

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-0582

STATE OF OHIO,

Appellee,

v.

LAVERT HALL,

Appellant.

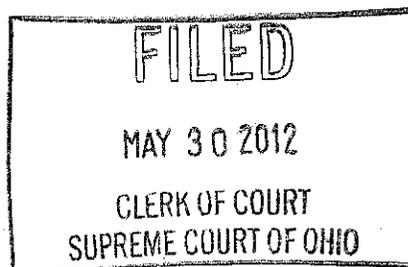
}
}
} On Appeal from the Cuyahoga County Court
} of Appeals, 8th Judicial District

}
} Court of Appeals
} Case No. 96680
}
}

**APPELLANT'S MEMORANDUM
IN SUPPORT OF JURISDICTION**

Russell S. Bensing (0010602)
1370 Ontario St.
1350 Standard Bldg.
Cleveland, OH 44113
(216) 241-6650 (telephone)
(216) 241-5464 (facsimile)
rbensing@ameritech.net

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

TABLE OF CONTENTS

Page

EXPLANATION OF WHY THE APPEAL INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR AN ISSUE OF GREAT PUBLIC INTEREST ..	1
STATEMENT OF THE CASE AND FACTS	5
LAW AND ARGUMENT	7
APPELLANT'S PROPOSITION OF LAW: In determining whether constitutional error is harmless, the reviewing court must examine the record to determine whether the error affected the jury's verdict. The court may conclude that the error did not affect the verdict if it finds that the remaining undisputed evidence shows that no rational juror could have voted to acquit the defendant.	7
CONCLUSION	14
SERVICE	15
Journal Entry and Opinion of the Eight District Court of Appeals	
Journal Entry denying Appellant's Motion for Reconsideration	

**EXPLANATION OF WHY THE APPEAL INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION OR AN
ISSUE OF GREAT PUBLIC INTEREST**

Lavert Hall is serving a twelve-year prison sentence because a court of appeals, not a jury, found him guilty. Over the objection of the defense, and in clear violation of Evid.R. 803(8), the trial judge submitted the police report of the incident to the jury. The report contained a wealth of highly prejudicial and inflammatory information, with no opportunity for the defense to challenge or deny it: references to charges that were never filed, prior arrests, statements that were never testified to at trial, and statements and observations by people who never appeared at trial, all painting Mr. Hall as someone who had threatened to kill his girlfriend and her child and had not only admitted to the crime here but threatened to repeat it. (This was not done through the testimony of the officers as to what they had been told by other witnesses; the officers who prepared the report themselves never testified at trial.) The appellate court found that the admission of the report was a violation of the evidentiary rules and that it “violated Hall’s right to confront witnesses” under *Crawford v. Washington*, 541 U.S. 36 (2004). The result was that it “allowed the State to present hearsay statements that were never subject to cross-examination and *were potentially more damaging than testimony from live witnesses.*” (Opinion at P13; emphasis supplied). The court nonetheless found the constitutional error harmless beyond a reasonable doubt because of the “overwhelming” evidence of guilt, which consisted mainly of a single disputed eyewitness identification.

But this case is not about simply correcting the obvious error of a lower court. It concerns an issue that arises with great frequency in the appellate courts: the standard for determining whether error is harmless. And it goes to the heart of our criminal justice system: the determination of guilt. Under our system, that determination is the sole province of the jury. Here, the appellate

court never considered how the improperly admitted evidence might have impacted the jury, never considered the possibility that the jury might have based its verdict almost entirely upon the highly prejudicial and inflammatory claims contained in the police report, claims that Mr. Hall never had a chance to impeach or contradict. Instead, the appellate court did its own weighing of the disputed evidence and made its own determination of guilt.

