

ORIGINAL

NO. 2012-0215

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 96207

STATE OF OHIO

Plaintiff-Appellant

-vs-

DARIUS CLARK

Defendant-Appellee

MERIT BRIEF OF PLAINTIFF-APPELLANT

Counsel for Plaintiff-Appellant

WILLIAM D. MASON (#0037540)
CUYAHOGA COUNTY PROSECUTOR

MARK J. MAHONEY (#0041928)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7877

Counsel for Defendant-Appellee

ROBERT TOBIK (#0029286)
Cuyahoga County Public Defender

ERIKA CUNLIFFE (#0074480)
Assistant Public Defender
3310 Lakeside Avenue, Suite 400
Cleveland, Ohio 44113

FILED
JUL 23 2012
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JUL 23 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	3
LAW AND ARGUMENT	5
PROPOSITION OF LAW I: Statements made to teachers by children during an interview to identify suspected child abuse and protect the future safety and welfare of that child, are non-testimonial and thus are admissible without offending the Confrontation Clause.	
CONCLUSION	14
CERTIFICATE OF SERVICE	15
Appendices	Appx. Pg.
Copy of date-stamped Notice of Appeal to the Supreme Court of Ohio	1
<i>State v. Clark</i> , 2011-6623	3

TABLE OF AUTHORITIES

Cases

<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)	5, 6, 7, 10, 11
<i>Davis v. Washington</i> , 547 U.S. 813, 126 S.Ct. 2266, 165L.Ed.2d 224 (2006)	6, 7, 10, 11
<i>In re T.L.</i> , 9th Dist. No. 09CA0018-M, 2011 Ohio 4709	9
<i>Ohio v. Roberts</i> , 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 5997 (1980).....	5
<i>People v. Cage</i> , 40 Cal.4th 965, 155 P.3d 205, 56 Cal.Rptr.3d 789 (2007).....	12
<i>Seeley v. State</i> , 373 Ark. 141, 282 S.W.3d 778 (2008)	11
<i>Stat v. Stahl</i> , 111 Ohio St.3d 186, 2006 Ohio 5482, 855 N.E.2d 834	7
<i>State v. Arnold</i> , 126 Ohio St.3d 390, 2010-Ohio-2742, 933 N.E.2d 775 (2010)	7, 8
<i>State v. Arroyo</i> , 284 Conn. 597, 935 A.2d 975 (2007).....	10
<i>State v. Hunneman</i> , 12th Dist. No. CA2006-01-006, 2006-Ohio-7023	8
<i>State v. Johnson</i> , 12th Dist. No. CA2005-10-422, 2006-Ohio-5195.....	9
<i>State v. Muttart</i> , 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944.....	7
<i>State v. Siler</i> , 116 Ohio St.3d. 39, 2007-Ohio-5637, 876 N.E.2d 534.....	7

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue regarding the admissibility of a child victim's statement to his or her teacher detailing instances of sexual or physical abuse has not received widespread treatment in Ohio case law. Of the cases that exist, the focus is on the intent of the child declarant when making the statement.

More prevalent are cases dealing with the treatment of a child victim's statement to individuals other than the child's teacher. These cases typically involve statements to social workers, nurses and doctors, and law enforcement officers. These cases also hold that the focus is on the intent of the child, but the intent of the questioner may have some relevance when analyzing admissibility issue. In those instances, testimonial statements are those statements or inquires the primary purpose of which is gathering information for subsequent use at trial. Generally, nontestimonial statements are statements made for the purposes of medical diagnosis and/or treatment or for safety reasons.

A secondary issue involving child statements to teachers has developed around the fact that teachers are mandatory reporters when suspected abuse is involved. Courts have determined that a mandatory duty to report child abuse does not automatically transform an individual into an agent of the police nor make the child's statement testimonial.

In the instant case, it is clear that L.P.'s statements to his teachers are nontestimonial, as L.P. did not intend that his statements be used as part of an investigation to be used at trial. L.P. was responding to inquires about his health and safety from his teachers. To the extent his teachers' purposes are relevant, the teachers were clearly acting out of concern for his health, welfare and continued safety of the

child. The two teachers asked non-leading questions of the child, i.e. "what happened?" The identity of his assailant was not sought after information, but information L.P. spontaneously volunteered. Even if the teachers had inquired as to the identity of the assailant, it would have been for the purpose of his continued health, welfare and safety, so as not to send the child back into a dangerous and harmful situation. This primary purpose is not one that transforms the statement into a testimonial statement prohibited by the Confrontation Clause.

STATEMENT OF THE CASE

Defendant Darius Clark was charged in a nine-count indictment by the Cuyahoga County Grand Jury relating to the physical abuse of two children in his care. Count one charged Clark with Felonious Assault, the identified victim being L. P., age 3 at the time of the offense. Counts two through five were also charges of Felonious Assault; the victim in these counts is identified as A. T. She was age 22 months at the time of the offenses. Counts six and seven charged Clark with Endangering Children, representing one charge for each child. Likewise, counts eight and nine charged Clark with Domestic Violence, again one count per each child.

Clark's co-defendant was his live-in girlfriend, Taheim Traywick. She is the mother of the two victims. She faced the same nine counts set forth above, but was also charged with Permitting Child Abuse. Taheim plead guilty to Endangering Children, Domestic Violence and Permitting Child Abuse. Although she agreed to testify as part of the plea agreement she was not promised any particular sentence by the State of Ohio.

The case against Clark proceeded to a jury trial wherein the jury found him guilty of all charges except one of four charges of Felonious Assault.

Defendant filed an appeal with the Eighth District Court of Appeals. On December 22, 2010, the Eighth District sustained Defendant's third and fourth assignments of error. The Eighth District found Clark's confrontation clause rights pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio constitution were violated by admitting the out-of-court statements made by L.P. to the following witnesses: Cleveland police detective Jody Remington, Cuyahoga County Department of Children and Family Services (CCDCFS) social worker Sarah Bolog; CCDCFS social worker Howard Little, L.P.'s assistant preschool teacher Ramona Whitley, L.P.'s lead preschool teacher Debra Jones, the children's maternal grandmother, and the children's maternal great aunt. The appellate court found the statements were testimonial in nature and thus not admissible.

