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Case Number 406,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TIMOTHY MCCRARY,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 406, 2021
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S CORRECTED REPLY BRIEF

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I. THE TRIAL COURT VIOLATED McCRARY'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN, AFTER FINDING J.Y. UNAVAILABLE, IT ALLOWED THE STATE TO INTRODUCE J.Y.'S OUT-OF-COURT TESTIMONIAL STATEMENTS UNDER 11 DEL.C. § 3513.

The State concedes that, with respect to testimonial statements, "*Crawford*[1] overruled *Ohio v. Roberts*,[2]" the decision upon which *McGriff v. State*[3] relied in upholding § 3513.[4] The State also concedes that J.Y.'s CAC statement "is testimonial in nature, implicating the Sixth Amendment Confrontation Clause" because its "primary purpose" was "to obtain evidence that might be relevant to any criminal prosecution of McCrary."[5] However, the State erroneously claims J.Y.'s recorded statement resulting from her father's interview was "nontestimonial" and, thus, *Crawford* is inapplicable with respect to that statement.[6]

In arguing the non-testimonial nature of J.Y.'s recorded statement to her father, the State appears to advocate without persuasive authority, a renunciation of the controlling objective "primary purpose" analysis established by the United States Supreme Court.[7] The objective "primary

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[1] *Crawford v. Washington*, 541 U.S. 36 (2004).
[2] 448 U.S. 56 (1980).
[3] 781 A.2d 534 (Del. 2001).
[4] State's Resp. Br. at p. 17.
[5] *Id.* at p. 21.
[6] *Id.* at p. 22.
[7] *Id.* at pp. 20-21.

purpose" analysis requires an examination of all the circumstances under which the statement was made, including the statements and actions of each of the parties involved, in order to obtain "the most accurate assessment of the 'primary purpose'" of the statement.[8] In other words,

> the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.[9]

Accordingly, and contrary to the State's view, the totality of the circumstances surrounding J.Y.'s statement includes much more than the limited facts that law enforcement had not yet officially entered the picture or that J.Y. had not yet been to the hospital. Many other factors must also be considered.

J.Y.'s statement was not spontaneous, and there was no "ongoing emergency" at the time it was made. She had already made a "spontaneous" disclosure to her mother and, upon demand, repeated her allegation to other family members. Additional time then elapsed as the family waited for her father to respond from the casino after he was called.

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[8]*Michigan v. Bryant* 562 U.S. 344, 360 (2011). *See Davis v. Washington*, 547 U.S. 813, 826 (2006).
[9]*Bryant*, 562 U.S. at 360.

When her father arrived, he questioned J.Y. and decided to record the interview. It is the recorded nature of the interview that "add[ed] an element of formality and greatly increase[d] the[statement's] usefulness to the prosecution."[10] This, alone, "should be taken as a strong indication of [the] testimonial purpose"[11] of the statement. The questioning was designed to elicit a statement inculpating McCrary and it was provided to law enforcement.[12] In fact, the father contacted the police as soon as the recorded interview was completed.[13] It is clear that the "primary purpose" of the questioning was "to establish or prove past events potentially relevant to later criminal prosecution."[14] Had the parents not wanted to engage in their own investigation, then the mother would have called police immediately or at some point between demands for J.Y. to repeat her allegations to three different family members or at some point while they waited for the father to come to the house to conduct the recorded interview. The statement was the result of an interview orchestrated and recorded by the father to collect and

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[10]Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them"*, 82 Ind. L.J. 917, 974–75 (2007).
[11] Mosteller, 82 Ind. L.J. at 974–75.
[12]*Crawford*, 541 U.S. at 53 n.4 (noting there are "various" definitions of interrogations).
[13] A28.
[14] *Davis*, 547 U.S. at 822. See *Crawford*, 541 U.S. at 51-52.

preserve evidence against the alleged perpetrator. And, no other purpose was placed on the record.