This is the result of lack of a clear articulation of how harmless error is to be determined. Should the focus be on how the error affected the jury's verdict, or should it be on the strength of the remaining evidence? Ohio courts, including this one, have vacillated between the two tests. Compare, for example, *State v. Hale*, 119 Ohio St. 3d 118, 144, 2008-Ohio-3426, 892 N.E.2d 864 ("error was harmless in view of the overwhelming evidence of Hale's guilt") with *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, P78, 842 N.E.2d 996 ("question is whether there is a reasonable possibility that [error] might have contributed to the conviction") and *State v. Young*, 5 Ohio St.3d 221, 226, 450 N.E.2d 1143 (1983) (appellate court must decide "the probable impact of the error" on the jury); *State v. Richmond*, 8th Dist. No. 96155, 2011-Ohio-6450, P45 ("we find any error harmless given the overwhelming evidence of defendant's guilt") with *State v. Scott*, 8th Dist. No. 91890, 2010-Ohio-3057, P54 ("error was harmless because it did not affect the outcome of the trial and did not contribute unfairly to the verdicts"); *State v. Schmidt*, 9th Dist. No. 10CA0071-M, 2012-Ohio-537, P23 ("even where the admission of evidence is erroneous, the error is harmless where there is overwhelming evidence of the defendant's guilt") with *State v. Hilliard*, 9th Dist. No. 22808, 2006-Ohio-3918, P42 (error did not "contribute[] to Hilliard's conviction"); *State v. Bankston*, 2nd Dist. No. 24192, 2011-Ohio-6486, P19 ("The test for harmless nonconstitutional error is whether there is substantial evidence to support the guilty verdict even after the tainted evidence is cast aside") with *State v. Shells*, 2nd Dist. No. 20802, 2005-Ohio-5787 (error was harmless

“because the error did not contribute to the verdict”).

The lack of a clear standard creates two problems. The first is that it leads inevitably to inconsistent results. One court might look only at the remaining evidence and affirm the conviction, even in cases where particularly damaging evidence almost certainly contributed to the verdict, as happened here. Another court might concentrate solely upon the egregiousness of the error and reverse a conviction, despite the fact that no rational juror could have ignored the remaining overwhelming, undisputed evidence against the defendant.

The second problem with a lack of a clear standard is that focusing solely on the nature of the remaining, untainted evidence is inconsistent with our system of justice, which reposes in the jury the responsibility for determining guilt. As a unanimous Supreme Court explained in *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), “The inquiry. . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.” This was a reiteration of what the Court had held almost a half century before in *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946): “. . .the question is, not [was the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury’s decision.”

That is not to suggest that the untainted evidence should be ignored; it may well be that the evidence is indeed so overwhelming that no rational juror could have voted to acquit the defendant. But this again places the focus where it should be: on the jury. It is not whether the appellate court judges believe that the defendant is guilty, it is whether they can safely conclude that any rational juror would have still found the defendant guilty regardless of the tainted evidence.

In the past few years, this Court has made a major effort to clarify the law in areas which had

been the subject of confusion in the lower courts. See *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830 (mens rea in indictments), *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314 (allied offenses), *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330 and *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204 (final judgment entry), and *State v. Fischer* (post-release controls). The issue of harmless error arises far more frequently – indeed, in every case in which error is found – and, as the cases above demonstrate, is subject to just as much confusion. Clarifying the standard for review of harmless error is all the more important here because, in light of United States Supreme Court precedent, it appears that many lower court decisions may run afoul of the Sixth Amendment’s guarantee of jury trial, and may result in the reversal of otherwise valid convictions.

Appellant submits that the proposition of law below articulates a clear standard for the appellate courts to follow in determining harmless error of a constitutional dimension. The court must determine whether the constitutional error impacted the jury’s verdict, and to conclude that the error is harmless, it must find beyond a reasonable doubt that no rational juror could have found the defendant not guilty. In doing so, it must review the record to determine whether there are any indications of how the error might have influenced the verdict. The reviewing court is not permitted to reweigh the evidence to resolve any disputes; questions of credibility are the sole province of the jury.

This standard allows for the situation where the evidence is indeed overwhelming, in the sense that any rational juror would have voted to convict, notwithstanding the error. It allows for meaningful review of whether an error is truly harmless – an issue which arises in every single appeal in which error is found – while remaining consistent with our system’s recognition that the determination of guilt is within the sole province of the jury.