The Supreme Court of Ohio granted the State's Motion in Support of Jurisdiction on the narrow issue of whether L.P.'s statements to his teacher's violated Defendant's Confrontation Clause rights.

STATEMENT OF THE FACTS

The child victims herein, L.P., then three and a half years old, and A.T., then twenty-two months old, were primarily in the care of their mother Taheim Traywick, who was living with her boyfriend, Defendant-Appellee, Darius Clark. . Clark shared the responsibility of caring for the two children as well. Clark was also responsible for the two small children when Taheim left town. It is undisputed that Taheim would leave town and travel to Washington D.C. at appellant's suggestion to work as a prostitute and to make money for their shared living expenses.

On March 8, 2010, Traywick went out of town and left the children in the care of Defendant until March 12, 2010. On March 16, 2010, Traywick again left the children in the care of the Defendant for an indeterminate length of time.

On March 17, 2010, preschool teachers, Ramona Whitley and Debra Jones, noticed welt marks on L.P.'s face. Ms. Whitley was the first to notice the marks and asked L.P. "what happened?" L.P. gave three answers: (1) he fell, (2) he did not know, and (3) "Dee did it." Ms. Whitley then informed Ms. Jones of the marks on L.P. Ms. Jones took L.P. outside of the classroom and asked him "what happened?" L.P. responded, "Dee did it." Ms. Whitley and Ms. Jones took L.P. to a supervisor's office and called 696-KIDS.

On March 18, 2010, a social worker, Sarah Bolog, went to the Defendant's mother's home to find the children. Two teenagers were watching the children. The social worker waited for Defendant's mother to arrive, at which point she talked with the Defendant's mother and took the children to the hospital.

At the hospital, doctors examined the children. The doctor testified that L.P. had bruises in various stages of development and abrasions that were consistent with being whipped with a belt and A.T. had multiple bruises, burn marks, a swollen hand, and padder sores near her hairline that are consistent with her braids being ripped out. The Doctor testified that injuries occurred between February 28, 2010 and March 18, 2010, but could not narrow the time further.

On April 15, 2010, State charged Defendant and Traywick with five counts of felonious assault in violation of R.C. 2903.11(A)(1), two counts of endangering children in violation of R.C. 2919.22(B)(1), and two counts of domestic violence in violation of

R.C. 2919.25(A). Traywick pled guilty to three of the counts and the court postponed her sentencing until after Defendant's trial.

On November 16, 2010, the court held a hearing and found L.P. incompetent to testify. The court denies Defendant's motion in limine to exclude L.P.'s out of court statements identifying Defendant as the cause of the injuries.

On November 22, 2010, a jury found Defendant guilty of all but one count of felonious assault against A.T. and sentenced Defendant to eight years in prison for each felonious assault conviction, four years in prison for each count of endangering children, and six months in prison for each count of domestic violence, on November 30, 2010. The court ordered the felonious assault sentences to run consecutively for an aggregate of twenty-eight years in prison.

LAW AND ARGUMENT

PROPOSITION OF LAW I:

Statements made to teachers by children during an interview to identify suspected child abuse and protect the future safety and welfare of that child, are non-testimonial and thus are admissible without offending the Confrontation Clause.

Confrontation clause jurisprudence

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court of the United States rejected the reliability rationale of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 5997 (1980), for admission of out-of-court statements by witnesses. The Supreme Court of the United States stated, "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and prior opportunity for cross examination" by the defendant before the statement may be admitted without violating the

Confrontation Clause. *Id.* at 68. The Court in *Crawford* declined to define testimonial, despite discussing various possible definitions. *Id.* at 52.

Two years later, the Supreme Court of the United States had the opportunity to revisit the question of what qualified as a testimonial statement in *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165L.Ed.2d 224 (2006). In *Davis*, the Court stated, “[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” *Id.* at 821. The Court in defining testimonial held, “[statements] 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.” *Id.* at 822. In defining nontestimonial statements, the Court held, “[s]tatements 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.” *Id.* The Court in *Davis* evaluated testimonial statements only in the context of statements made to law enforcement or agents of the police. In evaluating the testimonial character of the statements the court looked at four factors: (1) was the declarant speaking about events as they were actually happening, (2) was the declarant facing an ongoing emergency, (3) were the elicited statements necessary to be able to resolve the present emergency, (4) the formality of the proceedings. *Id.* at 827. The factors that guided the court’s interpretation of the testimonial characteristics of a statement are simply meant as guidance; the test is what was the primary purpose of the interrogation. If the primary purpose is investigating a possible crime, then the statement is deemed testimonial.

Cases from the Supreme Court of Ohio

In *Stat v. Stahl*, 111 Ohio St.3d 186, 2006 Ohio 5482, 855 N.E.2d 834, this court applied the decisions of *Crawford* and *Davis*. This court held that the testimony of a nurse practitioner, regarding statements of a rape victim made during a rape exam that identified her attacker, was not testimonial as the victim had already made an identification to the police and could have reasonably assumed the identification to the nurse practitioner served a separate and distinct medical purpose. This court stated, “[i]n determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations.” *Id.* at ¶36.

In another case, this court held a child victim's statements to a social worker, before a doctor examined the child, were nontestimonial because “statements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford*.” *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶63.

In *State v. Siler*, 116 Ohio St.3d. 39, 2007-Ohio-5637, 876 N.E.2d 534, this court held statements to a deputy sheriff were testimonial because when they were made no ongoing emergency existed and the primary purpose of the interrogation was to establish past events potentially relevant to a later criminal prosecution.

In *State v. Arnold*, 126 Ohio St.3d 390, 2010-Ohio-2742, 933 N.E.2d 775 (2010), this court held that statements made to interviewers at child advocacy centers that are made for medical diagnosis and treatment are nontestimonial and are admissible without offending the Confrontation Clause. *Id.* at ¶43. Additionally, this Court held that statements made to interviewers at child advocacy centers that serve primarily a

forensic or investigative purpose are testimonial and are inadmissible pursuant to the Confrontation Clause. *Id.* at ¶36. *Arnold* dealt with statements made at a child advocacy center, a multidisciplinary center; the center sought to “provide a comprehensive, culturally competent, multidisciplinary response to allegations of child abuse in a dedicated, child friendly setting.” *Id.* at ¶29. This court noted, “most members of the team retain their autonomy. Neither police officers nor medical personnel become agents of the other.” *Id.* at ¶33

Like in the instant case, some of the statements in *Arnold* dealt with the identification of the perpetrator. This court in *Arnold* noted, “[i]nformation regarding the identity of the perpetrator, the age of the perpetrator, the type of abuse alleged and the time frame of the abuse allows the doctor or nurse to determine whether to test the child for sexually transmitted infections.” *Id.* at ¶32. This court stated the original purpose for which the statements were taken is controlling and subsequent use at trial of the statements does not change the original purpose. *Id.* at ¶43.

