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AS MODIFIED: JUNE 19, 2008
RENDERED: JUNE 19, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000407-MR

JEFFREY ALLEN — APPELLANT

V.

ON APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
NO. 03-CR-000133

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Appellant, Jeffrey Allen, was convicted by a Letcher County Circuit Court jury of wanton murder. He was sentenced to fifty years imprisonment. Appellant now appeals his conviction as a matter of right pursuant to Ky. Const. § 110(2)(b).

Appellant raises three allegations of error: 1) that the introduction into evidence of certain non-emergency 911 phone calls violated his confrontation rights as guaranteed by the Sixth Amendment; 2) that the trial court improperly excluded certain hearsay testimony, which should have been admitted under the excited utterance exception to the hearsay rule; and 3) that the trial court erred in denying Appellant the opportunity to present evidence in surrebuttal testimony. Upon review, we reverse the judgment and sentence of the trial court below.

I. BACKGROUND

Appellant, Jeffrey Allen, and his wife, Eugenia Allen, were foster parents in Letcher County over the course of two years under the supervision of the Cabinet for Health and Family Services. During that time, Appellant had numerous children in his care. Among those were the Doe children, four siblings living with the Allens under their care and supervision. The Doe children ranged in age from: A.J., aged six (6); J., approximately three and a half (3 ½); Dakota, approximately two and a half (2 ½); and Jo, who was less than a year old. Also living with the Allens was T., age five and a half (5 ½). T. was the foster child of Chuck and Louise Jones, but had been living with the Allens for approximately two years.

Dakota seemed to bear the burden of the emotional turmoil suffered by the various foster children under Appellant's supervision. Dakota was a small child for his age and had been diagnosed with failure to thrive. His brief life was marked by violence and physical aggression allegedly inflicted upon him by his siblings and T., as well as Appellant.

According to evidence introduced at trial, J. was allegedly known to be particularly aggressive towards Dakota. Allegedly, she would strike him, head-butt him in the knees, and pinch his cheeks, causing bruises on his face. J. was also alleged to have bitten Dakota on the cheek and lip on prior occasion, to have scratched the side of his face, and to have stuck her fingers in Dakota's eyes. Moreover, A.J. was known to flick Dakota in the ears. Testimony also alleged that in the days leading up to Dakota's death, J. knocked Dakota off of a picnic table, choked him, and spread his legs apart, in the manner of "wishboning." Appellant contends that the alleged violent behavior of the other children explained the bruising evident on Dakota's body.

T. was also alleged to have been violent towards Dakota. Testimony indicated that T. had a history of violent behavior towards others, according to various witnesses. T. was frequently angry and aggressive towards adults and children. Moreover, evidence was presented to suggest that T. was jealous of the Doe children and possessive of the Allens.

Dakota died on March 27, 2003, the same day that a social services worker from the Cabinet of Health and Family Services and a Court Appointed Special Advocate (CASA) worker were sent to Appellant's home. Appellant contends that Dakota died from injuries inflicted from the other children, but gave conflicting accounts of what happened when interviewed. Initially, Appellant claimed that on the day of Dakota's death, he found J. sitting on top of Dakota with her knees on his stomach. In a later interview with authorities, Appellant claimed instead that he had found T. jumping and stomping on Dakota while wearing cowboy boots.

During their visit shortly before Dakota's death, the individuals from CASA and social services noted that Dakota had bruising along the jaw line and a black eye. However, they did not notice any bruising on the neck. After these individuals departed the Allen home, Eugenia allegedly also left on an errand. When she returned home, she found Appellant sitting on the couch holding Dakota, who was non-responsive. Eugenia then called her father, who lived next door, and he suggested that they take Dakota to the hospital. As Eugenia's father drove, they stopped at the Salt Lick Fire Department. Upon arrival, CPR was performed on the child, and 911 was called to send an ambulance. Subsequently, an ambulance arrived and transported Dakota to the hospital. Several attempts were made to intubate him both in the ambulance and at

the hospital, as well as attempts to revive the child's heart. Dakota was subsequently pronounced dead at the hospital after attempts to resuscitate him were unsuccessful.

