RENDERED: JULY 22, 2005; 10:00 A.M.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001979-ME

A.G.G. APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 03-AD-00018

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES APPELLEE

AND: NO. 2004-CA-002032-ME

W.E.G. APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 03-AD-00018

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BARBER, AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

SCHRODER, JUDGE: These appeals[2] decide that a child's statements elicited by a counselor during a sexual abuse assessment and in therapy sessions, and by a physician during a sexual abuse examination, were testimonial evidence and therefore inadmissible at trial, under the recent United States Supreme Court case of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), where the child did not testify at trial and there was no prior opportunity for cross-examination. Accordingly, we vacate and remand for further proceedings consistent with this opinion.

This case arises from proceedings in the Barren Circuit Court which terminated the parental rights of A.G.G. and W.E.G. A.G.G. and W.E.G. were married in 1994, and are the parents (A.G.G. is the mother and W.E.G. is the father) of two children, N.G., born June 15, 1996, and A.G., born January 7, 2001. Both A.G.G. and W.E.G. are considered disabled, due to mental limitations (described in the proceedings as lower intellectual functioning). It was undisputed that the family lives in poverty. The family has been involved with the Cabinet

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Two separate appeals heard together.

for Families and Children (the Cabinet) on and off since 1996, shortly after N.G.'s birth, relating to neglect. A.G.G. and W.E.G. completed parenting classes in 1998. In December, 2001, the Cabinet received an allegation of environmental neglect. Case worker Karla Norman subsequently visited the family's residence, a rented mobile home, and found it to be unsafe. Her immediate concern was that the mobile home was being heated with a stove in an unsafe manner. The home also had broken windows, exposed wires, holes in the ceiling and floors, was roach infested, and was very dirty. The children and their clothes were dirty. Everyone had poor personal hygiene. A.G.G. and W.E.G. fixed the heating source and covered the wiring, but failed to make other necessary repairs and improvements. Environmental neglect was substantiated in February, 2002. The children were not removed, and Norman testified that she felt comfortable leaving the children in the home at that time - there was no indication of alcohol, drugs, or domestic violence, and the children expressed no fear of their parents. In March, 2002, the case was transferred to social worker Erin Morgan.

As did other Cabinet workers in this case, Morgan testified that, in attempting home visits, she rarely found A.G.G. and W.E.G. at their own home, more often finding them, along with the children, at W.E.G.'s parents' home, which also had deplorable living conditions. Also residing with W.E.G.'s

parents, and of relevance to this case, were W.E.G.'s brothers J.G. and E.G. Morgan first found A.G.G. at her own home on April 4, 2002. She observed the home to have roaches, clutter, and a bad smell. Morgan instructed A.G.G. on specific cleaning and hygiene matters. She also referred the family to the family preservation program. A.G.G. and W.E.G. complied with, and did well in, the program (which is limited to six weeks) and conditions improved during this time. Subsequently, however, the conditions deteriorated. In a July, 2002, home visit, Morgan found feces around the toilet and dried vomit on the floor. Roaches were found in A.G.'s nebulizer. The unsanitary conditions in the home continued and worsened, which were described to include roach infestation, filth, clutter, bad odor, and mice feces in the kitchen cabinets. The children were continually observed to be filthy.[3]

Morgan also continued to find the family at W.E.G.'s parents' residence, in violation of a June, 2002, court order that the children have no contact with W.E.G.'s father.[4] A.G.G. and W.E.G. also failed to follow other parts of their case plan, which included counseling and sending the children to day care and/or kindergarten.

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[3] Morgan testified that she did not know if A.G.G.'s and W.E.G.'s inability to keep the skills learned in the family preservation program was due to their mental limitations or lack of motivation.

[4] The reason for this court order was not explained at the hearing.

A.G.G. and W.E.G. failed to make any substantial progress, and, in October, 2002, the children were removed and placed in the custody of the Cabinet for neglect. A.G.G. and W.E.G. were given supervised visitation.