How other Ohio counties treat statements of child victim’s to teachers and other similar adults

One Ohio case deals with a child victim’s statement to his or her teacher about the abuse. A few Ohio cases deal with child victim’s statements to other adults. Those cases are briefly discussed below.

In *State v. Hunneman*, 12th Dist. No. CA2006-01-006, 2006-Ohio-7023, the court considered statements of a child to her bus driver, teacher, and nurse that her father had bent her finger backwards until it broke and found the statements were nontestimonial in nature. In that case, the child spontaneously presented her finger to her bus driver, but the teacher and the nurse each asked the child what happened. The

court said, “[n]othing in this case indicates [the child] ever had any expectation that her statements about the nature of her broken finger would be available for use in a later trial against her stepfather. Nor can we say with any evidence that an objective witness in then five year old [child’s] position would reasonably believe that the statements were being made for that purpose.” *Id.* at ¶16. For the purpose of evaluating the testimonial nature of the statements, “[i]t is clear that the focus is to be on the beliefs and expectations of [the child].” *Id.* at ¶16.

In another case, the Twelfth District upheld the admission of medical records that contained the statements of a child victim regarding acts of sexual abuse and the identity of the abuser. *State v. Johnson*, 12th Dist. No. CA2005-10-422, 2006-Ohio-5195.

In another case, the Ninth District considered a child victim’s statement to a social worker about her abuse. *In re T.L.*, 9th Dist. No. 09CA0018-M, 2011 Ohio 4709. The Ninth District held that the statements which related to medical or psychological treatment were nontestimonial, included were statements identifying the abuser. The Ninth District held that statements serving a forensic or investigative purpose were testimonial and barred under the Confrontation Clause. Those statements included the Defendant telling the child to sit on the bed and that Defendant and child were playing hide and seek.

How other states treat statements of child victim’s to teachers

Other states have dealt with the specific issue of how to treat child victim’s statements to teachers. The cases are few. In addition, other states have dealt with how to treat child victim’s statements to a variety of other individuals. A brief discussion of these cases follows.

In *State v. Arroyo*, 284 Conn. 597, 935 A.2d 975 (2007), the Connecticut Supreme Court considered the admission of testimony relaying the child victim's outcry statements and held the statements did not violate the defendant confrontation rights. In that case, the victim, a five-year-old girl, repeatedly tested positive for chlamydia and a Department of Children and Family services investigation was underway, but not yielding the cause of the child's chlamydia. The child's mother asked the child's teacher to ask the child how she had become infected. The child told the teacher her godfather had touched her. In regards to the child victim's statements to the child's teacher, the court held the statement nontestimonial saying, "[t]he circumstances of this interview, however, did not even remotely resemble an interview that would be considered to elicit testimonial statement under *Davis* and *Crawford*. The child met with the teacher at her mother's request . . . and there is no suggestion in the record that the teacher performed any investigatory function whatsoever." *Id.* at 636.

The court discussed the holdings in *Crawford* and *Davis* and their applicability to the case. The court stated,

the determining factor resolving whether the subject statements are testimonial or nontestimonial is the primary purpose of the interrogation between the declarant and the witness whose testimony the state later seeks to introduce regarding the declarant's statements; that is, whether the interrogation is primarily intended to provide assistance to the declarant or to further investigation and preparation for prosecution.

Id. at 629. The court went on to state, "[t]he mere fact that police are involved, as in the present case, because they are made privy to the information contained in the interview, is not sufficient, without more, to render the interviews testimonial." *Id.* at footnote 20. The court noted, the ongoing emergency requirement articulated in *Davis* applies to

police and agents of the police, when people other than the police are involved there does not have to be an ongoing emergency. Speaking of social workers and forensic interviewers, the court said, “by the very nature of the assistance provided to a victim, [a social worker/forensic interviewer] always [provides assistance] after the emergency has passed. A victim . . . does not seek counseling or mental health assessment during the assault. Therefore, the interview, and the statements derived therefrom, will always involve past events.” *Id.*

Furthermore, in discussing forensic interviewers, the court noted their duty to report suspected child abuse did not automatically render them agents of the police. In fact, the court found the statements to the forensic interviewer were nontestimonial because there was no evidence to suggest the interview was at the instruction or request of the police, nor was the forensic interviewer employed by a law enforcement agency. *Id.* at 633-34.

In *Seeley v. State*, 373 Ark. 141, 282 S.W.3d 778 (2008), the Arkansas Supreme Court considered a child victim’s statements to a social worker and found them to be nontestimonial as “using an objective standard, the primary purpose of the interview was medical treatment.” *Id.* at 156. The court stated, “[w]e conclude that in light of *Crawford* and *Davis*, both the primary purpose of the person making the statement and the primary purpose of the person asking the questions may be relevant to a confrontation-clause analysis.” *Id.* at 151. As to the identification statements, the court said, “the proper treatment of [the child] included ensuring her continued safety. The identity of anyone who may have harmed [the child] was relevant to ensuring her safety after she left the hospital.” *Id.* at 154.

