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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001364-MR

RICKY LEE JONES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 14-CR-003013

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MAZE, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Ricky Lee Jones was found guilty of first-degree criminal abuse against his minor son, reckless abuse of an adult, and being a first-degree persistent felony offender. He was sentenced to twelve years of imprisonment.

Ricky raises the following errors: (1) the trial court erred when it allowed the Commonwealth to play a 911 audio tape to the jury in violation of the

Confrontation Clause to the United States Constitution and this state's hearsay rules; (2) the trial court erred when it admitted testimony that he pulled hair from the head of a witness when he was not charged with committing a crime against her; (3) the trial court erred when it allowed the Commonwealth to introduce evidence regarding tears to the adult victim's perineal region and testimony about those tears; (4) the jury instruction resulted in a non-unanimous and unreliable verdict; and (5) the errors amounted to cumulative and reversible error. We agree with Ricky that the portion of the audio tape of the 911 call reporting that the adult victim said Ricky abused her and her daughter was prejudicial inadmissible hearsay. The remaining issues will be discussed as necessary to offer guidance in case of a new trial on remand.

Ricky is the former paramour of Michelle Gentry, with whom he had two children, son and daughter. Son was born in 2000 and daughter was born in 2003. Michelle's older daughter from a previous relationship, Mysteri, resided with Ricky and Michelle.

Sometime in 2004 or 2005, Michelle was diagnosed with breast cancer. In 2009, after Michelle's physical condition deteriorated, Ricky assumed many of the caretaking responsibilities for her and the children.

The charges against Ricky arose after Ann Aimes called 911 on August 23, 2012, requesting assistance while at Ricky's residence. Police arrived

and after Michelle underwent a medical examination, Ricky was charged with first-degree rape for forcing sexual intercourse on Michelle.

Michelle died on November 10, 2012, as a result of breast cancer. The rape charge was dismissed but the Commonwealth obtained a new indictment charging Ricky with abuse or neglect of an adult and separate counts of first-degree criminal abuse against son and daughter. He was also indicted for being a first-degree persistent felony offender. At a trial held in 2016, the evidence included the following, although not in the order in which we recite it.

In 2012, Ann was the home-school coordinator at Liberty High School. She testified that during the first week of school, the students attended a suicide prevention program that entailed the completion of a form inquiring if the student needed immediate suicide prevention services. After Mysteri indicated she needed such service, Ann asked to see Mysteri's wrist and when she complied, observed what appeared to be cut marks.

Ann was unable to contact Michelle on the phone, so she and Mysteri went to the home. When Ann arrived at home, Ricky was at work.

Upon entering the bedroom where Michelle was, she saw Michelle on a mattress and box spring. She had no body hair, no hair on her head, no eyelashes and no eyebrows. She described the room as being in disarray with "an

overwhelming smell of urine and of body odor[.]" When Ann sat down on the bed, the bed was wet.

Ann called 911 and the audio tape was played to the jury. Ann is heard saying, "I am with Ms. Gentry, she has cancer and is bedridden. She has reported to me that her husband is beating on her and beating on her daughter and I need a policeman here to help me do this . . . it's beyond what I do." The trial court admonished the jury that although what it heard on the 911 tape was hearsay, it could consider the call or the limited purpose of understanding the sequence of events.

Son testified that in 2010, Ricky and Mysteri had a verbal altercation. He testified that he recalled being downstairs and Michelle looking at Mysteri and saying that a patch of Mysteri's hair was missing.

Son testified Ricky frequently yelled at him and called him names. Son testified Ricky hit him on the head, pushed his head and whipped him with a belt. He described a specific incident that occurred during the 2010-2011 school year when Ricky became enraged because toilet paper was in the bathtub. Son testified after he denied putting the paper in the tub, Ricky whipped him repeatedly with a belt. He testified Michelle woke up and took photos of the red marks on his buttocks.

Son testified about another incident during the same school year. He testified he and Ricky were upstairs playing a game when Ricky asked him to take out the trash. Son testified he thought Ricky asked if he wanted to go to the library and son said "no." After son continued to say no, Ricky followed son downstairs and put his hands around son's throat and started shaking him. Son also testified about an incident involving daughter when he spanked her and threw her against a wall.