The State also appears to argue that regardless of whether either of J.Y.'s two statements is testimonial, there is no confrontation issue here because J.Y. was "available" and defense counsel had an opportunity to cross examine her.[15] Quite the opposite is true. The trial court made a finding that J.Y. was unavailable based on her "total failure of memory with regard to the incident; and also the contents of any such statement made about the incident as is required by Section 3513[(b) (2) (a) (3)]."[16] This required finding for the introduction of J.Y.'s prior statements sets §3513 apart from the other statutory hearsay exception often used by the State – §3507. Apparently, the State fails to recognize this significant distinction because it erroneously relies almost exclusively on law interpreting §3507 in its effort to justify the trial court's denial of McCrary's rights with respect to the introduction of J.Y.'s statements.

Unlike §3513, section 3507 requires a witness who is available, *i.e.* one whose testimony touches on both the events and the out-of-court statement. The "3507 cases" that the State relies upon are inapplicable because most of

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[15] State's Resp. Br. at p. 22-23.
[16] § 3513 (b) (2) (a) & (b). See *Thomas v. State*, 725 A.2d 424, 427 (Del. 1999). State's Resp. Br. at 13-14.

them deal with whether the prosecutor satisfied the "availability" foundational requirement of 3507 which is not at issue here.[17]

Accordingly, because the principles from 3507 do not apply in this case, the State is wrong in its assertion that the *Crawford* requirement that the defendant be given "an opportunity for effective cross-examination" was satisfied.[18] It is true that defense counsel asked J.Y. two questions on *voir dire* of the topic of "unavailability" – "How are you?" and "A little bit nervous?" However, these questions came after the State obtained nothing fruitful from her. And, in response to defense counsel's second question, J.Y. simply nodded her head.[19] Defense counsel's inability to continue down the road of further questioning "cannot be deemed to have been a strategic choice,

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[17] See State's Resp.Br. at p. 24 n. 44 citing (*Roberts v. State*, 897 A.2d 768 (Del. 2006) (finding no abuse of discretion for trial court to admit prior statement under § 3507 after concluding witness sufficiently touched upon statement and events); *Johnson v. State*, 878 A.2d 422 (Del. 2005) (finding within the discretion of the trial judge to have found the witness' response touched on the events, thus minimally satisfying the first part of the § 3507 foundation); *Feleke v. State*, 620 A.2d 222, 227 (Del. 1993) (finding no abuse of discretion for trial court to admit prior statement under § 3507 after concluding witness sufficiently touched upon statement and events).

[18] Interestingly, a couple of the State's "3507 cases", like *McGriff*, do not appear to withstand the test of time and *Crawford*. *See Burke v. State*, 484 A.2d 490, 495 (Del. 1984); *Tucker v. State*, 564 A.2d 1110, 1120 (Del. 1989).

[19] A24.

for any attempt on his part to continue to question this young witness "would have been, at best, *pro forma*."[20]

Significantly, the State does not contest the substantive argument regarding the problematic nature of allowing admissibility to turn on the judge's subjective views. The State does not dispute that, like *Roberts*, the reliability test in §3513 is "amorphous, if not entirely subjective" and "fundamentally at odds with the right of confrontation." Nor did the State contest any of the specific issues cited with respect to the judge's subjective reliability determinations made pursuant to § 3513 in this case.

Finally, the State erroneously claims that McCrary's conviction with respect to J.Y. can stand even if this Court were to exclude either or both of J.Y.'s statements. It cites the hospital records as well as the hearsay statements presented through a nurse and J.Y.'s mother as evidence supporting his conviction. However, this evidence is not sufficient to

[20] *Kansas v. Noah*, 162 P.3d 799 (Kan. 2007) (finding that the limited cross examination of the child not sufficient to meet *Crawford* requirements of a full opportunity to cross-examine the declarant in admission of testimonial hearsay); *In re N.C.*, 105 A.3d 1199, 1216–17 (PA 2014) (child's statements made during a videotaped forensic interview and otherwise admissible under the Tender Years statute, were testimonial under a *Crawford* analysis, and the admission of the statements at a juvenile's adjudication hearing violated the juvenile's right to confrontation under the Sixth Amendment)

overcome the plain error created by the violation of McCrary's rights to confrontation.