In *People v. Cage*, 40 Cal.4th 965, 155 P.3d 205, 56 Cal.Rptr.3d 789 (2007), the California Supreme Court concluded that a child victim's statements to a mandated reporter of child abuse did not render the child's statements to the mandated reporter testimonial. In *Cage*, a fifteen year old was brought to the hospital with a large cut on his face and neck. The doctor, a mandated reporter of child abuse, asked the child what happened. The child responded his grandmother held him down while his mother cut his face with a piece of glass. The doctor asked no further questions pertaining to the identification of the attacker. The court noted the primary purpose of the question and answer was to receive prompt medical attention. The doctor posed a neutral question and after receiving an answer, which identified the assailant, the doctor did not pursue the identity further. In addition, the interview "had none of the formality or solemnity that characterizes testimony by witnesses," nor was the doctor acting in conjunction with law enforcement. *Id.* at 987. The doctor made no effort to memorialize the statement and the child was under not criminal sanction for a false statement. *Id.*

Application to the case at hand

For the instant case, the standard is that the statements are testimonial if the objective declarant would believe the statements were primarily for the purpose of assisting in an investigation for later use at trial. If the primary purpose of the statements was not to assist in investigation or for use at a later trial, the statements are nontestimonial. In addition, the purpose of the one to whom the statement was made or who may have asked questions is only relevant if it would affect the purpose of the declarant.

Even if the purpose of the one to whom the statement was made or who asked the question were relevant to the inquiry, none of the cases suggest that mere status as a

mandatory reporter of child abuse makes one an agent of the police or transforms an otherwise nontestimonial statement into a testimonial statement. Further, in statements dealing with the identity of the abuser, such statements are important to the continued safety and health of the child and may be allowed as medically necessary or necessary for the safety of the child.

In the instant case, the teachers were mandatory reporters of child abuse. The teachers asked a neutral question of L.P.; "what happened." In response to Ms. Whitley, L.P. gave three answers one of which was "Dee did it." In response to Ms. Jones, L.P. stated, "Dee did it." There is nothing to suggest L.P. understood what mandatory reporting was or that his teachers' status as mandatory reporters of child abuse affected his answer. In addition, there is nothing to suggest an objective three and a half year old would expect statements he makes to his teacher would be used later in litigation.

To the extent that the teacher's purpose may be relevant, each teacher posed a single neutral question to L.P. of "what happened." Neither teacher followed up on that with more questions as to the identity. Other than their status as mandatory reporters of suspected child abuse, there is nothing to suggest the interviews took place at the request of the police, in the presence of law enforcement, or for the purpose of collecting information for use at later litigation. In fact, Ms. Whitley testifies that she saw the welt marks on L.P. and asked him what happened. She was asking out of concern for the safety and well-being of the child, not out of a desire to elicit information for prosecution. Part of the concern for the safety and well-being of the child is who injured the child, so that the child does not return to a dangerous situation. Nothing suggests Ms. Whitley or Ms. Jones inquired into the identity of the person who bruised L.P. The record suggests they merely asked L.P. what happened and he spontaneously stated the

identity of his abuser. Even if the teacher's had solicited this information, it was for the health and safety of the child, not as part of an investigation for later use at trial.

CONCLUSION

The State respectfully requests this Honorable Court adopt the Proposition of Law set forth above. The statements of L.P. to his teacher are nontestimonial. In determining the testimonial nature of statements, the proper inquiry is as to the primary purpose of the declarant. To the extent it may be affect the primary purpose of the declarant, the intent of person to whom the statement is made or who asks the question may be relevant. In the instant case, there is nothing to suggest the purpose of the teacher's would have influenced L.P.'s statement or that L.P.'s statement was made for the purpose of investigation for later use at trial. In fact, the record indicated that L.P.'s statements were in response to inquires as to his health and safety by his teachers. Statements obtained for the purpose of health or safety are not considered testimonial.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY:


MARK J. MAHONEY (0041928)
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
(216) 443-7877
(216) 443-7806 fax
mjmahoney@cuyahogacounty.us email

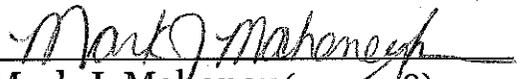
CERTIFICATE OF SERVICE

A true copy of the foregoing Merit Brief of Appellant was sent by regular U.S.

mail this 20th day of July, 2012 to:

Counsel for Defendant-Appellee

ROBERT TOBIK (#0029286)
Cuyahoga County Public Defender
ERIKA CUNLIFFE (#0074480)
Assistant Public Defender
3310 Lakeside Avenue, Suite 400
Cleveland, Ohio 44113


Mark J. Mahoney (0041928)
Assistant Prosecuting Attorney

ORIGINAL

NO. **12-0215**

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 96207

STATE OF OHIO,
Plaintiff-Appellant

-vs-

DARIUS CLARK,
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Counsel for Plaintiff-Appellant

WILLIAM D. MASON
Cuyahoga County Prosecutor

MARK J. MAHONEY (0041928)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee

NATHANIEL McDONALD
310 Lakeside Avenue, 2nd Floor
Cleveland, Ohio 44113

OFFICE OF THE OHIO PUBLIC DEFENDER
250 East Broad Street, 14th Floor
Columbus, Ohio 43215

FILED
FEB 06 2012
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
FEB 06 2012
CLERK OF COURT
SUPREME COURT OF OHIO

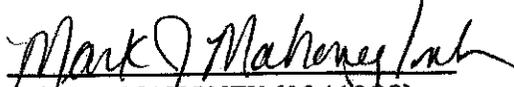
NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Now comes the State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized in Court of Appeals Case No. CA 96207 entered December 22, 2011.

Said cause did not originate in the Court of Appeals, is a felony, and involves a substantial constitutional question or a question of public or great general interest.

Respectfully submitted,

**WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR**



MARK J. MAHONEY (0041928)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

SERVICE

A copy of the foregoing Notice of Appeal has been sent by regular U.S. Mail this 3rd day of February, 2012, to Nathaniel McDonald, 310 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113 and to the Office of the Ohio Public Defender, 250 East Broad Street, 14th Floor, Columbus, Ohio 43215.



Assistant Prosecuting Attorney

[Cite as *State v. Clark*, 2011-Ohio-6623.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96207

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARIUS CLARK

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-536300

BEFORE: Sweeney, J., Blackmon, P.J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: December 22, 2011

ATTORNEYS FOR APPELLANT

Robert Tobik, Esq.
Chief Public Defender
By: Nathaniel McDonald, Esq.
Assistant Public Defender
310 Lakeside Avenue, Suite 400
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason, Esq.
Cuyahoga County Prosecutor
By: Jennifer A. Driscoll, Esq.
Mark J. Mahoney, Esq.
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Darius Clark (“defendant”) appeals his multiple convictions for felonious assault, child endangerment, and domestic violence regarding his girlfriend’s two children, and his associated 28-year prison sentence. After reviewing the facts of the case and pertinent law, we reverse and remand for a new trial.