N.G. and A.G. were placed in foster care on October 17, 2002, at which time N.G. was six years old and A.G. was twenty-one months old. The foster mother testified that the children and their clothes were very dirty when they arrived. The foster mother (as did Morgan) described N.G. as being very far behind in schooling, and that he did not know the alphabet or how to count. She described A.G. as "hyper" and aggressive. She testified that the children used curse words, and engaged in what she considered inappropriate behavior such as passing gas and burping at the table. The foster mother later observed sexual behavior. In January, 2003, she observed that A.G. would reach toward his rectum when she changed his diaper and tell her to "look" and she thought this was abnormal. A few months later, in May, 2003, she caught N.G. engaging in sexual behavior with A.G. N.G. also began sexually acting out with other children.[5]

[5] Because of his sexual behavior, N.G. was eventually removed from this foster home, in February, 2004, and sent to live at a separate foster home where there were no younger children. A.G. remained in the original foster home. The foster mother testified that after N.G. was removed, A.G. did well at first, but recently began engaging in sexual and aggressive behavior at his day care. She testified that this behavior started after a temporary two week stay by A.G. in the same foster home as N.G.

Morgan initiated a sexual abuse investigation with law enforcement. N.G. was interviewed by a Glasgow police officer, but the officer was unable to get any "coherent disclosures" of sexual abuse from him. N.G. was therefore sent to be interviewed by Julie Griffey, a therapist employed by "Life Skills" counseling center. This interview, referred to as a "sexual abuse assessment," took place on May 27, 2003. Over the objections of the defense, and at issue on appeal, Griffey was permitted to testify as to statements allegedly made by N.G. during this interview and at subsequent sessions, which alleged sexual abuse by his parents and his uncles J.G. and E.G.

Griffey testified from reports she had prepared regarding her sessions with N.G. At the May 27, 2003, sexual abuse interview (at which time N.G. had been in foster care for seven months) she explained "good touch" and "bad touch" to N.G., using anatomically correct dolls.[6] She explained "bad touch" as a touch in the area where your underwear or bathing suit covers you, that usually no one else is in the room, that it feels sneaky, and that often the person tells you not to

[6] Griffey already had a case file on N.G., having first seen him in July, 2002, at which time he was still with his parents. At that time, Morgan had referred N.G. to Griffey because of behavior problems and Morgan's concern that he had been around two (unnamed) alleged sex offenders. A.G.G. brought N.G. to this appointment. Griffey spoke to N.G. alone and N.G. did not report any sexual abuse to Griffey at this time. Griffey saw N.G. again in October, 2002, when he was in foster care. At that time, N.G. was not acting out sexually. Griffey's concerns at that appointment were that N.G. seemed delayed in speech, exhibited disruptive behavior, and that his play was not "meaningful or purposeful."

tell. In summary, Griffey testified that, with the assistance of the dolls, in response to her questioning about bad touches, N.G. told her about the following sexual acts: that J.G. made him touch his penis, that J.G. touched his penis, that he put his mouth on J.G.'s penis, that J.G. put his penis in his butt, that E.G. put his penis in his butt, and that E.G. put his mouth on his penis. Griffey testified that N.G. told her that these incidents happened at "nanny and pa's house", in J.G.'s bedroom and in E.G.'s room, and that everyone else was in the kitchen.

Griffey testified that, following the discussion about his uncles J.G. and E.G., she asked N.G. if anyone else had "touched" him, and N.G. said that "Momma did", "at the house at the trailer park and Daddy at the trailer park", "no one else was home when momma touched me", "Momma was in the kitchen when Daddy touched me." At this point, N.G. had become tired so Griffey stopped discussing abuse with him. Griffey reported the results of the interview to Morgan.

Following the May 27, 2003, interview, Griffey continued to see N.G. to try to obtain more details about the sexual abuse and for therapy to work on his sexual acting out behavior. Griffey testified that at a June, 2003, appointment, in "play therapy", N.G. mentioned the same four people, J.G., E.G., and his mother and father. At a September, 2003, appointment, it had been reported to Griffey that N.G. had been

discovered performing oral sex on a playmate. Griffey testified that, in discussing this behavior with N.G., he told her that "Daddy and [J.G.]" did this, and that "Daddy did it in the bedroom when Mommy was away."

On cross-examination, defense counsel pointed out that at the May 27, 2003, interview, when N.G. had named his mother and father as having "touched" him, Griffey (according to her own report from which she was reading), had only asked if anyone else had "touched" him, not "bad touch". Griffey explained that she cannot transcribe every word spoken, and also that she believed N.G. would have understood she was asking about "bad touches". Griffey acknowledged that N.G. had given no details in the May 27, 2003, interview of where his parents touched him. She testified, however, that in an October, 2003, session (at which time N.G. had not been in the custody of his parents for a year), when she was doing an exercise with N.G. in which she was reviewing "what happened" to him and "bad touches", he indicated his mommy and daddy (as well as J.G. and E.G.) gave him "bad touches", and pointed to the genital area of a gingerbread man. Defense counsel also pointed out that by Griffey's defining "bad touch" as a touch "in the area where your underwear or bathing suit covers you", that innocent parental touches (as would occur when helping a child go to the toilet, changing a child's pants, wiping a child's bottom, putting on a child's clothes, and potty

training) could be identified by a child as a “bad touch”. Griffey insisted that she had explained “bad touch” thoroughly, and believed N.G. understood what she meant by “bad touch”.