Conflicting testimony was presented at trial as to the presence of bruising on Dakota's neck, and as to whether a child could have caused the fatal injuries which led to his death. Several witnesses from the fire department testified that they did not observe any bruising around the neck. However, nurses attending to Dakota at the hospital noticed extensive bruising on the body and around the neck, noting that the child had bruises in what appeared to be the pattern of adult fingerprints around the neck. Ultimately, hospital staff notified authorities as to their suspicion that Appellant had murdered the child.

II. ANALYSIS

A. The trial court's improper admission of testimonial hearsay in the form of non-emergency 911 calls was prejudicial.

Appellant first argues that certain evidence admitted at trial in the form of non-emergency 911 phone calls amounted to testimonial hearsay, and thus violated his Confrontation rights as guaranteed under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI.

A total of five calls were placed to 911 following the discovery of the non-responsive child. At trial, Appellant objected to the introduction of all the tapes of these phone calls on grounds of prejudice, and violation of his confrontation rights. His objections were overruled. Here, Appellant takes specific issue to the fourth and fifth phone calls placed to 911, arguing that these calls were made after the emergency situation had subsided and, therefore, must be excluded.

Two separate callers phoned 911 subsequent to Dakota's death. In the fourth call, a nurse phoned 911 from the hospital indicating her suspicion that Appellant was

involved in Dakota's death. In the call, she details Dakota's bruising around the neck, speculates that the story which Appellant was giving did not "fit," and adds that she does not think a four-year-old could do that (meaning cause the injuries). Clearly, her implication was that she did not believe Appellant's account of what happened to Dakota, and that she felt Appellant was responsible for the child's death. Moreover, her implication is evident, in that the 911 operator responds that they will send an investigator.

In the fifth call placed to 911, a caller, identifying himself only as from the Whitesburg Police Department, has a conversation with the 911 operator involving several testimonial hearsay and double hearsay statements. The caller gives statements as to what other officers have told him and as to what a janitor told an officer, who then, in turn, told the caller. Initially, the caller states that "it was the foster parents." Although there is some ambiguity as to exactly what the caller is implying in this statement, the rest of the conversation clarifies the insinuation. The caller indicates that the child was dead and that other officers told him to call for a state trooper to investigate the death. He stated that the family members had previously been rowdy and upset. Further, the caller indicates that the child had bruises all over his body and that nurses had examined the body more closely and found additional bruising. The caller then stated that the child had "handprints around the neck, bruises on the inner thigh, and a black eye." Nobody from the Whitesburg Police Department was called to testify at trial.

This Court has recently grappled with the far-reaching implications of the landmark decision handed down by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and its bearing on

the admission, at trial, of out-of-court witness statements. See, e.g., Heard v. Commonwealth, 217 S.W.3d 240 (Ky. 2007); Rankins v. Commonwealth, 237 S.W.3d 128 (Ky. 2007). Crawford had the effect of effectuating a tectonic shift in the manner with which trial courts examine out-of-court witness statements. Specifically, Crawford abandoned the balancing test purported in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), in favor of a testimonial-versus-nontestimonial centered analytical framework. Crawford, 541 U.S. at 54, 124 S.Ct. at 1365-66 (holding that out-of-court statements that are testimonial should be barred unless the witness is unavailable and the defendant had a prior opportunity to cross-examine, irrespective of the sufficient indicia of reliability of such statements).

Initially, the United States Supreme Court, in Crawford, articulated a minimum threshold for those statements which may be deemed testimonial in nature. The Court then indicated that, at a minimum, out-of-court statements which qualified as testimonial included prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and statements elicited during police interrogations, the latter being innately testimonial. Id. at 51-52, 124 S.Ct. 1354-55.