{¶ 2} During the time pertinent to this case, defendant was living with his girlfriend (“mother”) and her two children, L.P., who was born on September 26, 2006, and A.T., who was born on May 17, 2008. From March 8 through March 12, 2010, the children were under the care of defendant while mother was staying with a friend. On

March 16, 2010, mother again left the children in defendant's care. At all other times pertinent to this appeal the children were under the care of defendant and mother.

{¶ 3} On March 17, 2010, L.P.'s preschool teachers noticed bruises on him and reported possible abuse to the authorities. On March 18, 2010, a social worker found the children at defendant's mother's house, where they were being looked after by two teenagers. After awhile, defendant's mother arrived at the house, and eventually, the social worker took the children to the hospital. According to the doctor who examined the children, L.P. had multiple bruises in various stages of development and abrasions consistent with being whipped with a belt. A.T. had multiple bruises and burn marks, a swollen hand, and a pattern of sores at her hairline consistent with braids being ripped out of her head. The doctor suspected child abuse and estimated that the injuries occurred between February 28 and March 18, 2010. In response to questions from several adults, L.P. stated that "Dee did it." It is undisputed that defendant's nickname is "Dee."

{¶ 4} On April 15, 2010, defendant and mother were charged with the following: five counts of felonious assault in violation of R.C. 2903.11(A)(1), two counts of endangering children in violation of R.C. 2919.22(B)(1), and two counts of domestic violence in violation of R.C. 2919.25(A). Mother pled guilty to three of the counts, and the court postponed her sentencing until after defendant's trial.

{¶ 5} On November 16, 2010, the court held a hearing and found four-year-old L.P. incompetent to testify. The court also summarily denied defendant's motion in limine requesting that evidence of L.P.'s out-of-court statements identifying defendant be

excluded from trial. On November 22, 2010, a jury found defendant guilty of all counts except one of the felonious assault charges concerning A.T. The court sentenced defendant to eight years in prison for each felonious assault conviction, four years in prison for each count of endangering children, and six months in prison for each count of domestic violence. The court ran three assault sentences and one endangering children sentence consecutively for an aggregate of 28 years in prison.

{¶ 6} Defendant appeals and raises nine assignments of error for our review. We address the assignments of error out of order where appropriate, starting with assignments of error three and four.

{¶ 7} III. “The trial court violated Mr. Clark’s confrontation clause rights pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution by admitting prejudicial out-of-court statements by [L.P].”

{¶ 8} IV. “The trial court violated Mr. Clark’s confrontation clause rights pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution when it erroneously found that the requirements of Ohio Rule of Evidence 807 had been satisfied.”

{¶ 9} In the instant case, the court denied defendant’s motion in limine and ruled admissible L.P.’s out-of-court statements that “Dee did it.” Seven witnesses testified as to what L.P. stated: Cleveland police detective Jody Remington; Cuyahoga County Department of Children and Family Services [CCDCFS] social worker Sarah Bolog; CCDCFS social worker Howard Little; L.P.’s assistant preschool teacher Ramona

Whitley; L.P.'s lead preschool teacher Debra Jones; the children's maternal grandmother; and the children's maternal great aunt.

{¶ 10} Defendant argues that the court erred by admitting L.P.'s statements at trial, because the statements were testimonial in nature, L.P. was declared incompetent to testify, and defendant did not have the opportunity to cross-examine L.P.

The Confrontation Clause

{¶ 11} We review issues concerning Confrontation Clause violations under a de novo standard. *State v. Babb*, Cuyahoga App. No. 86294, 2006-Ohio-2209. Pursuant to the Sixth Amendment to the United States Constitution, out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the defendant was given a prior opportunity for cross-examination. *Crawford v. Washington* (2004), 541 U.S. 36, 52, 124 S.Ct. 1354, 158 L.Ed.2d 177. This test does not apply to nontestimonial hearsay. *Id.* See, also, *Michigan v. Bryant* (2011), 562 U.S. _____, 131 S.Ct. 1143, 1167, 179 L.Ed.2d 93 (holding that the statements at issue were not testimonial and “leav[ing] for the [state] courts to decide on remand whether the statements’ admission was otherwise permitted by state hearsay rules”).

{¶ 12} Thus, as a threshold matter, courts must determine whether statements are testimonial before subjecting them to *Crawford* standards. *Id.* at 51-52. Testimonial statements are, among other things, “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.” *Id.* (Internal citations omitted.)

{¶ 13} The definition of testimonial statements was further scrutinized in *Davis v. Washington* (2006), 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224, where the United States Supreme Court held the following: “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.”

{¶ 14} In *Davis*, the victim’s statements to a 911 operator were found to be nontestimonial, as their primary purpose was “to enable police assistance to meet an ongoing emergency.” *Id.* at 828. However, the victim’s statements to police officers who responded to the domestic-violence call were held to be testimonial, because “the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime.” *Id.* at 830.

{¶ 15} The Ohio Supreme Court applied this body of law to statements made to a medical professional in *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834. The *Stahl* court distinguished *Davis*, and held that a rape victim’s statements to a nurse practitioner during a medical examination were nontestimonial, because the primary purpose was receiving medical treatment. *Id.* at ¶25. “In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner

is relevant only if it could affect a reasonable declarant's expectations." *Id.* at paragraph two of the syllabus.

{¶ 16} In *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, ¶30, the Ohio Supreme Court further addressed this issue, holding that "to determine whether a child declarant's statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test" enunciated in *Davis*. The court also stated that the objective-witness test found in *Stahl* applies when the interrogator is not in law-enforcement. *Siler* at ¶28. The distinction between the two tests is "based on the identity of the interrogator and the purpose of the questioning." *Id.*

Additionally, the court concluded that "the age of a declarant is not determinative of whether a testimonial statement has been made during a police interrogation." *Id.* at ¶41.

