective witness to believe the statement would be available for use at a later trial. *Id.* at 51-52.

In *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the United States Supreme Court further defined the meaning of the term "testimonial." In that case, the court held that the Confrontation Clause applies only to testimonial hearsay and not to statements made "to enable police assistance to meet an ongoing emergency." *Id.* at 2277. In *Davis*, the victim had made a 911 emergency call and, in the course of that call, incriminated the defendant. In affirming the lower court's admission of the statements, the *Davis* court distinguished statements made during an emergency situation from statements made during the course of an investigation after the crisis situation has passed. Specifically, the *Davis* court held:

> 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 prosecution. *Id.* at 2273-2274.

In the case of 911 calls, the *Davis* Court reasoned, the declarants are generally "speaking about events *as they [are] actually happening* * * *." (Emphasis sic.) *Id.* at 2276. 911 callers are typically in the midst of the emergency. *Id.* Under these exigent circumstances, the callers are not testifying as witnesses, and their statements do not qualify as testimonial in nature.

Further, in *Michigan v. Bryant*, 562 U.S. __, 131 S.Ct. 1143, 1157, 179 L.Ed.2d 93 (Feb. 28, 2011), a testimonial exception was more discretely defined as follows:

> The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than "prov[ing] past events potentially relevant to later criminal prosecution." * * * *Davis*, 547 U.S., at 822, 126 S.Ct. 2266. Rather, it focuses them on "end[ing] a threatening situation." *Id.* at 832, 126 S.Ct. 2266. Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination. (Footnote omitted.)

This court has held that although appellate courts generally review decisions on the admission of evidence for an abuse of discretion, we apply a de novo standard of review to evidentiary questions raised under the Confrontation Clause. *State v. Worley*, 8th Dist. No. 94590, 2011-Ohio-2779, ¶ 11, citing *State v. Babb*, 8th Dist. No. 86294, 2006-Ohio-2209, ¶ 17; *State v.*

Simuel, 8th Dist. No. 89022, 2008-Ohio-913, ¶ 35; *State v. Steele*, 8th Dist. No. 91571, 2009-Ohio-4704, ¶ 18.

Here, two police reports were admitted into evidence over defense counsel's objection. Both reports contain testimonial statements "that would lead an objective witness to believe the statement would be available for use at a later trial." *Crawford* at 51-52. The reports contain statements of investigating officers who were not responding to an emergency and who did not testify at trial. According to one report, Officers Daniel Baillis, Bryan Curry, and Gerald Bronson investigated the crime in addition to Artara Adams. The second report identifies additional officers Mark Bickerstaff, Johnny Harris, and Michelle Wolf as investigating officers. One report identifies Officer Daniel Baillis as the reporting officer, while the second report identifies Officer Johnny Harris as the reporting officer. Yet none of these officers testified at trial except Det. Adams.

The police reports further indicate that the police were investigating Hall for crimes of menacing and intimidation of a crime victim or witness. Such statements are unfairly prejudicial since he was not on trial for these offenses. The admission of the police reports violated Evid.R. 803(8) and the Confrontation Clause and constituted error.

However, because the evidence of Hall's guilt is overwhelming, we find this error harmless. Although there was no physical evidence linking Hall to the crime, David Flowers testified that he observed the two vehicles pull up in front of the house, and Hall held a gun pointed at him. In addition, Anthony Flowers testified that he heard Hall's laughter after the shots were fired.

David Flowers's testimony that he saw Hall holding the gun out the vehicle window, coupled with Anthony's excited utterance to the 911 dispatcher in which he identified Hall as one of the shooters, along with Michelle's testimony regarding Hall's calls to her, require our conclusion that the police reports did not contribute to Hall's convictions beyond a reasonable doubt.

Hall's two assignments of error are overruled.