Subsequently, in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Court began to flesh out the parameters of testimonial statements within the context of interrogation. Davis dealt, generally, with the products of interrogations tending to produce testimonial responses and specifically with the admission of 911 phone calls. See id. at __, 126 S.Ct. at 2274 n.1. Moreover, Davis articulated that for purposes of Sixth Amendment analysis, the interrogations of 911 operators should be deemed the actions of the police. Id. at __, 126 S.Ct. at 2274 n.2.

Therefore, the protections of the Confrontation Clause are applicable to these calls when the calls elicit a testimonial response. See id. at __, 126 S.Ct. at 2276.

In Davis, the Court ruled that

> [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*. 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 __, 126 S.Ct. at 2273-74 (emphasis added). The Court expressly acknowledged, however, that interrogation is not a necessary prerequisite to a testimonial response. See id. at __, 126 S.Ct. at 2274 n.1 (emphasis added). The Court reminded us that the

> Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning.) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

Id. at __, 126 S.Ct. at 2274 n.1 (citing Raleigh's Case, 2 How. St. Tr. 1, 27 (1603)). Moreover, Davis expresses a series of considerations used in evaluating whether a 911 conversation produced testimonial statements. These include 1) whether the speaker is referring to events as they are actually happening or past events, 2) whether there is an ongoing emergency, 3) whether the nature of what was asked and answered was necessary to resolve a present emergency, and 4) the level of formality of the conversation. Id. at __, 126 S.Ct. at 2276-77.

In Heard, this Court examined the impact of Crawford and Davis upon the admission of evidence in light of Sixth Amendment Confrontation issues. 217 S.W.3d at 240. Specifically, Heard considered out-of-court statements within the parameters of

the ongoing emergency framework, as outlined in Davis. Id. at 244. This Court noted that Davis set a high threshold for a statement to qualify as nontestimonial, and thus exemption from the protections of the Confrontation Clause. We observed that out of court statements "made to address an ongoing emergency may evolve into testimonial statements" if they refer to past events after the emergency situation has subsided. Id. Additionally, not all statements made during the general timeline of an emergency situation will be deemed nontestimonial, because "[t]he emergency must be in progress for the statements to qualify." Id.

In Heard, an officer was erroneously permitted to testify about what a victim told him pertaining to an attack made by the appellant. 217 S.W.3d at 244. The statements made by the victim to the officer were given after the emergency situation had passed and the victim was no longer in danger. Cf. Davis, 547 U.S. 813, 126 S.Ct. 2266 (holding that the 911 call placed by the victim was not testimonial because the victim was being assaulted during the conversation and was speaking during an emergency situation as it transpired). Importantly, the statements were made concerning violations of the law. Heard, 217 S.W.3d at 244. Thus, this Court held that the victim's statements were clearly testimonial and should not have been allowed into evidence. Id.

In the present instance, and with respect to the fifth call placed to 911, we find that it is precisely the type of non-emergency, testimonial statements warned against by the United States Supreme Court in Davis and Crawford, and rejected by this Court in Heard. Here, the "nature of what was asked and answered," when viewed objectively, was such that the information was not necessary to resolve the present emergency, but rather to simply learn what had happened in the past. Davis, 547 U.S. __, 126 S.Ct. at 2276.

Although in Davis the 911 call was placed during an ongoing emergency, the Court recognized that "one might call 911 to provide a report of a crime absent any imminent danger." Id. at __, 126 S.Ct. at 2276. Indeed, that is what happened in the present instance. Here, a series of phone calls were placed to 911 as the situation evolved. However, by the time the last two calls were made, young Dakota had already been transported to the hospital and pronounced dead. The emergency situation had clearly subsided, and the ensuing calls were prosecutorial in nature.

The fifth call to 911, made by an unknown police officer, should have been excluded because it was clearly testimonial, and there was no opportunity for cross-examination. See Crawford, 541 U.S. at 54, 124 S.Ct. at 1365-66 (holding that out-of-court statements that are testimonial should be barred unless the witness is unavailable and the defendant had a prior opportunity to cross-examine, irrespective of the sufficient indicia of reliability of such statements). The onus falls squarely upon a trial court to ensure that one's right to Confrontation is upheld.