The medical records provided no evidence of injury, trauma, abuse or improper touching.[21] Further, the testimony of both the nurse and the mother relayed hearsay which McCrary had no opportunity to confront.[22] The improperly admitted statements "were more detailed than [J.Y.'s] bare-bones statement to h[er] mother [and nurse], and having a videotape [or audiotape] of the interview gave the ju[dge] the chance to actually see and hear [J.Y.] Moreover, given [the child advocate]'s special expertise in conducting forensic interviews of children, the ju[dge] would likely have given her testimony about the interview (as well as the interview itself) great weight in [his] deliberations."[23]

The most significant evidence that the admission of the out-of-court statements were harmful is the judge's own words that he factored those statements into his deliberations. Accordingly, admission of both or either one of J.Y.'s out-of-court statements was plainly erroneous requiring McCrary's conviction on Count 1 be reversed.

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[21] A-20, 43-44.
[22] State's Resp. Br. at p. 25.
[23] *Bobadilla v. Carlson*, 570 F. Supp. 2d 1098, 1113 (D. Minn. 2008), aff'd, 575 F.3d 785 (8th Cir. 2009).

II. THE ADMISSION OF L.F.'S HEARSAY STATEMENT UNDER 11 DEL.C. § 3507 CONSTITUTED AN ABUSE OF DISCRETION BECAUSE SHE NEVER TESTIFIED AS TO THE EVENTS SHE PURPORTEDLY PERCEIVED WHICH WERE THE SUBJECT OF HER HEARSAY STATEMENT.

Contrary to what the State implies, L.F. ***never testified*** about "bad touches," *i.e.* "the events perceived." The State erroneously attempts to use, as the trial court did, the out-of-court statement regarding "bad touches" to satisfy the required in-court testimony in an effort to allow for the introduction of the out-of-court statement regarding "bad touches." This circular reasoning is simply not consistent with the dictates of 11 Del.C. § 3507. "In order to offer the out-of-court statement of a witness, the statute requires the ***direct examination*** of the declarant by the party offering the statement, ***as to both the events perceived*** or heard ***and the out-of-court statement itself***." [24] Here, the State failed to elicit ***any testimony*** from L.F. about the events she allegedly perceived.

This Court reject similar reasoning in *Blake v. State*.[25] There, the State conceded that, with respect to three of the appellants, "direct examination of each witness [at issue] was insufficient to meet the foundational requirements of title 11, section 3507."[26] Among other things, there was a failure by the

[24] *Keys v. State*, 337 A.2d 18, 20 n.1 (Del. 1975).
[25] 3 A.3d 1077, 1081 (Del. 2010).
[26] *Id.*

prosecutor to elicit in-court testimony that touched upon the events. However, like it does today, "the State argue[d] that the prior statements of [the witnesses] did touch upon the events and, therefore, were properly admitted into evidence "absent their specific testimony that their prior statements were truthful or false."[27] In response, this Court repeated its "consistent" and "unequivocal" holding that "a witness' statement may be introduced **only** if the two-part foundation is first established: the witness testifies about **both** the events and *whether or not they are true.*"[28]

Here, in court, 7-year-old L.F. testified that she remembered going to preschool a couple years earlier. However, she did not remember the name of the school. She recalled that she had "girl" teachers. She also remembered that she rode the bus to preschool. There were two grownups on the bus, one "boy" and one "girl." The girl drove the bus. She did not remember what the "adult boy" did on the bus, and she did not remember his name. However, she did identify him by sight in the courtroom as McCrary. She stated that she did not know why but she did not like him. She also said that she never talked to anyone about him.[29] At no time did the prosecutor ever attempt to

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[27] *Blake*, 3 A.3d at 1081.
[28] *Id.* at 1083 (quoting *Ray v. State*, 587 A.2d 439, 443 (Del. 1991)). (emphasis in the original).
[29] A 58-61.

ask L.F. any questions about any alleged misconduct of any kind. In this last respect, our case is similar to *Blake*.