STATEMENT OF THE CASE AND FACTS

Mr. Hall was indicted by the Cuyahoga County Grand Jury on four counts of felonious assault and four counts of improperly discharging a firearm into a habitation, all with with one-, three-, and five-year gun specifications, stemming from an incident which occurred on July 25, 2010. The State presented the testimony of four witnesses at the trial. The first was a detective from the Crime Scene Unit, who testified extensively as to the physical evidence found at the scene – mostly shell casings – but acknowledged that none of the physical evidence linked Mr. Hall to the crime.

The State's next witness, David Flowers, testified that he was sitting on the porch of his house when two cars drove up, side by side, with guns pointing from the vehicles. He ran from the porch, and heard four gunshots. He testified that one of the people in one of the cars was Mr. Hall. He immediately called 911. On the tape, the dispatcher can be heard asking which of the cars Mr. Hall was in; the response was, "We couldn't tell, it happened so fast."

The third witness for the State, Anthony Flowers, was in an upstairs bedroom when the shots were fired. Although he was not able to observe any of the people in the cars, and despite having met Mr. Hall only three times previously, he claimed to have recognized Mr. Hall laughing as the cars drove away.

The State's final witness was Mr. Hall's girlfriend, Michelle Flowers, who testified to having received numerous phone calls from Mr. Hall after the shooting, several of which she claimed to have recorded on voice mail, in which he supposedly admitted that he had shot up her parents' house. The state submitted Ms. Flowers' cell phone records, showing that Mr. Hall had indeed called her on numerous occasions on that day, both before and after the shootings. No voice mail recordings were ever submitted at trial, and on cross-examination, Ms. Flowers admitted that the phone calls had not been only one-way: she had called Mr. Hall numerous times after the shooting

– sixty-seven times in the three days after July 25 – and had written him numerous love letters while he was in jail awaiting trial, until her family found out about it.

After the State rested, the defense called the lead detective, Artara Adams. He testified that he was never made aware that there were *two other drive-by shootings* in the same area that night, and that if he had been aware, he would have investigated them to determine if they might be linked to the shooting in this case, and might have provided leads to persons other than Mr. Hall. He admitted that it would also have been relevant to know that Mr. Flowers had told the dispatcher that he “couldn’t tell” which car Mr. Hall had supposedly been in. He acknowledged that Michelle Flowers had given him her phone, but that he could not find any of the voicemails she claimed to have received from Mr. Hall admitting to the shooting.

At one point during Det. Adams’ testimony, he stated that he was unsure of the time that the police responded to the call about the shooting, so defense counsel used the police report to refresh his memory on that point. That was the only use of the report by the defense. During the admission of the defense exhibits, the trial judge asked whether the defense wished to have the police report admitted as evidence. When told that the defense was not going to introduce the report, the judge asked the same question of the prosecutor, who replied affirmatively. Over objection of the defense, the report was admitted, and went to the jury during its deliberations.

The court granted Mr. Hall’s motion to dismiss two of the eight counts, and submitted the case to the jury, which returned a verdict of guilty.

On appeal, Mr. Hall made two assignments of error: that the admission of the report violated Evid.R. 803(8), and that it violated his Sixth Amendment right of confrontation, in that the report contained numerous testimonial statements. The Eighth District issued an opinion on January 26, 2012, sustaining both assignments of error, but the majority determined that “because the evidence

of Hall's guilt is overwhelming, we find this error harmless." (Opinion at P24.) The dissenting judge, noting that "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," found that he "cannot conclude that the information in the police reports did not contribute to Hall's conviction." By the same 2-1 vote, the court denied a timely-filed motion for reconsideration on February 21, 2012.

LAW AND ARGUMENT

APPELLANT'S PROPOSITION OF LAW: In determining whether constitutional error is harmless, the reviewing court must examine the record to determine whether the error affected the jury's verdict. The court may conclude that the error did not affect the verdict if it finds that the remaining undisputed evidence shows that no rational juror could have voted to acquit the defendant.