> [T]rial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.

Davis, 547 U.S. at __, 126 S.Ct. at 2277. Here, the trial court failed to recognize when the calls to 911 ceased to address an ongoing emergency situation, and instead became testimonial statements. The phone call by the police officer clearly goes beyond the intent of what the 911 line is to be used for, namely for reporting emergency situations, and segues into testimonial speculation concerning culpability. Because the police officer's 911 call concerned past events with prosecutorial implications, his statements were testimonial and therefore the trial court erred in admitting the call.

It appears from the record that Deidre Moore, who made the fourth call, was both the nurse who called into 911 from the emergency room, and the same nurse who testified as to the events of that day at trial. Thus, while the fourth call was also testimonial in nature, whether its admission violated Crawford need not be addressed. As noted in Davis, the Confrontation Clause only "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" 547 U.S. at 821, 126 S.Ct. at 2273 (quoting Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)) (emphasis added). Because Nurse Moore testified at trial and was therefore subject to cross-examination, the admission of her 911 call did not violate Appellant's confrontation rights. Nevertheless, the admission of that call was in error because it was hearsay and it did not satisfy any of the hearsay exceptions in KRE 803. Thus, the trial court erred in the admission of this fourth phone call.

Therefore, we must now examine this testimony in light of all the evidence, to determine if the inclusion of said testimony was harmless, bearing in mind the constitutional implications such error involves. See RCr 9.24; Greene v. Commonwealth, 197 S.W.3d 76, 83 (Ky. 2006) (holding that violations of the Confrontation Clause are subject to harmless error analysis). "It must not be overlooked that 'before a federal constitutional error can be held harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt.'" Heard, 217 S.W.3d at 240 (quoting Barth v. Commonwealth, 80 S.W.3d 390, 395 (Ky. 2001)); see also Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d. 705 (1967). The test when error involves a constitutional right is "whether there is a reasonable possibility that the evidence complained of might have

contributed to the conviction." Talbott v. Commonwealth, 968 S.W.2d 76, 84 (Ky. 1998) (quoting Chapman v. California, 386 U.S. at 23, 87 S.Ct. at 827).

We cannot say that this improperly admitted testimony was harmless beyond a reasonable doubt. The fifth 911 call, the police officer from the Whitesburg Police Department, called after the emergency had passed. Most damning, this caller specifically stated, "It was the foster parents." Combining the weight of the officer accusing the parents, specifically Appellant, with the official weight given to 911 testimony, this conversation cannot be harmless. To bolster this bald statement, the officer goes further on the 911 tape to comment that family members had been rowdy and upset on other occasions, repeats what "nurses" had told him about bruising all over the body including handprints around the neck, bruises on an inner thigh and a black eye. This alternate version of the forensic evidence presented at trial also is more than merely cumulative: by repetition and variation it increases the horror naturally felt at the injuries and death of this child, serving to inflame the jury.

The fourth call from Deidre Moore was also more than merely cumulative. Those statements carry with them the weight the public gives to 911 testimony and they further serve to bolster her testimony at trial. The fact that there was no emergency at the time Moore made the call also implies that Moore was knowingly making a record and voicing suspicions geared toward furthering police investigations through the official source of 911. It amounts to prejudicial "piling on."

Due to the prejudice caused by this testimony, Appellant's conviction must be reversed on this ground.

B. The trial court properly excluded non-spontaneous hearsay testimony as outside of the excited utterance exception.

Appellant next argues that the trial court erred in refusing to admit certain hearsay testimony, thus causing him substantial prejudice. We disagree, and address this because it may arise on retrial.

Appellant claims that certain hearsay testimony by Jeanette Sexton and Michelle Barnard, in the form of statements by Dakota's biological mother Delana, should have been admitted as excited utterances. At trial, Appellant attempted to introduce evidence that Sexton and Barnard, while present in the emergency room of the hospital, heard Delana tell Appellant and his wife that she knew they could not have hurt her baby and that she had to pull J. off Dakota the prior week. The trial court ruled that the evidence was inadmissible hearsay, not falling within the excited utterance exception under KRE 803(2).