Son testified he witnessed Ricky push Michelle. He recalled one specific incident when Michelle was not moving fast enough in her walker to get to a bus, Ricky pushed her causing her to fall. He also testified as to a specific incident when Michelle fell, and Ricky refused to help her.

Daughter testified she did not remember the fight between Mysteri and Ricky but did remember the bald spot on Mysteri's head. She testified when she was seven or eight years old, Ricky threw her against a wall and recalled going to the hospital for treatment. She testified Ricky punished her by using his hand or a belt but could not remember how many times she was struck with a belt.

When asked if she had seen Ricky physically abuse Michelle, daughter responded Ricky "might push her around, like bruise her, but that's about it." She testified that sometimes Michelle would try to hit Ricky and Ricky would defend himself. As to the incident where Ricky refused to help Michelle up from

the floor, daughter testified that she, her brother, sister, Michelle's friend and Ricky's friends assisted her.

Mysteri reluctantly testified saying she wanted to "move on." However, she testified that in September 2010, when she was fourteen, she threw a jar of Noxzema at Ricky who responded by pulling her hair. She testified Michelle was present and tried to stop Ricky. She further testified that on one occasion Ricky struck son leaving bruises on his back. She also testified that once when Michelle fell, Ricky did not assist in helping her up.

Dr. Woodcock, Michelle's doctor testified that from 2009 until her death, Michelle had a "very difficult three-year survival." He described the pain Michelle suffered and testified that movement caused severe pain. He testified a fall would be very painful and she would need assistance to stand. Dr. Woodcock testified that in August 2012, Michelle was fully cognizant.

Advanced nurse practitioner, Mellissa Johnston, examined Michelle on August 23, 2012. She described Michelle on that date as extremely weak. When she saw her, Michelle was slumped in a wheelchair and had urinated on herself. Johnston testified Michelle had three contusions to her left upper thigh and four sites of injury to her genital area, including a contusion to her hymen. Michelle also had a broken fingernail.

The trial court instructed the jury on criminal abuse in the first degree as follows:

> (A) That in Jefferson County, Kentucky, between the 1st day of August 2011,and the 23rd day August 2012, and before the finding of the Indictment herein, he intentionally abused [son];
>
> (B) That he thereby:
>
> -caused serious physical injury to [son]; OR
>
> -placed [son] in a situation that may have caused him serious physical injury; OR
>
> -caused torture, cruel confinement or cruel punishment to [son];
>
> AND
>
> (C) That [son] was at the time 12 years of age or less.

The jury was instructed on reckless abuse or neglect of an adult as follows:

> (A) That in Jefferson County, Kentucky, between the 1st day of September 2010, and the 21st day August, 2012, and before the finding of the Indictment therein, he recklessly abused or neglected Michelle Gentry;
>
> (B) That when he did so, he was a caretaker as defined under Instruction No 4;
>
> AND
>
> (C) That when he did so abuse or neglect her, Michelle Gentry was 18 years of age or older who because of mental or physical dysfunctional, was unable to manage her own

> resources or carry out the activity of daily living or protect herself from neglect, or a hazardous or abuse situation without assistance from others, and who may have been in need of protective services.

After the jury returned its verdict and during the penalty phase, the Commonwealth requested that the trial court give the jury special verdict forms on the charge of criminal abuse in the first degree and reckless abuse or neglect of an adult, expressing concern that the jury instructions given may have resulted in a non-unanimous verdict. The special verdict forms as to both charges instructed that jury to unanimously find that Ricky guilty based on its finding that he did the following:

> ___ He strangled [son] by placing his hands around [son's] neck, applying pressure and causing [son]to have fuzzy vision;
>
> ___He would often hit [son] on his head;
>
> ___He would mug [son] by grabbing his head and pushing;
>
> ___He forced [son] to lower his pants and then hit him with a belt in the bathroom upstairs and in the kitchen, downstairs leaving a mark;
>
> ___He would use a belt as the usual punishment for [son].
>
> ___He called [son] "retarded, a "faggot, "stupid" and the "[n] word[.]"