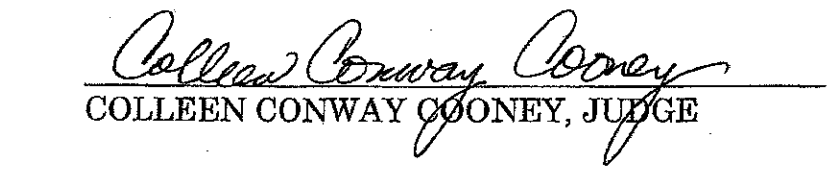
Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



COLLEEN CONWAY COONEY, JUDGE

FRANK D. CELEBREZZE, JR., P.J., CONCURS;
LARRY A. JONES, J., DISSENTS (WITH SEPARATE OPINION ATTACHED).

LARRY A. JONES, J., DISSENTING:

Respectfully, I dissent. The majority correctly finds that the admission of police reports in this case violated Evid.R. 803(8) and the Confrontation Clause were unfairly prejudicial to Hall. Yet the majority overrules the trial court's error, finding it "harmless" because the evidence of Hall's guilt was overwhelming.

Error in the admission of evidence in a criminal trial must be considered prejudicial unless the court can declare, beyond a reasonable doubt, that the error was harmless, and *unless there is no reasonable possibility that the evidence may have contributed to the accused's conviction.* (Emphasis added.) *Columbus v. Obasohan,* 175 Ohio App.3d 391, 397, 2008-Ohio-797, 887 N.E.2d 385 (10th Dist.), citing *State v. Bayless*, 48 Ohio St.2d 73, 106, 357 N.E.2d 1035 (1976), vacated in part on other grounds, 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155 (1978). As to constitutional errors, not all errors are prejudicial. We may decline to notice a constitutional error if the error is harmless beyond a

reasonable doubt. *State v. Love*, 4th Dist. No. 05CA2838, 2006-Ohio-1824, 2006 WL 933360, ¶ 34, citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

> 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. *State v. Conway*, 108 Ohio St.3d 214, 228, 2006-Ohio-791, 842 N.E.2d 996, citing *Chapman* at 24.

""When a claim of harmless error is raised, the appellate court must read the record and decide the probable impact of the error on the minds of the average juror."" *Obasohan* at 397, quoting *State v. Auld*, 4th Dist. No. 2006-CAC-120091, 2007-Ohio-3508, 2007 WL 1977748, quoting *State v. Young*, 5 Ohio St.3d 221, 226, 450 N.E.2d 1143 (1983).

Thus, we must consider whether the improper admission of the police reports *could have* contributed to Hall's convictions, not just whether there was overwhelming evidence of his guilt. Because the police reports were admitted into evidence, the jury improperly heard for the first time during deliberations that: (1) Hall called the victims immediately after the shooting and threatened to return to do more shooting; (2) Det. Adams contacted the victims after the shooting and informed them that Hall had been arrested and jailed for another crime; (3) Michelle had an active restraining order against Hall; and (4) Hall

called the victims a second time after the shooting, spoke with a police officer and claimed he did not shoot up the house and the victims had threatened him.

Based on these facts, I cannot conclude that the information in the police reports did not contribute to Hall's conviction. Not only did the jury learn that Michelle had a restraining order against Hall, but also that Hall had been arrested and jailed for another crime. Simply put, the admission of the police reports allowed the state to improperly bolster its witnesses' testimony without giving Hall the benefit of cross-examination.

Although there was eyewitness testimony that Hall was the shooter, there was no physical evidence linking Hall to the crime. Moreover, I am reminded that we must not only consider whether there was other evidence by which Hall could be convicted of the charged crimes, but whether there is a reasonable possibility that the police reports improperly admitted into evidence contributed to his conviction. I would find that the standard has been met and sustain the assignments of error.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. 96680

LOWER COURT NO. CP CR-540908

COMMON PLEAS COURT

-vs-

LAVERT HALL

Appellant

MOTION NO. 451879

Date 02/21/12

Journal Entry

Motion by Appellant for reconsideration is denied.

RECEIVED FOR FILING

FEB 21 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Presiding Judge FRANK D. CELEBREZZE, JR., Concurs

Judge LARRY A. JONES, SR., DISSENTS

Colleen Conway Cooney

Judge COLLEEN CONWAY COONEY

CA110966680

72549064

VOL 0747 PG 0985