Under KRE 803(2) an out-of-court statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" may be admissible. This Court has outlined eight (8) significant criteria in determining whether a statement is properly admissible under KRE 803(2); they include:

> (1) the lapse in time between the main act and the declaration; (2) the opportunity or likelihood of fabrication; (3) the inducement to fabrication; (4) the actual excitement of the declarant; (5) the place of the declaration; (6) the presence, in that place, of visible results of the act to which the utterance relates; (7) whether the utterance was made in response to a question; and (8) whether the declaration was against interest or self-serving.

Ernst v. Commonwealth, 160 S.W.3d 744, 754 (Ky. 2005) (citing Jarvis v. Commonwealth, 960 S.W.2d 466, 470 (Ky. 1998)); see, e.g., Thomas v. Commonwealth, 170 S.W.3d 343, 351 (Ky. 2005). To qualify as an excited utterance under KRE 803(2),

it must objectively appear that the declarant's condition was such that at the time the statement was made, it was "spontaneous, excited, or impulsive rather than the product of deliberation." Thomas, 170 S.W.3d at 350 (quoting Noel v. Commonwealth, 76 S.W.3d 923, 926 (Ky. 2002)). While no single factor sitting alone will be determinative, spontaneity of the statement, as opposed to mere immediacy in time, is commonly regarded as the factor bearing the most relevance in determining whether a statement qualifies under KRE 803(2). Roland v. Beckham, 408 S.W.2d 628, 632 (Ky. 1966).

Here, Appellant sought to introduce testimony through Sexton and Barnard that Delana stated that she knew Appellant would not have hurt Dakota. It appears that the statement was uttered in the hospital sometime after Dakota had been pronounced dead. However, we do not know how much time passed between Delana learning of her child's death and when she made the statement, as neither Sexton nor Barnard were present when Delana was informed. Further, when objectively looking at the nature of the statement, it is apparent that the statement was one of consolation, which is typically the fruit of deliberation. A consolatory statement is hardly the type of spontaneous, excited or impulsive response one would expect to hear from a mother who has just discovered that her child is dead.

"It is a well-settled principle of Kentucky law that a trial court ruling with respect to the admission of evidence will not be reversed absent an abuse of discretion." Commonwealth v. King, 950 S.W.2d 807, 809 (Ky. 1997). Here, the trial court's determination was supported by sound legal principles and was not arbitrary, unreasonable, or unfair. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1995). Therefore, we find that the trial court was proper in its determination that the hearsay statement was not admissible under KRE 803(2). There was no error.

C. There was no abuse of discretion in denying surrebuttal evidence.

Appellant next asserts that the trial court erred in denying him the opportunity to present certain evidence after the close of Appellant's case in chief as surrebuttal testimony.[1] We disagree, and again address because this may occur on retrial.

A trial court's decision on whether to admit or deny evidence is a matter of discretion and will not be reversed upon review absent an abuse of that discretion. King, 950 S.W.2d at 809. Under RCr 9.42, a trial court is afforded discretion in admitting rebuttal evidence. Thus, "[w]hen there is no clear showing of arbitrariness or an abuse of discretion, the ruling of the trial court will not be disturbed." Pilon v. Commonwealth, 544 S.W.2d 228, 231 (Ky. 1976). Rebuttal evidence is only justifiable and competent when it denies or disproves some affirmative case or fact that the adverse party has attempted to prove, or which otherwise explains it. Keene v. Commonwealth, 307 Ky. 308, 313, 210 S.W.2d 926, 928 (1948), overruled on other grounds by Colbert v. Commonwealth, 306 S.W.2d 825 (Ky. 1957). Therefore, it logically follows that surrebuttal evidence must, likewise, go to a fact that the adverse party has attempted to prove or otherwise explain in rebuttal testimony. Cf. Burden v. Commonwealth, 296 Ky. 553, 178 S.W.2d 1 (1944) (indicating that permitting Commonwealth's witness in rebuttal to testify to matters not testified to by defendant was error but prejudicial effect was negated by subsequent rebuttal testimony).

