EFiled: Feb 18 2022 03:48PM EST
Filing ID 67329359
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 OPENING BRIEF

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DATED: February 18, 2022

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NATURE AND STAGE OF THE PROCEEDINGS

Timothy McCrary, ("McCrary"), was charged by indictment with 8 offenses involving sexual misconduct with 4 alleged victims, (J.Y., L.F., M.G., A.L.).[1] Each complainant gave an out-of-court testimonial statement to the Child Advocacy Center. J.Y. also gave a recorded testimonial statement to her father. McCrary had a 6-day bench trial. Over defense objections, the State introduced J.Y.'s two statements via 11 Del. C. §3513[2] and L.F.'s statement via 11 Del. C. §3507.[3] There was no physical evidence or in-court testimony supporting the allegations in those statements.

In the end, the judge found McCrary guilty as to one count each of Unlawful Sexual Contact First Degree with respect to J.Y. and L.F.; guilty of both counts of Unlawful Sexual Contact First Degree related to A.L. ; and not guilty as to both counts related to M.G.

The judge sentenced McCrary to 20 mandatory years in prison followed by varying levels of probation.[4] This is his Opening Brief in support of a timely-filed appeal.

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[1]A14. Consistent with Del. Sup. Ct. R. 7 (d), Appellant refers to the complainants by the initials assigned to them by the State in the indictment.
[2] See September 7, 2021 Oral Decisions admitting J.Y.'s two out-of-court statements pursuant to §3513, attached as Ex. A and Ex. B.
[3]See September 9, 2021 Oral Decision admitting L.F.'s out-of-court statement pursuant to §3507, attached as Ex. C.
[4] See November 22, 2021 Sentence Order, attached as Ex. D.

SUMMARY OF THE ARGUMENT

1. 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 statement under 11 Del.C. § 3513. *Crawford v. Washington* holds that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." Thus, §3513 is facially unconstitutional as it allows the judge to admit hearsay from children who are unavailable based on the judge's own subjective finding of reliability. Even if this Court does not find §3513 facially unconstitutional, it must find that application of that statute in our case violated McCrary's right to confrontation. Thus, admission of J.Y.'s statements requires McCrary's conviction on Counts 1 to be reversed.

2. The trial court abused its discretion when it allowed the State to introduce L.F.'s out-of-court CAC statement pursuant to 11 Del.C. § 3507. Among other things, for admission under § 3507 the declarant must testify on direct as to both the events perceived or heard and the out-of-court statement itself. Here, the State failed to elicit any testimony from L.F. about the events she allegedly perceived.

3. The prejudicial effect of the several errors in this case deprived McCrary of a fair trial.

STATEMENT OF FACTS

J.Y.'s mother, Sarah, claimed that on the evening of May 16, 2019, J.Y. told her that McCrary had touched her vagina while she was at pre-school. J.Y. attended pre-school at the Head Start School in Harrington, Delaware where McCrary was a certified aide who assisted teachers and the bus driver in supervising students.[5] Sarah told the judge that once J.Y. told her about the purported touching, she ran her daughter over to her own mother's house which is connected to theirs. Sarah then had J.Y. tell her aunt (Sarah's sister) what she had just disclosed.[6]

Sarah then called J.Y.'s father who was gambling at a casino.[7] He came to the house and questioned J.Y. Significantly, he made it a point to record the interview. After the recorded interview, the parents took J.Y. to Milford Hospital for a physical examination.[8] That is where they first met with police.[9] The results of the exam revealed no signs of injury or penetration.[10]

On May 23, 2019, J.Y. was interviewed by Courtney Sheats, a forensic interviewer at the Children's Advocacy Center, ("CAC").[11] During the

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[5]A19, 21.
[6]A19.
[7]A27.
[8]A20-21.
[9]A20.
[10]A20, 43-44.
[11]A34.

interview, J.Y. claimed that, on multiple occasions, McCrary touched and rubbed lotion on her vagina during naptime.[12] Despite having already received a clean bill of health after one physical exam, J.Y. was referred to Nemours Children's Hospital by CAC for another exam that revealed nothing out of the ordinary.[13] J.Y.'s mom testified that she later joined a law suit seeking a monetary award from the school based on J.Y.'s allegations.[14]