After much prodding, the State was able to obtain in-court testimony from L.F. that touched on her out-of-court statement. Defense counsel objected to the introduction of that statement because, while L.F.'s testimony may have "touched on the statement," it did not "touch on the event." The trial court erroneously concluded that L.F. did touch on the event when she testified about a man and woman on the bus and that she spoke to the CAC interviewer about "bad touches."[30]

Here, as it did below, the State erroneously points to *Wilkinson v. State*.[31] In that case, this Court found the claimant "touched on the events" when "[s]he stated 'I don't want to' in response to a question about whether she would tell what happened with [defendant]." Unlike our case, the State in *Wilkinson* at least tried to question the claimant about the event. Here, the State made no attempt to question L.F. about the purported bad touches. Ours is not a dispute over whether the witness simply failed to provide sufficient details of the event as the State suggests. Ours is a case where the prosecutor chose to make no effort at trial to ask L.F. about the events.

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[30] A73.
[31] 2009 WL 2917800*5 (Del. 2009).

The trial court's reliance on *Johnson v. State*,[32] as well as the State's reliance on several other similar cases that support the conclusion that nothing in the Statute or its intent prohibits the admission of a statement on the basis of limited courtroom recall is misplaced. There was no demonstration that L.F. had limited recall of the event or that she refused to answer questions about the event. [33] She was simply not questioned about the event. Surely, 3507 was not designed to allow the State to escape its responsibility of trying to obtain testimony so that the defense can confront the witness.

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[32] 338 A.2d 124, 126 (Del. 1975).

[33] *Berry v. State*, 2013 WL 1352424, at *3 (Del. Apr. 3, 2013) (finding out-of-court statement admissible after witness claimed, upon questioning in court by the State, that he had no memory of the events); *Turner v. State*, 5 A.3d 612, 615-17 (Del. 2010) (finding, where witness, upon questioning by the State in court, did recall some but not all of the relevant events, out-of-court statement admissible; also, denial of making out-of-court statement did not prohibit admissibility as statute targeted at turncoat witnesses); *Washington v. State*, 62 A.3d 1224 (Del. 2013) (finding out-of-court statement admissible, where witness testified in court to the event and the statement without significant detail upon direct questioning by the State); *Feleke v. State*, 620 A.2d 222, 227 (Del. 1993) (finding witness "touched on the event" when witness testified, upon questioning by the State, that defendant "did something bad to her that involved touching"); *Woodlin v. State*, 3 A.3d 1084, 1089 (Del. 2010) (finding witness "touched on the event" when she testified, upon questioning by the State, that defendant did "something wrong" to her, and that "it's nasty"); *Collins v. State*, 56 A.3d 1012, 1019 (Del. 2012) (allowing admission of out-of-court statement even when witness denies making it is consistent with the purpose of § 3507 to allow the admission of such statements by turncoat witnesses); *Johnson v. State*, 338 A.2d 124, 126 (Del. 1975) (finding, where witness, upon questioning by the State in court, did recall some but not all of the relevant events, out-of-court statement admissible).

As to the State's improper suggestion that this Court should ignore its own precedent based solely on the nature of the charges brought against the defendant, the State appears to forget that it "represents all the people, including the defendant" and must "seek justice, not merely convictions."[34] Further, this Court recognizes, as the State should, that

> a sexual abuse charge by itself imposes a stigma on the accused and conviction provides a serious penalty. In interpreting our rules of evidence, we must be aware not only of the needs of society in general but also the defendant's right to a fair trial.[35]

The out-of-court statement provided the only evidence against McCrary with respect to the charges related to L.F. The State relied exclusively on that statement to obtain a conviction on one of those charges.[36] Thus, the trial court abused its discretion when it permitted the State to introduce the statement and this Court must now reverse McCrary's conviction on Count 6.[37]

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[34] *Hunter v. State*, 815 A.2d 730, 735 (Del. 2002) (internal citations and quotation marks omitted).
[35] *Wheat v. State*, 527 A.2d 269, 275 (Del. 1987).
[36] A 92.
[37] See *Blake*, 3 A.3d at 1083 (holding erroneous admission of statements under § 3507 without proper foundation required reversal where there was no physical evidence linking defendant to offenses).

CONCLUSION

For the reasons and upon the authorities cited herein, McCrary's convictions must be reversed.

Respectfully submitted,

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