At the close of Appellant's case the Commonwealth presented one rebuttal witness, Louise Jones, the foster parent of T. Jones testified that she had never seen T.

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[1] Upon the trial court's discretion, evidence may be admitted in reply to that called forth by the rebuttal testimony. Surrebuttal evidence is generally appropriate when new evidence or new facts are elicited for the first time on rebuttal. See 88 C.J.S. Trial § 197 (2008); see also 75 Am. Jur. 2d Trial § 294 (2008).

hit or kick an adult or child. Appellant had introduced extensive evidence indicating that T. had a history of violent behavior towards others.

Appellant sought to introduce additional testimony in surrebuttal from Roger Jones, Louise Jones's biological son. Roger intended to testify that he and his mother were present together at a birthday party where Louise witnessed T. strike another child. However, the trial court denied Appellant's request to put on additional witnesses in surrebuttal. The record indicates that at a bench conference, the trial judge considered the Commonwealth's objection that Appellant had failed to confront Louise Jones with this incident upon cross-examination. Moreover, the judge articulated his cognizance that the proposed testimony would go to the fact of establishing violent behavior towards other children by T., an issue already addressed. Clearly, the trial judge denied Appellant's request to present a surrebuttal witness based upon a reasoned determination that the proposed testimony was both cumulative of other testimony presented at trial and beyond the scope of addressing a fact that the Commonwealth had attempted to prove or otherwise explain. See Keene, 307 Ky. at 313, 210 S.W.2d at 928.

Therefore, Appellant has failed to show that the trial court's decision was arbitrary, unreasonable, or an abuse of discretion. See Pilon, 544 S.W.2d at 231. In fact, Appellant proffers no legal justification as to why the surrebuttal testimony should have been allowed. Appellant merely asserts a blanket proclamation that the testimony was critical and that a proper foundation was laid for the testimony. Moreover, Appellant's argument that Louise Jones's statement was inconsistent with other facts developed at trial bears no legal relevance. Different witnesses often present contrary

testimony, which was the case here. Such is the nature of the adversarial system. Thus, we find no error.

III. CONCLUSION

For the reasons set forth herein, Appellant's conviction of wanton murder is affirmed in part and reversed in part, and remanded for a new trial.

Lambert, C.J.; Minton, Noble and Schroder, JJ., concur. Scott, J., dissents by separate opinion in which Abramson and Cunningham, JJ., join.

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Supreme Court of Kentucky

2006-SC-000407-MR

JEFFREY ALLEN — APPELLANT

V.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, JUDGE
NO. 03-CR-000133

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE SCOTT

I respectfully dissent from the majority's position above. Truly, it stretches reason to suggest that admitting the tapes of the 911 phone calls in question constitutes reversible error in light of our previous holdings and in the context of the case at hand. Given the cumulative nature of the complained of testimony, and the damning nature of the other evidence presented during the course of this lengthy trial, any resulting error was harmless.

In the present instance, much of the substance of the hearsay testimony from the 911 calls centered upon the nature of bruising on Dakota's body when he arrived at the hospital. However, substantially similar testimony was introduced at trial when lay witnesses and medical experts alike testified extensively as to the nature and source of Dakota's injuries. Two nurses, which attended to Dakota at the hospital, Deidre Moore (who placed one of the 911 phone calls in question) and Marty Baker, testified to observing bruising around

Dakota's neck in the pattern of what appeared to be an adult handprint. Furthermore, the medical examiner, Dr. Rolfe, testified that a contributing cause of death, in addition to the rupturing of mesentery arteries and veins and other lacerations on the mesentery fan, was strangulation or suffocation.