The special verdict form for reckless abuse of neglect of an adult stated:

> We have found [Ricky] guilt under this verdict form and that finding is based on our unanimous finding that [Ricky] did the following:

____He pushed Michelle Gentry to the ground when she wasn't moving quickly enough to get to the TARC 3 bus;

___He refused to help Michelle get up from the ground when she fell down and then helped her only when his father arrived;

___He neglected Michelle by allowing her to remain in a bed soaked in urine;

___He abused or neglected Michelle by allowing her to suffer injuries evidenced by a broken fingernail on August 23, 2012;

___He abused or neglected Michelle her allowing her to suffer injuries evidenced by tears in her vagina;

___He abused or neglected Michelle by allowing her to suffer bruises to her upper thigh;

___He abused or neglected Michelle by doing acts of violence against her daughter [Mysteri].

The trial court concluded it was too late for the jury to receive the Commonwealth's proposed instructions and continued with the penalty phase.

The first three issues presented concern evidentiary rulings. Our standard review of a trial court's evidentiary rulings is whether the trial court abused its discretion. *McDaniel v. Commonwealth,* 415 S.W.3d 643, 655 (Ky. 2013). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 581 (Ky. 2000).

Ricky argues that while the Confrontation Clause and the rule against hearsay did not prohibit the jury from hearing Ann's statements on the 911 audio tape as to what she saw—Michelle was bedridden, the room was in disarray, and there was a foul odor—the portion of the audio tape in which Ann is heard repeating Michelle's statement that Michelle's "husband is beating on her and beating on her daughter" was inadmissible. We conclude the evidence was improperly admitted under this state's hearsay rules and, therefore, do not address whether the same statement would be inadmissible under the Confrontation Clause.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Kentucky Rules of Evidence (KRE) 801(c). KRE 802 provides that "[h]earsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky." As indicated by its admonishment, the trial court ruled that the portion of the 911 audio tape played to the jury where Ann is heard reporting what Michelle told her was not offered to prove the truth of the matter asserted but to explain the sequence of events.

The use of a hearsay statement for a purpose other than to prove the truth of the matter asserted must withstand the test of relevancy.

> A legitimate nonhearsay use of an out-of-court statement always involves relevancy in the *mere utterance of the words* comprising the statement (i.e., a logical connection between the utterance of the words and some material

> element of the case). Absent such relevancy, a claim of nonhearsay must be regarded as nothing more than a pretext for violating the hearsay rule.

Moseley v. Commonwealth, 960 S.W.2d 460, 461–62 (Ky. 1997) (quoting R. Lawson, *The Kentucky Evidence Law Handbook*, § 8.05 p. 361 (3rd ed. Michie, 1993)).

Ann's statement did not explain the sequence of events that were material to any element of the crimes charged against Ricky. Notably, Ann testified as to why she was at the residence and that she called 911. The reason the Commonwealth fought vehemently to introduce that portion of the 911 audio tape is because it was damaging evidence that Ricky physically abused Michelle and daughter. Having concluded that Ann's statement to the 911 operator as to what Michelle reported to her was hearsay and not admitted for any relevant purpose other than to prove the truth of the matter asserted, we address whether it was admissible under any exception to the rule.

As explained in *Colvard v. Commonwealth*, 309 S.W.3d 239, 244 (Ky. 2010):

> The hearsay rule developed over hundreds of years of Anglo–American experience in jury trials. That jurisprudential experience taught that statements of witnesses repeating what they had heard from others out of court was inherently unreliable and unworthy of belief. To protect the integrity of the trial and its truth—finding mission, such out-of-court statements were forbidden. We also learned, however, that certain kinds of out-of-

> court statements, because of the circumstances in which they were uttered, were highly reliable.

The burden to prove whether an exception to the hearsay rule applies is on the Commonwealth. *Slaven v. Commonwealth.*, 962 S.W.2d 845, 854 (Ky. 1997).