Pursuant to the sexual abuse investigation, N.G. and A.G. were referred to the Barren River Area Child Advocacy Center for sexual abuse examinations, where they were examined by Dr. Jeffries Blackerby, a pediatrician, on July 15, 2003. Dr. Blackerby was familiar with the allegations from the social workers’ and Griffey’s reports. Dr. Blackerby testified that the examinations showed “no specific abnormalities.”[7]

Dr. Blackerby did not interview two-year old A.G., but did attempt to interview N.G. Over the objections of the defense, and at issue on appeal, Dr. Blackerby was permitted to repeat what N.G. told him in the interview. Dr. Blackerby testified that N.G. was reluctant to talk so he did not strongly pursue the questioning, but did specifically ask about abuse by J.G. Dr. Blackerby testified that, in response to his asking what he acknowledged were leading questions, that N.G. told him that J.G. abused him many times, that it happened at J.G.’s house and that his “nanny and pa” and uncle E.G. lived there

[7] Dr. Blackerby’s report describes N.G.’s examination as “essentially normal” with one notation. Dr. Blackerby explained that in examining for sexual abuse he performs a test which involves anal dilatation in response to traction. He testified that N.G.’s test suggested normal dilatation, however, it was near the borderline range. Dr. Blackerby explained that he made a note of this as somewhat suspicious because of the allegations, although it was not necessarily abnormal and he saw no evidence of injury. Dr. Blackerby testified that A.G.’s examination was “totally normal.”

too, and that his parents were there when the abuse happened but that they did not see it happen.

W.E.G. did not testify at the termination hearing.[8] A.G.G. testified, and denied that she ever sexually abused the children or allowed them to be sexually abused. A.G.G. claimed that she never touched either of her children in a bad way, nor knows of anyone that has. She had no reason to believe that W.E.G. had ever sexually abused the children. She had never noticed either child sexually acting out, nor had any reason to believe that the children were sexually abused. She claimed she did not allow the children around W.E.G.'s family members without her, that she was always with them, and that the children always followed her.

It was undisputed that A.G.G. and W.E.G. had regularly attended the visitations with the children since their removal in October, 2002. Betty Harwood, the Cabinet worker who transported the children and supervised the visits testified that the visits mostly went well, and that A.G.G. and W.E.G. always brought food and toys for the children. Other than attending the visitations and parenting classes, however, Morgan

[8] W.E.G.'s counsel explained that he is a very shy person and did not feel comfortable testifying.

testified that A.G.G. and W.E.G. had not complied with their treatment plan.[9]

A few weeks before the termination hearing, in July, 2004, however, A.G.G. and W.E.G. moved to a different trailer, which is larger and clean, and does not have a roach problem.[10] The new trailer has two bedrooms, two bathrooms, running water, electricity, and a washer and dryer. It was undisputed by the Cabinet that the new trailer is clean and properly furnished.

It was further undisputed that, despite the allegations made by the Cabinet, no one had been convicted or even charged criminally with sexual abuse of N.G. or A.G.

KRS 625.090 sets forth the grounds for termination of parental rights. Pursuant to the requirements of the statute, the trial court found that the Cabinet met its burden of proof, and, on September 8, 2004, entered orders terminating the parental rights of both A.G.G. and W.E.G. as to both N.G. and A.G. The trial court found, in pertinent part:

> 1. [N.G.] and [A.G.] are abused and neglected children as defined in KRS 600.020(1) and termination of parental rights would be in the best interest of the children; in that, Respondents have caused or allowed each child to be sexually abused

[9] Which included behaving as if the children were with them by living in their own home instead of staying with W.E.G.'s parents, keeping a safe home environment, improving cleaning and hygiene, attending counseling, and staying away from people who could be harmful to the children.

[10] The termination hearing in this case took place on August 10, 2004 and August 31, 2004.