Moreover, the complained of 911 phone calls were not the most damning evidence to Appellant. Rather, what was particularly damning to Appellant, in addition to the medical experts' testimony at trial, were his own words. Appellant changed his story multiple times and gave conflicting accounts concerning who or what caused Dakota's death. Appellant first blamed Dakota's death on J., indicating he saw her sitting on top of him with her knees on his chest. Then, Appellant blamed Dakota's death on T., alleging that he jumped on him wearing cowboy boots. Appellant maintained that it was one of the foster children under his care who caused the injuries that led to Dakota's death despite the testimony of medical experts indicating that such small children could not inflict the types of fatal injuries which Dakota suffered.

Although I agree with the majority that introduction of the fourth and "fifth" 911 phone calls was error,[1] such error must be examined in proper context with the trial at large. I cannot join in the majority's finding that the introduction of the tapes of these phone calls warrants a new trial. The substance of the complained of testimony from the fourth 911 call is as follows:

> Moore: This is Deidre at Whitesburg ER
> Dispatcher: Uh huh
> Moore: I have a two-year-old that was brought in, CPR in progress, that was in foster care

[1] What has been termed the "fifth" phone call actually concerned two separate calls which occurred between the same two individuals and during the same course of conversation.

Dispatcher: Ok, who is the foster parents
Moore: Eugenia Allen, yeah, Eugenia Allen and the husband, but I don't know his name
Dispatcher: Did this happen in Letcher County or another and they brought them by
Moore: No, it happened in Letcher County
Dispatcher: Ok, so far you don't know what happened yet though
Moore: The story just, uh, really don't fit the picture, I don't think a four-year-old could do this
Dispatcher: Ok, I'll get someone come check it out

The "fifth" phone call contained the following dialogue:

Dispatcher: [inaudible]
Police: This is Whitesburg PD
Dispatcher: Uh huh
Police: They just brought a two-and-half-year-old child into, uh, Whitesburg ER, ARH
Dispatcher: Uh huh
Police: The child [inaudible] he has bruises all over its body from what my officer said, wanted to know if you could call to get a trooper [inaudible] to start taking pictures or what
Dispatcher: Hold on just a second
Police: Ok
Dispatcher: Are the parents there
Police: As far as I know they're still there, uh, I'm just gathering information from what my, uh, officers told me, uh, told me to call you all, to call if we could to get a trooper up there
Dispatcher: Not a problem, what was the initial call
Police: Uh, I don't know, uh, all I know is my officer was at the ER talking to one of the janitors [inaudible] and they asked an officer to stick around because some of the family members were getting really upset and rowdy
Dispatcher: Ok
Police: Ok, uh, the child had coded and when the nurses and everything started looking a whole lot closer they started finding some more bruises
Dispatcher: Ok, we'll call you right back
Police: Ok

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Police: This is Whitesburg PD again, I'm sorry to bother you
Dispatcher: That's ok
Police: Uh, he wants to know if you can get a trooper en route now because a lot of the family is calling on him right now [inaudible] and uh

Dispatcher: We've got 'em on the way, we've got a detective on the way
Police: Ok, thank you, uh, I can give you a little information that my officers give me, uh, it was foster parents, the child is a foster child, so it's foster parents, they said they took him to Sand Lick Fire Department and he coded at Sand Lick Fire Department, then they called Letcher and Letcher transported to ARH
Dispatcher: Uh huh
Police: They said it had handprints around the neck, bruises on the inner thigh and black eye, social services [inaudible] and coroner is en route
Dispatcher: Ok, we've got 'em on the way
Police: Ok
Dispatcher: Alright, thanks

It is significant to note that a portion of the dialogue, which the majority was particularly troubled by, that occurred between the unnamed caller from Whitesburg Police Department and the 911 dispatcher, appears rather innocuous when viewed in proper context. The majority takes issue with the caller's seeming insinuation that it was the foster parents [who did it]. However, what the caller actually said was, "it was foster parents, the child is a foster child, so it's foster parents." The caller's statement merely indicates that Dakota was in foster care and nothing more. As such, it appears this exchange was a point of clarification from the earlier call where the dispatcher had asked if the parents were still there.