The 911 audio tape contains two layers of hearsay: Ann's statements and Michelle's statements as repeated by Ann. "[S]uch evidence is admissible if each part of the combined statements conforms with an exception to the hearsay rule." *Thurman v. Commonwealth*, 975 S.W.2d 888, 893 (Ky. 1998). The Commonwealth argues that both hearsay statements fall within the present sense impression and/or excited utterance exception to the hearsay rule.[1]

KRE 803 provides in part:

> The following are not excluded by the hearsay rules, even though the declarant is available as a witness:
>
> (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or conditions.

[1] We note that the Commonwealth does not argue the exceptions to the hearsay rule under KRE 804 when the declarant is unavailable are applicable to Ann's statement to Michelle nor could it reasonably argue that any of those exceptions are applicable under the facts.

"For present sense impression, the statement must be made while the declarant is observing the event." *Bray v. Commonwealth*, 68 S.W.3d 375, 381 (Ky. 2002). As noted in *Jarvis v. Commonwealth*, 960 S.W.2d 466, 469 (Ky. 1998), "[t]he language of the rule makes clear that time is an important element of the exception." Our Supreme Court has consistently required that for a statement to be present sense impression, it must be made contemporaneously with the event being described or immediately thereafter. *See e.g.*, *Young v. Commonwealth*, 50 S.W.3d 148, 166 (Ky. 2001) (witness's description of the killer given to officer seven minutes after the shooting was not a present sense impression); *Fields v. Commonwealth,*12 S.W.3d 275, 279-80 (Ky. 2000) (an audio description of crime scene investigation recorded by investigating officer shortly after completion of the investigation describing events that occurred was not a present sense impression); *Jarvis,* 960 S.W.2d at 469-70 (because there was no evidence that the statement was made as the killing occurred or immediately thereafter, child's statement that she saw the defendant kill her mother was not a present sense impression).

Neither Michelle nor Ann were observing the event described. Any physical abuse of Michelle or daughter by Ricky could not have occurred sufficiently close in time to when the statements were made because Ricky was at work when Ann arrived. Moreover, the Commonwealth produced no evidence that

Michelle or daughter was beaten on the date the statement was made. The present sense impression exception to the hearsay rule is inapplicable to both statements.

"The premise for the [excited utterance] exception is that statements made under the stress of the excitement caused by a startling occurrence are more likely the product of that excitement and, thus, more trustworthy than statements made after the declarant has had an opportunity to reflect on events and to fabricate." *Noel v. Commonwealth*, 76 S.W.3d 923, 926 (Ky. 2002). Courts assess whether a statement is an excited utterance using eight criteria: "(i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving." *Souder v. Commonwealth*, 719 S.W.2d 730, 733-34 (Ky. 1986) (quoting *Lawson, Kentucky Evidence Law Handbook*, 8.60(B) (2d ed. 1984) (overruled on other grounds, *B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007)). The question is "whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue, or whether that

nervous excitement has died away." *Mounce v. Commonwealth*, 795 S.W.2d 375, 379 (Ky. 1990).

While it is not necessary that a statement be contemporaneous with or immediately after an event described, the declarant's statement must be made under the excitement or stress of the event. Although Michelle was in a deteriorated state when she made the statement, there was no evidence or reason to believe that at the moment she made the statement she did so under any stress of shock or excitement of having been beaten.

Even if the definition of excited utterance could be strained to include Michelle's statement, Ann's statement to the 911 operator regarding what Ann reported to her cannot be characterized as an excited utterance under the most imaginative of definitions. Her request that the 911 operator send police to the home was made because she had reflected on the situation and decided that assistance was beyond her job as a school counselor. Her voice on the tape is calm and lacks any indicia of the necessary emotional reaction necessary to be characterized as an excited utterance.

This case has similarities to our Supreme Court's decision in *Johnson v. Commonwealth*, 2013-SC-000806-MR, 2015 WL 4967252 (Ky. 2015) (unpublished),[2] where the Court addressed the admissibility of a 911 audio tape.

[2] We cite this unpublished case pursuant to Kentucky Rules of Civil Procedure 76.28(4)(c).