The most vexing issue in an appeal is often not whether there was error, but its significance. This is particularly true where the error complained of is the wrongful admission of evidence, because it requires the appellate court to gauge how the tainted evidence affected the trial's result.

The United States Supreme Court has consistently held that, in determining whether error is harmless, the focus is on how the tainted evidence impacted the jury. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963). "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot. . . be conceived of as harmless." *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 827, 17 L.Ed.2d 705 (1967).

Thus, a reviewing court's first task in gauging whether the erroneous admission of evidence is harmful is to evaluate the record to determine how the evidence may have impacted the jury.

While the reviewing court is not privy to the jury's deliberations, of course, the record may very well contain indications of how much significance the jury gave the improperly-admitted evidence. For example, where the prosecutor makes repeated references to that evidence in opening or closing, or the attorneys or the trial judge comment about the importance of the evidence, a reviewing court may properly find that if the trial participants believed the evidence was important, the jury could have concluded likewise. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 297-298, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). If the improperly admitted evidence affected the conduct and strategy of the prosecution or the defense, that would be another indication that it impacted the trial. See, e.g., *Fahy*, supra (due to wrongful admission of evidence, defendants were essentially compelled to take stand to testify). The length and difficulty of the jury deliberations may also indicate that the remaining evidence was not as overwhelming as might be claimed. See, e.g., *United States v. Varoudakis*, 233 F.3d 113, 126 (1st Cir. 2000) (longer deliberations "weigh against finding of harmless error" because "[l]engthy deliberations suggest a difficult case"). And the evidence may simply have been so inflammatory that its effect on the verdict is self-evident, or so innocuous that a court can reasonably conclude that it could not have affected the jury. *Fulminante*, supra at 296-97.

In this case, several of these factors, especially the latter, clearly show that the wrongful admission of the evidence contributed to the jury's verdict. The best indication of this is the very decision of the court below, which painstakingly detailed the egregious effects that the wrongful admission of the police report had on Mr. Hall:

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 Mr. Hall threatened her before the shooting incident.

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

"Speaking with 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." P14-15.

As the court acknowledged,

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. P16.

That was not all. The second incident report, regarding a charge of menacing that was never pursued, contains extensive damaging hearsay concerning allegations that were never testified to in court, such as that that Mr. Hall had called Michelle Flowers and told her that he "knew where she was (with her baby daddy) and that he was going to come over and kill them all." The report also contained an extensive summary of a telephone conversation by a police officer, who never testified at trial, with a person who was identified as Mr. Hall - by another person who never testified at trial - in which Mr. Hall supposedly denied the shooting and claimed that he had evidence showing that the family had threatened him, but when asked by the officer to provide it, hung up the phone. The police reports also informed the jury that Ms. Flowers had a restraining order against Mr. Hall, and that Mr. Hall had been arrested and jailed for another crime.

Moreover, the admission of the police report affected the strategy in the case. As noted, the only evidence against Mr. Hall presented by live witnesses was the disputed identification, the allegation that Mr. Hall had left voice mail messages on Ms. Flowers' phone admitting to the crime, which was refuted by the investigating detective, and Anthony Flowers' claim of recognizing Mr.

Hall's laugh. On this last point, notably absent from the police report is any indication that Anthony Flowers had made any mention of this, despite Mr. Flowers' repeated claims in cross-examination that he had in fact told the police about it. This was very probably the reason that the police officers who responded to the crime were never called by the State. Calling them would have had little benefit to the prosecution; outside of the supposed phone conversation between one officer and Mr. Hall, their observations would have had produced no relevant evidence against Mr. Hall. They would not have been permitted to testify about what the other witnesses told them; as the court below noted, there was no allegation of improper motive or recent fabrication which would have permitted proof of prior consistent statements under Evid.R. 801(D)(1)(b). The only result of having the officers testify would have been allowing the defense to get them to acknowledge that Mr. Flowers had never told them anything about the supposed laugh, and thus would have refuted one of the few pieces of evidence against Mr. Hall.¹ The admission of the report, though, gave the State the best of both worlds: it allowed them to get in the officer's observations, as well as a wealth of prejudicial, inflammatory, and inadmissible statements, while shielding the officers from cross-examination and thus protecting one of their few pieces of evidence against Mr. Hall from impeachment.