{¶ 17} The issue of child victims' testimony was addressed most recently by the Ohio Supreme Court in *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶11, where the court determined the following: "whether, in a criminal prosecution, the out-of-court statements made by a child to an interviewer employed by a child-advocacy center violates [sic] the right to confront witnesses * * *." *Arnold* recognized that the child advocate who interviewed the victim worked in a "dual capacity," such that the questioning "might produce both testimonial and nontestimonial statements." *Id.* at ¶41. The court explained the child advocate's dual capacity as follows: "she was both a forensic interviewer collecting information for use by the police

and a medical interviewer eliciting information necessary for diagnosis and treatment.”
Id. at ¶44.

{¶ 18} *Arnold* concluded that statements regarding “medical diagnosis and treatment are nontestimonial and are admissible without offending the Confrontation Clause. * * * We further hold that statements * * * that serve primarily a forensic or investigative purpose are testimonial and are inadmissible pursuant to the Confrontation Clause when the declarant is unavailable for cross-examination at trial.” Id. Additionally, the court held that the “forensic statements” were subject to a harmless error review. Id.

{¶ 19} In the instant case, L.P.’s statement to Detective Remington that “Dee did it” was primarily investigative or forensic in nature, as the detective was clearly a member of law enforcement. Detective Remington testified about her interaction with L.P. as follows: “As long as we played, he was okay. He was pretty enamored with my badge, like most little boys are. So I gave him the badge, and I told him I’m the police, and I’d like to help you. I’d like to make sure nobody ever hurts you like this again. Can you tell me who hurt you?” There is no suggestion that L.P.’s identification of defendant as the abuser was elicited for medical purposes or to assist an ongoing police emergency. Therefore, this testimony was improperly admitted at trial.

{¶ 20} Bolog testified that she is an investigator for CCDCFS. Her primary duties are to “gather information to determine if, according to the Ohio Revised Code, there is substantial evidence for child abuse or neglect or dependency issues.” She testified that

the “bottom line” purpose for her investigation is “making sure that the minors in Cuyahoga County are safe and have stable provisions for their basic needs.” Bolog testified that L.P. told her who abused him on two occasions:

{¶ 21} “The first time was in [defendant’s mother’s house] and it was right before the commotion * * * and, you know, the police were there and everything was going on. * * * I was showing him pictures of my dogs, and we were trying to gain that trust. And in talking about things non-related, we would throw in a question about the investigation. So it was like fun question, fun question, fun question, how did you get this mark on your face? And his body language changed. * * * And he said — he put his head down and he said, Daddy did it. Dee did it. And he just said Dee did it.

{¶ 22} “And then the second instance where he said it in front of me was at the hospital. Detective Remington and her partner had come in. * * * And [L.P.] was very interested in her badge and handcuffs, you know. * * * And at this point, she had a picture of [defendant]. And she asked [L.P.] if he knew who this was, and he said, you know — looked at it and * * * turned his head and said, It was daddy. It was Dee. So when asked * * * how did you get these marks? What happened? And he said again, Dee did it.”

{¶ 23} We analyze L.P.’s statements to Bolog under the framework of *Arnold*, inasmuch as Bolog, as a social worker, acted in a dual capacity. In *Arnold*, the court found that some of the victim’s statements to the child advocate were made with a primary purpose to “gather forensic information to investigate and potentially prosecute a

defendant for the offense.” *Arnold* at ¶33. These statements included: the “assertion that Arnold shut and locked the bedroom door before raping her; her descriptions of where her mother and brother were while she was in the bedroom with Arnold, of Arnold’s boxer shorts, of him removing them, and of what Arnold’s ‘pee-pee’ looked like; and her statement that Arnold removed her underwear.” *Id.* at ¶34.

{¶ 24} The *Arnold* court reasoned that the statements “involved a description of past events,” specifically concerning the abuse, the victim had been discharged from the hospital and there was no medical emergency, and “the interview was rather formal, more akin to the videotaped, planned interview of *Crawford* than to the frantic 9-1-1 call or the sequestered but spur-of-the moment interview recounted in *Davis*.” *Id.* at ¶35.

{¶ 25} The court additionally determined that other statements made during the same interview were “medically necessary,” because, for example, certain information can trigger the administration of a rape kit or a test for sexually transmitted diseases. *Id.* at ¶39. See, also, *In re J.M.*, Pike App. No. 08CA782, 2011-Ohio-3377, ¶39 (holding that a child-victim’s statement that the incident occurred on July 3, 2007 was not testimonial because “placing [the] injury in a temporal context served a medical-diagnostic purpose”).

{¶ 26} Upon review, we find that Bolog was acting as an agent of law enforcement when L.P. identified defendant as the person who abused him. This information established defendant as a suspect in the investigation. Furthermore, although removing victims from abusive situations may fall under Bolog’s duty to keep children safe, under the circumstances of the instant case there was no evidence of an ongoing police

emergency. Accordingly, L.P.'s statements to Bolog were testimonial, and because L.P. was not subject to cross-examination, the statements were improperly admitted at trial.

{¶ 27} Little testified that he is an intake social worker at CCDCFS, and his job duties are “to investigate allegations of abuse and neglect, dependency, [and] emotional maltreatment.” Asked what he talked to L.P. about when he arrived at the daycare, Little testified as follows:

{¶ 28} “I talked to L.P. basically about how did he receive the bruising that was on his left facial area and also about basically trying to get more information about who was * * * Dee.

{¶ 29} “* * *

{¶ 30} “[L.P.] mentioned that Dee was his father, that he lived in the home. He had mentioned that — first that he had sustained some marks and bruises from falling down the stairs. But when I re-questioned him and tried to make him feel a little bit more comfortable, he later stated that the bruises came because he didn't put his toys back up and they were thrown all over the floor. So that's why he got a spanking for that.”

{¶ 31} Upon review, we find that Little's discussion with L.P. was part of the preliminary investigation to aid law enforcement. There is no indication that L.P.'s statements were made in the midst of a police emergency. Additionally, there is no evidence that the statements were made in the context of medical treatment or diagnosis. Accordingly, L.P.'s statements to Little were testimonial and inadmissible at trial.

{¶ 32} Two of L.P.'s teachers testified at defendant's trial about L.P.'s out-of-court statements. It is an issue of first impression for this court whether statements made to teachers may be testimonial in nature, and thus subject to analysis under *Crawford*.