Johnson was on trial for robbing a Yellow Cab driver. After learning of the robbery from its driver, a fellow Yellow Cab employee called 911 and recounted the driver's description of the incident.

Although the Commonwealth agreed with Johnson that the 911 tape was inadmissible hearsay, our Supreme Court took the opportunity to comment on the issue. It pointed out that the 911 audio tape was double hearsay. *Id*. at 4. "While the driver's statements to Yellow Cab could perhaps be conceived as either a present-sense impression or excited utterance, the same [could not] be said for Yellow Cab's statements to the 911 operator." *Id*. As explained by the Supreme Court:

> There was no present-sense impression because Yellow Cab did not have personal knowledge of the situation—Yellow Cab did not witness anything to describe. And Yellow Cab's statements to the 911 operator cannot be considered an excited utterance because there was no startling experience for which the unknown Yellow Cab employee would have been excited.

Id. at 4 n. 14. The same analysis is applicable to the statement made by Ann reporting Michelle's statement that she and daughter had been beaten by Ricky.

We are reversing Ricky's conviction based on the prejudicial admission of hearsay evidence. Of course, without this evidence, the Commonwealth may or may not seek to retry this case given the strength of the

remaining evidence. However, should the remaining issues arise if this case is retried, we briefly discuss each.

Ricky argues that the testimony he pulled Mysteri's hair out after she threw a Noxzema jar was erroneously admitted as improper evidence of prior crimes or bad acts. KRE 404(b). Under the rule, evidence of prior crimes or bad acts must be relevant "for some purpose other than to prove the criminal disposition of the accused[.]" *Meece v. Commonwealth,* 348 S.W.3d 627, 662 (Ky. 2011). Even evidence admissible under KRE 404(b) must be relevant, probative, and not unduly prejudicial. *Bell v. Commonwealth,* 875 S.W.2d 882, 889-91 (Ky. 1994). *See also* KRE 401; 402; and 403.

The Commonwealth argues that while the testimony regarding the hair-pulling incident is evidence of a prior bad act, it is relevant to prove the crime of knowing abuse or neglect of an adult because abuse of Mysteri in Michelle's presence constituted abuse of Michelle. It argues this is so because of the mental impact of seeing the altercation on Michelle and the pain she suffered because of her physical condition when attempting to defend Mysteri.

KRS 209.990(2) provides that "[a]ny person who knowingly abuses or neglects an adult is guilty of a Class C felony." "Adult" is defined as:

> [A] person eighteen (18) years of age or older who, because of mental or physical dysfunctioning, is unable to manage his or her own resources, carry out the activity of daily living, or protect himself or herself from neglect,

> exploitation, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services[.]

KRS 209.020(4). "Abuse" means "the infliction of injury, sexual abuse, unreasonable confinement, intimidation, or punishment that results in physical pain or injury, including mental injury[.]" KRS 209.020(8).

The problem with the Commonwealth's relevancy argument is that when Ricky pulled Mysteri's hair, he did not *inflict* "injury, sexual abuse, unreasonable confinement, intimidation or punishment" upon Michelle as required by the statute and, therefore, there was no act of abuse that could have *resulted* in physical or mental injury. The evidence had no probative value other than to show Ricky's propensity to abuse children under his care and was unduly prejudicial. If the evidence is the same upon retrial, it must be excluded.

For the same reason that the evidence concerning the hair-pulling incident should have been excluded, Ricky argues the evidence regarding the bruises on Michelle's thigh and perineal tears should have been excluded. As noted, the rape charge filed against Ricky was dismissed. However, the Commonwealth was permitted to introduce evidence that when examined, Michelle had contusions on her thigh and perineal tears. Ricky argues the only possible probative value of this evidence was to prove Ricky had sexual intercourse with Michelle either by physical compulsion or while she was

physically helpless. The Commonwealth counters that the trial court correctly ruled within its discretion that the evidence could be indicative of neglect or abuse and that the bruising and tears could have occurred from a means other than sexual intercourse.