Given all this, it is not surprising that the court below concluded that the admission of the police report "allowed the State to present hearsay statements that were never subject to cross-examination," and that the evidence contained in the report was "potentially more damaging than the testimony from live witnesses." P13. Indeed, what would have been surprising is any other conclusion. The evidence at trial presented three pieces of evidence, all disputed, that Mr. Hall had

¹ The defense could have argued in closing that the police report did not mention Mr. Flowers' claim, but given the full contents of the report, directing further attention to it would have clearly constituted malpractice and ineffective assistance of counsel.

shot into a house. The police report presented evidence, none of which was subject to cross-examination or refutation, that Mr. Hall had threatened to kill his girlfriend and her child, that he had been arrested for other crimes, that there was a restraining order against him, and that he had admitted to the shooting, both before and after committing it, and had called the house, while the police were still there responding to the shooting, and threatened to return and shoot it up again.

Yet after spending nine pages detailing how the admission of the police report violated not only Evid.R. 803(8), but the Sixth Amendment's Confrontation Clause as well, the majority dismissed these violations as harmless error in three brief sentences, finding that "the evidence of Hall's guilt is overwhelming" to the extent that it "require[s] our conclusion that the police reports did not contribute to Hall's convictions beyond a reasonable doubt." P24-25.

This brings us to the second step of the analysis for harmless error. As noted, there may be occasions when a reviewing court can conclude that even the wrongful admission of highly prejudicial evidence did not contribute to the verdict, because the remaining *undisputed* evidence is so overwhelming that no rational juror could have ignored it.

This was obviously the basis for the majority's conclusion. Despite the reference to the conclusion that "the police reports did not contribute to Hall's convictions," the majority opinion is bereft of any analysis of that issue, other than a recitation of all the evidence properly submitted to the jury.² Indeed, if Mr. Hall's case was more damaged by constitutionally inadmissible evidence, it is difficult to discern how that evidence could *not* have contributed to the jury's verdict. The only way the majority could have properly sustained the verdict is by concluding that the tainted evidence did not contribute to the verdict because the remaining undisputed evidence was so overwhelming that no rational juror could have returned a verdict of not guilty.

² Indeed, it seems to have been an afterthought added in response to the dissent.

The key word here is “undisputed”; it is the jury’s function to weigh credibility, not the reviewing court’s. The problem with the majority’s conclusion becomes manifest when the three brief sentences supporting its result are scrutinized. Rather than respecting the role of the jury as the ultimate arbiters of fact, the majority took it upon themselves to weigh those disputed testimony of the State’s witnesses, and concluded that they were worthy of belief. But this is the function of the jury, not of a panel of appellate judges. As the majority acknowledged, there was no physical evidence linking Mr. Hall to the crime. There was no circumstantial evidence, or direct testimony by independent witnesses.³ All that the majority could cite was the identification by David Flowers, the recognition of the “laugh” by Anthony Flowers, and the claim by Michelle Flowers that Mr. Hall admitted the crime to her.

None of this comes remotely close to demonstrating the kind of overwhelming evidence necessary to show, beyond a reasonable doubt, that the error did not contribute to the verdict: a showing that no rational juror could have voted to acquit in the face of that evidence. Of course a rational juror could have found that David Flowers’ identification was suspect, if he could not even tell which of two cars Mr. Hall was supposedly in; Det. Adams himself testified that was significant. Moreover, given the present state of knowledge regarding the highly subjective nature of eyewitness identification, and the fact that it is the most common cause of wrongful convictions, it is difficult to conclude that even an unimpeached eyewitness identification could constitute “overwhelming” evidence of guilt. As one United States Supreme Court Justice recently noted,

The empirical evidence demonstrates that eyewitness misidentification is “the single greatest cause of wrongful convictions in this country.” Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that