> or exploited (See also KRS 625.090(2)(f) and KRS 600.020(1)(e)) and in that Respondents have failed to provide sanitary living conditions in the children's home (See also KRS 625.090(2)(e) and KRS 600.020(1)(d)).
>
> 2. [A.G.G.] and [W.E.G.] have caused or allowed the children to be sexually abused or exploited.
>
> 3. [A.G.G.] and [W.E.G.], for a period of not less than six (6) months, have continuously or repeatedly failed or refused to provide or have been substantially incapable of providing essential parental care and protection for the children and there is no reasonable expectation of improvement in parental care and protection, considering the age of the children.
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> 4. [A.G.G.] and [W.E.G.], for reasons other than poverty alone, have continuously or repeatedly failed to provide or are incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the children's well-being and there is no reasonable expectation of significant improvement in the parents' conduct in the immediately foreseeable future, considering the age of the children.

From the September 8, 2004, termination orders, A.G.G. and W.E.G. filed separate appeals to this court, which were heard together for our review.

The first issue on appeal, raised by A.G.G., is that it was a violation of the Confrontation Clause for the trial court to allow the hearsay statements of N.G. to be admitted as evidence against her, as N.G. did not testify at trial, and there was no prior opportunity for cross-examination. The

Cabinet counters that the hearsay was admissible under KRE 803(4), the medical treatment or diagnosis exception to the hearsay rule.

The Confrontation Clause of the Sixth Amendment of the United States Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. The United States Supreme Court has held that, as a termination of parental rights proceeding seeks not only to infringe upon, but terminate, a fundamental liberty interest (that of natural parents in the care, custody, and management of their child), a parent must be provided with fundamentally fair procedures. Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). In termination of parental rights proceedings, fundamental fairness includes the right to confrontation. G.E.Y. v. Cabinet for Human Resources, 701 S.W.2d 713 (Ky.App. 1985). Both "[a] child and his parents share a vital interest in preventing erroneous termination of their natural relationship." Santosky, 455 U.S. at 760.

In the landmark case of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court revisited the Confrontation Clause and its decision in Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). In Roberts, the Supreme Court considered the relationship of the Confrontation Clause to the rule against

hearsay, and its many exceptions. Roberts interpreted the purpose of the Clause as a substantive one - to ensure reliability of evidence. Roberts went on to hold that the constitutional right to confrontation can be "dispens[ed] with" where reliability can be inferred where the evidence falls within a "firmly rooted hearsay exception" or has "particularized guarantees of trustworthiness", on grounds that such evidence comports with the "substance of the constitutional protection." Roberts, 448 U.S. at 64-66.

Where Roberts circumvented the Confrontation Clause by allowing into evidence out-of-court statements deemed reliable by a court, or through the rules of evidence, Crawford, in a strongly-worded opinion by Justice Scalia, returns the Court to a strict construction of the Clause in line with the original intent of the Framers. Crawford abrogated Roberts and held that the Confrontation Clause is a procedural, not substantive, guarantee that cannot be usurped by state or federal rules of evidence or judicial determinations of reliability.

The Crawford Court arrived at its holding by looking at the historical underpinnings of the Confrontation Clause, and what it meant to the Framers in 1791, the year the Sixth Amendment was ratified. The Framers source of the confrontation right was the English common law, which required, in criminal trials, live testimony in court subject to adversarial testing.

Crawford, 541 U.S. at 43. Burned into the minds of the Framers, however, were fearsome periods in English history, where England legislatively adopted elements of continental civil law practice in conducting criminal trials. Id. at 43-46.[11] These statutes carved out exceptions to the common law right to confrontation, and allowed out-of-court examinations of witnesses to be read in court as evidence against an accused in lieu of live testimony. Id.

The most notorious use of these practices occurred in the great political trials of the sixteenth and seventeenth centuries. Id. at 44. The most renowned was that of Sir Walter Raleigh in 1603, when Raleigh had been accused by one Lord Cobham of plotting to seize the throne. Sir Walter Raleigh's trial was held up by the Crawford Court throughout the opinion as a paradigmatic confrontation violation, and exactly what the Framers intended would never occur in the criminal trials of this country – that an accused would be condemned by an accuser whom he did not get to cross-examine. The Court described the infamous proceedings:

> Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the

[11] The civil law system is "[o]ne of the two prominent legal systems in the Western World, originally administered in the Roman Empire and still influential in continental Europe, Latin America, Scotland, and Louisiana, among other parts of the world." See Blacks Law Dictionary 239 (7th ed. 1999).

> jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face ...." The judges refused, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.

Crawford, at 44 (citations omitted)(emphasis added).[12]

To guarantee that the common law right to confrontation could never be abrogated in this nation, either legislatively or judicially, our Framers adopted the right to confrontation as a constitutional right. The original understanding of the confrontation right is found in the earliest decisions: "'[I]t is a rule of the common law, founded

[12] The Crawford Court recognized that Roberts, ironically, permits the same abuses condemned by our Framers in the Raleigh trial. Justice Scalia, comparing Raleigh to Roberts, opined:

> The Raleigh trial itself involved the very sorts of reliability determinations that Roberts authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying Roberts might invoke today: that Cobham's statements were self-inculpatory, that they were not made in the heat of passion, and that they were not "extracted from [him] upon any hopes or promise of Pardon[.]" It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

Crawford, at 62 (citations omitted)(emphasis added).

on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.'" Crawford, at 49, quoting State v. Webb, 2 N.C. 103, 104 (Super. L. & Eq. 1794) (decided three years after the adoption of the Sixth Amendment).

The Crawford Court held that, in accordance with original intent, the Sixth Amendment guarantees the right of confrontation as it stood at common law in 1791, the year the Sixth Amendment was ratified. Id. at 54. The only method of assessing reliability acceptable to the Framers was that of the common law - cross-examination. The common law did not allow the admission of the testimonial statement of a witness who did not appear at trial unless he was shown to be unavailable to testify[13] and the defendant had had a prior opportunity for cross-examination. The Framers did not intend, and the Sixth Amendment does not allow for "reliability" exceptions from the confrontation right to be developed by the courts or legislative bodies.[14] Accordingly, the Roberts test, which allowed the confrontation right to be replaced by "hearsay exceptions" and "particularized guarantees of trustworthiness" as surrogate means of assessing reliability, was deemed by the Crawford Court

[13] Reflecting the preference for face-to-face confrontation at trial.

[14] "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court." Crawford, at 51.

as fundamentally at odds with the Confrontation Clause and original intent, and discarded.

Justice Scalia explained, "the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Crawford, at 61.[15] "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising." Id. at 67.

Crawford does not represent a new rule of admissibility, but returns to the original intent of the Framers, that the Sixth Amendment incorporates the right of confrontation as it stood at common law in 1791, a procedural guarantee. Accordingly, courts can no longer determine the admissibility of hearsay by inquiring as to whether the hearsay falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness". Once again, the

[15] "[T]he Clause envisions 'a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'" Roberts, at 63-64, quoting Mattox v. United States, 156 U.S. 237, 242-243, 15 S. Ct. 337, 339, 39 L. Ed. 409 (1895).

testimonial statement of a declarant who does not testify at trial may only be admitted where the declarant is unavailable and the defendant had a prior opportunity for cross-examination. "Where testimonial evidence is at issue [] the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Crawford, at 68.[16]

In the case before us, we are reviewing the admissibility of a child's (N.G.'s) accusatory statements, elicited by a therapist (Griffey), and by a physician (Dr. Blackerby), which were read into evidence at trial by the therapist and the physician. N.G.'s statements accuse his parents and uncles of a crime – sexual abuse – and were offered as proof of the matter asserted. N.G., the accuser, did not testify at trial and there was no prior opportunity for cross-examination. The Cabinet asserts the medical exception to the hearsay rule allows the statements admission into evidence. Visions of Sir Walter Raleigh come to mind. "Call my accuser before my face." Our Framers foresaw the formulation of possible exceptions to the common law right to confrontation and

[16] "An assertion is testimonial evidence whether made out of court or in court, if it is offered with a view to persuading the tribunal of the matter asserted." Blacks Law Dictionary 580 (7th ed. 1999) quoting John H. Wigmore, A Students' Textbook of the Law of Evidence 120 (1935). See also Robert G. Lawson, The Kentucky Evidence Law Handbook, § 8.05[2] (4th ed. 2003), defining as "testimonial", an out-of-court statement offered as proof of the matter asserted. If a statement is offered for some other purpose it is non-testimonial and would not violate the hearsay prohibition. See also Davis v. Bennett's Adm'r, 132 S.W.2d 334 (Ky. 1939), and Barnes v. Commonwealth, 794 S.W.2d 165, 167 (Ky. 1990) discussing as "testimonial", an out-of-court statement which is offered as evidence of the truth of the fact asserted.

felt so strongly about retaining the right for all times that they made it a constitutional guarantee. The common law of 1791 would not allow these criminal accusations into evidence untested by cross-examination. The Crawford Court recognized the Confrontation Clause was a procedural guarantee to test for truthfulness and constitutionally could not be dispensed with through other tests of reliability or trustworthiness. Therefore, N.G.'s statements were admitted in violation of the Confrontation Clause.