In the proper evidentiary context, this same evidence may be indicative of neglect or abuse as the Commonwealth suggests. However, the Commonwealth must come forth with medical evidence that substantiates its theory that the bruises and tears were caused by neglect and abuse. Otherwise, its probative value is outweighed by its prejudicial effect.

Finally, we address Ricky's argument that the jury instructions for criminal abuse in the first degree and reckless abuse of neglect of an adult violated the unanimity requirement for jury instructions. In *Johnson v. Commonwealth*, 405 S.W.3d 439, 449 (Ky. 2013), the Supreme Court held that "a general jury verdict based on an instruction including two or more separate instances of a criminal offense, whether explicitly stated in the instruction or based on the proof—violates the requirement of a unanimous verdict."

As in *Johnson*, a single instruction was given on each charge based on evidence of two or more separate instances of criminal conduct, authorizing the jury to convict Ricky of only one crime. "[U]nlike the case where two theories—such as two means or mental states—of a single crime are presented in an

instruction, we have an instruction that includes multiple crimes but directs only one conviction." *Id*. at 455. In *Johnson*, the Court explained the unanimity problem created with such an instruction:

> [It] is like giving directions to a McDonald's on the east side of town to half a group of travelers, and directions to one on the west side of town to the other half, despite a rule that requires all the travelers to go to the same restaurant. Both groups arrive at *a* McDonald's, but not all the travelers are in the same place.
>
> The unanimity requirement mandates that jurors end up in the same place. When we give the kind of instruction in this case to juries, they are forced by its language to *appear* to end up in the same place in order to convict. But that appearance is illusory because we can never know whether the jurors are indeed in the same place. Such instructions make it possible that some of the jurors may vote for the first crime, and some may vote for the second, with all agreeing that the defendant committed a crime. In other words, all of the jurors end up convicting (i.e., arriving at *a* McDonald's), but some of the jurors voted for one instance of the offense (i.e., the east-side McDonald's) and some voted for the other (i.e., the west-side McDonald's). We have no certainty that twelve people found the defendant guilty of the same instance of the crime.

Id. at 449. If this case is retried and the Commonwealth introduces the same admissible proof, the trial court is required to instruct the jury in such a manner so that a unanimous verdict is reached.

For the reasons stated, the judgment is reversed, and the matter is remanded to the Jefferson Circuit Court for proceedings consistent with this opinion.

MAZE, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: I agree with the reasoning and the result reached by the majority with one clarification. The majority declines to address the Confrontation Clause issue, concluding that portions of the statement made by Ann Aimes to the 911 operator were not admissible under any exception to the hearsay rule. However, the Confrontation Clause to the United States Constitution precludes the admission of testimonial statements regardless of their admissibility under the hearsay rules. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177 (2004).

In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the United States Supreme Court clarified that:

> 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.

Id. at 822, 126 S. Ct. at 2273-74.

To determine whether statements are testimonial, the Court in *Davis* directed trial courts to consider: (1) whether the events spoken about were actually happening, or were past events; (2) the presence of an ongoing emergency; (3) whether what was asked and answered was for the purpose of resolving the situation, rather than simply learning what had happened in the past; and (4) the level of formality in the interview. *Id.* at 827, 126 S. Ct. at 2276-77. See also *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244 (Ky. 2009). In the current case, most of the statements which Aimes made to the 911 operator concerned the ongoing emergency at Ricky's residence. Furthermore, Aimes told the operator about Michelle's report of past abuse to emphasize the emergency nature of the present circumstances.

Therefore, the trial court correctly found that the 911 call was nontestimonial in nature and was not subject to exclusion as a Confrontation Clause violation. The trial court also correctly admonished the jury not to consider the 911 call as substantive evidence, but only for the limited purpose of understanding the sequence of events. Nevertheless, I must agree with the majority that Aimes's statements in the 911 call included hearsay and were not subject to any exception to the hearsay rule. For the remaining reasons stated in

the majority opinion, I agree that the conviction must be set aside and that matter be remanded for a new trial. On remand, the trial court must determine whether the entire 911 call should be excluded or only the portion containing the inadmissible hearsay.

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