{¶ 33} Ramona Whitley, who was L.P.'s assistant preschool teacher at the time the abuse was discovered, testified that on March 17, 2010, she noticed that L.P.'s eye was bloodshot and he had "welt marks" on his face. Whitley testified that as part of her job, she is "supposed to always observe [the children], look for different things, what's going on with them." Whitley brought L.P.'s injuries to the attention of a co-worker. Whitley was instructed to make "the 696 call," which she explained is "a number that you call if a child is in need for some sort of service, if the child is hurt, being physically abused, sexually abused, there's a number that we call to make sure everything's okay." Whitley testified that she is a "mandatory reporter," meaning that "by law I have to report what is going on when it comes to the safety of a child." Whitley testified that when she asked L.P. what happened, he gave three different answers: that he fell; that he did not know; and that "Dee did it." Additionally, Whitley made a statement to the Cleveland police two to three days later.

{¶ 34} Debra Jones, who was L.P.'s lead preschool teacher, testified that on March 17, 2010, Whitley brought L.P.'s injuries to her attention. Jones took L.P. out of the classroom and asked him what happened. L.P. looked "bewildered * * * he almost looked uncertain, but he said, Dee did it." Jones testified that she took L.P. to her supervisor's office and Whitley called 696-KIDS because "we saw enough to make the

call.” Jones testified that two days later she met with and gave a statement to a detective from the Cleveland Police Department.

{¶ 35} Upon review, we find that the primary purpose of Jones and Whitley questioning L.P. was to report potential child abuse to law enforcement. Both teachers testified that their obligation to report is mandatory. We additionally find that it is reasonable for an objective witness to expect that statements made to a teacher while she is reporting suspected child abuse may be used at a later trial. Therefore, we conclude that L.P.’s statements to Whitley and Jones were testimonial and improperly admitted at defendant’s trial.

Evid.R. 807

{¶ 36} Out-of-court statements that are not testimonial in nature are considered hearsay, which is generally inadmissible at trial, unless it falls within one of many exceptions to the rule against hearsay and is “sufficiently reliable for admission.” See *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶25. We review the admissibility of relevant evidence under an abuse of discretion standard. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. At issue are L.P.’s statements to grandmother and great aunt. Asked if she ever talked to L.P. “about who did this to him,” great aunt testified that “[h]e laid in my lap, and he told me Dee did it.” Asked “did you ever find out who caused those injuries to the children,” grandmother testified that “[L.P.] told me Dee.”

{¶ 37} Defendant argues that these statements are inadmissible hearsay pursuant to Evid.R. 807(A), which states as follows:

{¶ 38} “An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing * * * any act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply:

{¶ 39} “(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. 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. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

{¶ 40} “(2) The child’s testimony is not reasonably obtainable by the proponent of the statement.

{¶ 41} “(3) There is independent proof of the sexual act or act of physical violence.

{¶ 42} “(4) At least ten 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.”

{¶ 43} Defendant essentially argues that, under the circumstances in the instant case, L.P.’s statements were not reliable under the first element of Evid.R. 807(A), and that, under the third element, there was no independent proof that he was the perpetrator of the act of physical violence.

{¶ 44} In *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, 906 N.E.2d 427, ¶34, the Ohio Supreme Court held that “a hearsay statement of a child declarant can be admitted under Evid.R. 807 without a determination of the child’s competence to testify.”

{¶ 45} In *Silverman*, the child victim was killed; thus, the court did not determine whether she was competent to testify. *Silverman* limited the holding in *State v. Said* (1994), 71 Ohio St.3d 473, 644 N.E.2d 337, which required a finding of competency prior to admitting a statement under Evid.R. 807. *Silverman* at ¶30.

{¶ 46} The instant case is distinguishable from *Silverman* and *Said*, because, after a hearing, the court found L.P. incompetent to testify.

{¶ 47} “Counsel, * * * I believe — I’ve heard enough out of — this child is not competent to testify. Watching the — he’s gone already. Watching his demeanor on

the stand — and it’s, by the way, perfectly understandable to deal with this kind of behavior, but he’s definitely not competent in this Court’s opinion. So that’s my ruling. He will not be able to testify as a witness.”

{¶ 48} In applying the circumstances of the case at hand to Evid.R. 807, we must determine whether L.P. “was particularly likely to be telling the truth” when stating that “Dee did it.” First, the evidence is inconclusive as to whether these statements were spontaneous declarations by L.P. or answers to questions posed by others. Second, L.P. repeatedly stated that Dee abused him; however, L.P. also stated that a fall down the stairs caused the bruises and that he did not know how he got the bruises. Third, the evidence in the record shows that L.P.’s mental state was understandably somewhat unstable and that he was undergoing counseling. Fourth, the record is silent on L.P.’s “motive or lack of motive to fabricate.” Fifth, L.P. used terminology expected of a four-year-old — “Dee did it.” Sixth, “the means by which the statement was elicited” is unclear from the record. We note, however, that all of L.P.’s statements previously analyzed under *Crawford* were made in response to investigative questions asked by adults. Seventh, the record does not establish when L.P. identified defendant as his abuser to his grandmother and great aunt.

{¶ 49} We turn to the third element of Evid.R. 807, which generally questions whether there is independent proof of the act of physical violence. However, in the instant case, the question is not whether the abuse occurred; rather, it is “Who abused

L.P.?” Under a similar fact pattern, the United States Court of Appeals, Sixth Circuit, found that admission of evidence identifying the abuser was not harmless error:

{¶ 50} “In the instant case, L.B.’s taped statements contained the only evidence that she had been raped by Mr. Gaston. While there was physical evidence that L.B. had been the victim of sexual abuse, the physical evidence did not support an inference that Mr. Gaston was the perpetrator. The denial of the right to cross-examine L.B. had a substantial and injurious effect on the jury’s verdict. Accordingly we conclude that the trial court’s errors were not harmless.” *Gaston v. Brigano* (C.A. 6, 2006), 208 Fed.Appx. 376, 392.

{¶ 51} Pursuant to Crim.R. 52(A), “[a]ny error * * * which does not affect substantial rights shall be disregarded.” In *State v. Cooper*, Cuyahoga App. No. 86437, 2006-Ohio-817, ¶19, we held that “[t]he defendant has a constitutional guarantee to a trial free from prejudicial error, not necessarily one free of all error. Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal.”