For those statements that are not so obviously testimonial under Crawford's historic analysis, the Crawford court provided additional guidance by recognizing various core classes of statements as testimonial. These classes of statements include (1) "*ex parte* in-court testimony or its functional equivalent - - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and, pertinent to the present case, (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the

statement would be available for use at a later trial[.]" Crawford, at 51-52 (citations omitted).[17]

The statements of N.G., which describe and accuse various persons of abuse, clearly fall into the category of statements made under circumstances which, from an objective perspective, would be reasonably believed to be available for use at a later trial. Not only is child abuse a criminal offense under any circumstances, but KRS 620.030 requires medical and mental health professionals to report suspicion of child abuse to law enforcement, the county or commonwealth attorney, or the cabinet. Our Supreme Court has recognized that this reporting requirement is demonstrative of an unequivocal intent that suspected abuse will be investigated by state authorities. See Commonwealth v. Allen, 980 S.W.2d 278 (Ky. 1998). See also, KRS 620.040; KRS 620.050.[18] Furthermore, in the present case, a sexual abuse investigation involving both the Cabinet and law enforcement was underway, with both Griffey's and Dr. Blackerby's findings reported back to the Cabinet and law enforcement.

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[17] "Objective" means "[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions." See Blacks Law Dictionary 1101 (7th ed. 1999). An objective witness is neither the declarant nor the person who took and reads the statement to the court, but the mythical third party who is "[w]ithout bias or prejudice; disinterested." Id.

[18] See also, KRS 620.020, KRS 620.030-.050, and KRS 431.600-.660 which recognize the role of "children's advocacy centers" in investigating and prosecuting child abuse.

As N.G.'s statements were testimonial, their admission violated the Confrontation Clause because there was no showing that N.G. was unavailable to testify and the defense had no prior opportunity for cross-examination.[19] "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford, at 68-69.

A.G.G.'s second argument is that the Cabinet failed to present clear and convincing evidence that the children had been sexually abused or that A.G.G. perpetrated or had knowledge of the sexual abuse of her children. W.E.G.'s second and third arguments overlap A.G.G.'s. In light of our decision that the Confrontation Clause requires us to exclude the hearsay statements of N.G., there is little, much less clear and convincing, evidence of sexual abuse.

A.G.G.'s last argument and W.E.G.'s remaining arguments relate to sanitary and living conditions, reasonable expectation of improvement, the sufficiency of the evidence, and the trial court's decision to terminate parental rights. The trial court has a great deal of discretion in determining whether a child fits within the abused or neglected category and whether the abuse or neglect warrants termination. M.P.S. v.

[19] Had N.G. testified, there would be no confrontation problem, but the rules of evidence would have applied.

Cabinet for Human Resources, 979 S.W.2d 114, 116 (Ky.App. 1998) (citing Department for Human Resources v. Moore, 552 S.W.2d 672, 675 (Ky.App. 1977)). The standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. Id. (citing V.S. v. Commonwealth, Cabinet for Human Resources, 706 S.W.2d 420, 424 (Ky.App. 1986)).

In excluding the hearsay statements of N.G. as admitted in violation of the Confrontation Clause, there is not clear and convincing evidence of sexual abuse, and the trial court's findings to the contrary are in error. Neglect alone is sufficient for termination. That being said, however, much of the reasoning given by the trial court for terminating in this case pertained to sexual abuse. We do not know if the trial court would have ruled in favor of termination on neglect alone, without the findings related to sexual abuse. See KRS 625.090(1); Cabinet for Human Resources v. J.B.B., 772 S.W.2d 646 (Ky.App. 1989); G.E.Y. v. Cabinet for Human Resources, 701 S.W.2d 713, 715 (Ky.App. 1985) (Where it is apparent that the trial court relied on inadmissible hearsay in making termination decision, the error in the admission of the unreliable evidence cannot be deemed harmless or nonprejudicial.) We believe the

better procedure would be to vacate the decision to terminate as to each appellant and remand to the trial court.

For the foregoing reasons, the judgments of termination of the Barren Circuit Court are vacated and the matter remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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