This notwithstanding, both of the complained of calls were hearsay. However, because of the Supreme Court's ruling in Davis, the calls must be examined under different rubrics. 547 U.S. 813, 126 S.Ct. 2266. It is well-established that even constitutional errors may be considered harmless. See, e.g., Talbott v. Commonwealth, 968 S.W.2d 76, 83-84 (Ky. 1998) ("The fact that an error involves a constitutional right does not preclude harmless error analysis."); Quarels v. Commonwealth, 142 S.W.3d 73, 80-81 (Ky. 2004).

However, the novelty of landmark decisions such as Crawford or Davis should not cause this Court to lose sight of what we are looking at, which is neither more nor less than inadmissible hearsay. Thus, as in every instance wherein we evaluate the improper admission of hearsay testimony, we must be cognizant that the error in introducing such testimony is relative. It is relative to the other evidence admitted at trial. See Brewer v. Commonwealth, 206 S.W.3d 343, 352 (Ky. 2006) (holding admission of hearsay testimony harmless when it was cumulative of other testimony presented at trial); White v. Commonwealth, 5 S.W.3d 140, 142 (Ky. 1999) (holding admission of hearsay testimony harmless error because it was rendered cumulative by other testimony at trial). It is relative in terms of content. And, it is relative in terms prejudicial impact. Bratcher v. Commonwealth, 151 S.W.3d 332, 349 (Ky. 2004) ("But even if those questionable [hearsay] portions of Statement 6 were inadmissible, they were not sufficient to change the outcome of the trial, and we find that their admission was at most harmless error.").

An acknowledgement of the relative and comparative nature of any error at the trial level is built into the very standard by which error is adjudged on appeal. RCr 9.24 indicates,

> No error in . . .the admission . . . of evidence . . . is ground for granting a new trial or for setting aside a verdict . . . unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. *The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.*

RCr 9.24 (emphasis added). Clearly, inherent in this analysis is a recognition that some errors should be deemed harmless when considered relative to the case at large. Moreover, the mandate of the rule is clear: an error must be

disregarded if it does not affect an appellant's substantial rights. "In determining whether an error is prejudicial, an appellate court must consider whether upon the whole case there is a substantial possibility that the result would have been any different." Abernathy v. Commonwealth, 439 S.W.2d 949, 952 (Ky. 1969) overruled in part on other grounds by Blake v. Commonwealth, 646 S.W.2d 718 (Ky. 1983); Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003); Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002). I am of the belief that the error in this instance should be disregarded, as I do not believe that Appellant would have been acquitted had the tapes of these calls not been introduced.

Harmless error analysis requires that we examine error holistically. Error, standing alone, is insufficient to warrant reversal of a criminal conviction unless there is a substantial possibility that the introduction of such error into the trial significantly contributed to a finding of guilt. Thus, as I do not believe that the result at trial would have been any different absent the error, "the error itself is insufficient to entitle Appellant to relief." Wells v. Commonwealth, 206 S.W.3d 332, 334 (Ky. 2006) (holding harmless the admission of DNA test results in violation of appellant's confrontation rights).

As a reviewing body, we are duty-bound to abide by the letter of the law and mete out justice upon those who seek the ear of this Court. However, we must be ever vigilant to not allow reason to take flight from our jurisprudence. I fear that our decision here today has suffered from this disconnect.

Abramson, J., and Cunningham, J., join this dissent.

Supreme Court of Kentucky

2006-SC-000407-MR

JEFFREY ALLEN — APPELLANT

V.

ON APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
NO. 03-CR-000133

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER

On the Court's own motion, the Memorandum Opinion of the Court rendered June 19, 2008 shall be modified on page 1, modifying the title. Page 1 shall be substituted, as attached hereto, in lieu of page 1 of the Opinion as originally rendered. Said modification does not affect the holding.

Entered: June 19, 2008.

CHIEF JUSTICE