{¶ 52} Upon review, we find that L.P.’s statements lacked the “particularized guarantees of trustworthiness” outlined in Evid.R. 807. Although Ohio law is not clear on this precise point, we are concerned with reconciling the court’s finding L.P. incompetent to testify in November of 2010 with the court’s finding that statements L.P. made eight months prior were reliable enough to be admitted at trial. Compare *State v. Street* (1997), 122 Ohio App.3d 79, 85, 701 N.E.2d 50 (opining that finding a child witness incompetent

to testify requires the “conclusion that any earlier statements he made were inadmissible under Evid.R. 807. * * * We find it unreasonable to presume that [the child witness] might have been more competent at an earlier age, such as when the statements in question were made”) (emphasis in original).

{¶ 53} Additionally, we find that the only direct evidence that defendant was the perpetrator was L.P.’s statements identifying him. The evidence shows that when mother left L.P. in defendant’s care, L.P. was staying at defendant’s mother’s house with various family members. Therefore, we conclude that L.P.’s statements to grandmother and great aunt are inadmissible hearsay under Evid.R. 807. Coupled with L.P.’s improperly admitted testimonial statements under *Crawford*, we find prejudicial error in the court’s ruling regarding L.P.’s statements that “Dee did it.” We are aware of the sensitive nature of this case and any case concerning victims of child abuse. The injuries to these children are reprehensible, and the perpetrator deserves punishment. Notwithstanding, we must recognize and ensure “the Sixth Amendment’s guarantee that, “[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.”” *Crawford*, 541 U.S. at 38. The right to a fair trial is paramount to the delivery of a just verdict.

{¶ 54} Accordingly, defendant’s third and fourth assignments of error are sustained.

{¶ 55} Defendant’s first assignment of error states as follows:

{¶ 56} I. “Mr. Clark’s convictions with respect to counts 1 and 6 are not supported by legally sufficient evidence as required by state and federal due process.”

{¶ 57} Specifically, defendant argues that the state failed to present sufficient evidence of serious physical harm to support the felonious assault and endangering children convictions regarding L.P. Both of these offenses contain an element of “serious physical harm,” which is defined in R.C. 2901.01(A)(5) as follows:

{¶ 58} “(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶ 59} “(b) Any physical harm that carries a substantial risk of death;

{¶ 60} “(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶ 61} “(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶ 62} “(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.”

{¶ 63} When reviewing sufficiency of the evidence, an appellate court must determine, “after viewing the evidence in a light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492.

{¶ 64} Upon review, we find the following evidence in the record:

{¶ 65} Dr. Jeffrey Pennington, who is an emergency medicine physician, testified that he examined L.P. and A.T. for suspected child abuse on March 18, 2010. He

observed “linear vertical abrasions with [bruising] on the upper torso, left chest, [and] bilateral medial thighs” of L.P. According to Dr. Pennington, these bruises were typical of “being beaten with objects that leave particular marks,” and meant “that you were struck with something that left a very sharp mark” such as “a belt or something of that nature.” L.P. also had two separate bruises near his left eye and “conjunctival hemorrhage,” which is “bleeding in the white part of the eye which can result from minor trauma as well as being hit.” L.P. had a mark on his left cheek, the size and shape of which indicated it might have been caused by a bite, and bruising on his arm, which was consistent with “finger marks from being grabbed.”

{¶ 66} At the hospital, L.P. was given an acuity ranking of three on a scale of one to five. Dr. Pennington testified that this is an “intermediate range of acuity, meaning it’s not life-threatening, but they should be seen within a reasonable time.” L.P.’s final assessment was multiple linear abrasions and bruising “in different stages of development indicative of non-accidental trauma.” Dr. Pennington explained that some of the bruising appeared brand-new and some of it was “days or longer older.”

{¶ 67} L.P. and A.T.’s great-aunt, who now has custody of the children, testified that she saw them at the emergency room on March 18, 2010. L.P. had a black eye and what looked like belt marks across his stomach and his back. L.P.’s black eye lasted “a couple of weeks,” and the bruising on L.P.’s back made it uncomfortable for him to lay down for “a little bit over a month.” According to the great aunt, L.P. continues to have headaches and nightmares and is in counseling once a week.

{¶ 68} According to the children’s maternal grandmother, who also testified at trial, “it took a while” for L.P.’s bruises to go away, and “[m]entally, he’s really messed up.”

{¶ 69} Defendant argues that the instant case is analogous to *State v. Snyder*, Cuyahoga App. No. 94755, 2011-Ohio-1062 and *State v. Ivey* (1994), 98 Ohio App.3d 249, 648 N.E.2d 519, in which this court found insufficient evidence of serious physical harm in relation to child abuse. Upon review, however, we find that the facts of the case at hand are distinguishable in one substantial aspect: *Snyder* and *Ivey* involved single incidents of corporal punishment, while the evidence in the instant case suggests that L.P. was the victim of recurrent abuse.

{¶ 70} Evidence in the record suggests that L.P. was whipped, hit, bit, and grabbed with enough force to leave lasting marks, some of which were located in and around his left eye. Dr. Pennington testified that L.P.’s injuries were in various stages of development, suggesting that L.P. was abused on more than one occasion. L.P.’s relatives testified that his bruises lingered, and the physical pain affected him for approximately one month after the injuries were inflicted. Additionally, there is evidence that L.P. suffers from nightmares and headaches, for which he receives counseling. L.P. was three and one-half years old when the abuse at issue occurred.

{¶ 71} We find that reasonable minds could have found that L.P. suffered serious physical harm as defined in R.C. 2901.01(A)(5)(a)-(e), in that he is undergoing counseling, he was incapacitated, he suffered temporary, serious disfigurement, and had chronic

bruises. A reasonable trier of fact could infer that this abuse would result in acute pain to a three-and-a-half-year-old child. Defendant's first assignment of error is overruled.

{¶ 72} Pursuant to App.R. 12(A)(1)(c), defendant's remaining assignments of error are made moot by our disposition of assignments of error three and four. Defendant's convictions are reversed and this case is remanded for a new trial.

{¶ 73} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

JAMES J. SWEENEY, JUDGE

PATRICIA ANN BLACKMON, P.J., and
EILEEN A. GALLAGHER, J., CONCUR