³ With no disrespect intended to the Flowers, they were hardly impartial; the difficulties between Mr. Hall and Michelle Flowers were well-known to the rest of the family.

eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police orchestrated procedures. *Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716, 739, 181 L.Ed.2d 694 (2012) (Sotomayor, J., dissenting).⁴

Similarly, a rational juror could have discounted Anthony Flowers' identification of Mr. Hall's laugh, especially in light of Mr. Flowers' admission on cross-examination that he had only met Mr. Hall on three occasions, and his failure to indicate what he found sufficiently distinctive about the laugh that he could have recognized it. A rational juror could have easily discredited Ms. Flowers' testimony that Mr. Hall had left her voicemails admitting to the crime, given the detective's refutation of that claim; moreover, a rational juror could have easily concluded that Ms. Flowers' subsequent conduct – repeatedly calling Mr. Hall and sending him love letters in jail – was at complete odds with her claim that he had admitted he'd shot up her family's house.

There was no dispute that someone had fired shots at the Flowers' home. What was disputed was the identity of the shooters. The State presented only three witnesses who could link Mr. Hall to the shooting; all of that testimony was disputed and impeached to some degree. We do not know how the jury would have resolved those disputes. We do know that the jury, as the court below confessed, was given far more damaging evidence against Mr. Hall from the police report than from the witness stand. The conclusion that the erroneous admission of the police report contributed to the jury's verdict is inescapable. Instead of acknowledging that and reversing the convictions, the court below affirmed them by usurping the jury's role and resolving the disputes in the evidence.

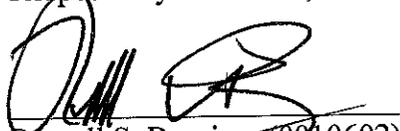
⁴ The majority's quarrel in *Perry* was not with Justice Sotomayor's concerns about the inadequacy of eyewitness identifications, but with whether due process compelled suppression of identifications without a showing that police procedures were so suggestive that they created a likelihood of misidentification.

CONCLUSION

Inconsistency in the standard for determining harmless error inevitably leads to inconsistent results. Both parties suffer from that, some courts finding error when the remaining evidence is more than sufficient to sustain the verdict, others ignoring the effect of inadmissible evidence by engaging in their own analysis and weighing of the evidence to conclude that it is "overwhelming." This case is an example of the latter. With all due respect to the court below, for a man to be sentenced to twelve years in prison after a trial in which the majority concedes the evidence introduced in violation of the rules of evidence and his constitutional rights was probably more damaging to him than the admissible evidence is simply wrong.

The standard for review of harmless error articulated here is simple in application, provides consistency of result, and is consonant with our system of justice and the respective roles of juries and appellate courts. Appellant requests that this Court accept jurisdiction of Appellant's Propositions of Law so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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

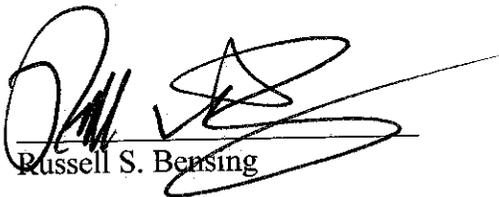
**ATTORNEY FOR LAVERT HALL,
APPELLANT**

SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Jurisdiction was hand-delivered to offices of the Attorney for Appellee,

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

this 24th day of April, 2012.


Russell S. Bensing

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

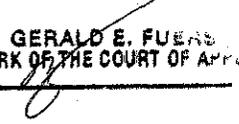
ATTORNEYS FOR APPELLEE

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. FUERS
CLERK OF THE COURT OF APPEALS
BY  Der.

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.

COPIES RETURNED TO COURT FOR
AIR MAILING FEBRUARY 13, 2012

RECEIVED FOR FILING

FEB 21 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

Presiding Judge FRANK D. CELEBREZZE, JR.,
Concurs _____

Judge LARRY A. JONES, SR., DISSENTS _____

Colleen Conway Cooney
Judge COLLEEN CONWAY COONEY

VOL 0747 PG 0985