As part of his investigation, Major Shyers of the Harrington Police Department obtained surveillance footage from the school. He found nothing supporting J.Y.'s allegations.[15] However, Shyers pointed to footage from May 20, 2019 during classroom #2's naptime as a basis to charge McCrary for offenses committed against A.L.[16] According to Shyers, the video shows McCrary sitting on the floor next to a 4-year-old white female, A.L., who had a blanket on her. A.L. was clothed and was either asleep or trying to sleep.[17] McCrary and A.L. were surrounded by other children were going to sleep. Shyers claimed the video shows McCrary with his hand under the blanket.

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[12] J.Y.'s CAC Statement, Court Ex.2.
[13] A39-42.
[14] A21.
[15] A50-51.
[16] A47-53.
[17] A47-83.

Purportedly, there are times when his hand is moving around and times when his hand is still.

Due to concerns sparked by the surveillance footage, police sought to have A.L. interviewed by the CAC. On June 21, 2019, after persuading her reluctant parents to bring A.L. to the CAC, police told them about the video and said that A.L. was a "victim."[18] During the CAC interview, A.L. did not disclose any misconduct. While she was able to identify herself and McCrary in a photograph shown to her by the interviewer, she denied that McCrary touched her vagina. A.L. said that he patted kids on their back to help them fall asleep, but the kids had their clothes on, and he did not pat any other part of their bodies.[19]

On June 24, 2019, police issued a press release announcing McCrary's arrest and the offenses for which he was charged. As part of the announcement, police solicited parents to contact them if they had kids who attended the preschool whom they felt may have been victimized by McCrary. The State's next two complainants surfaced after this solicitation.

L.F. came forward after her mother learned of the advertisement from friends, acquaintances, and employees at the school.[20] She contacted Major

[18] A 54-56.
[19] A.L.'s CAC Statement, Court Ex. 3.
[20] A78-83.

Shyer. She then took L. F. for a medical examination which revealed no signs of trauma.[21] L.F. was interviewed at the CAC on July 10, 2019.[22] During the interview, L.F. claimed McCrary had touched her butt and vagina during nap time.[23] She was also less than clear about possible misconduct on the bus. Her mother testified that she had joined a lawsuit against the school seeking a monetary award based on these claims.[24]

M.G.'s mother similarly contacted police after news of McCrary's charges.[25] M.G. marched into her CAC interview on July 16, 2019 and asked what she was "supposed to tell" the interviewer. Then within about 30 seconds, the 5-year-old said that Mr. Tim had rubbed up the side of her leg, and down her "hiney" and lifted her pants and underwear.[26] She claimed this all happened on the bus. M.G.'s mother also joined the lawsuit against the school seeking a monetary award. [27]

Almost two months after A.L. told the CAC that McCrary did not do anything inappropriate, her mother spoke to Shyers and claimed that minutes after the interview, A.L. told her and her husband that McCrary did touch her

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[21] A84-85.
[22] A67.
[23] L.F.'s CAC Statement, (Transcript, Court Ex. 4); (DVD, Court Ex. 5).
[24]A81, 84-86.
[25]A86, 88.
[26] A90-91, 93-95.
[27] A87, 89.

vagina. She advised that her daughter told her that he went underneath her blanket and under her clothing to touch her, but not underneath her panties.[28] She also noted that, at some later point, A.L. randomly mentioned the "incident" again to her while in the shower.

[28]A57.

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.

Question Presented

Whether 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.[29]

Standard and Scope of Review

Generally, a violation of a defendant's right to confrontation is reviewed *de novo*.[30] "Under the plain error standard of review, the defect complained of must be so 'prejudicial to substantial rights' that it 'jeopardize[s] the fairness and integrity of the trial process.' Claims of error implicating constitutional rights of a defendant are reviewable notwithstanding their nonassertion at trial."[31]

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[29] A 29-30, 34-36.

[30] *Williamson v. State*, 707 A.2d 350, 354 (Del. 1998).

[31] *Winters v. State*, 858 A.2d 961 (Del. 2004) (quoting *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982) and *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)). *See United States v. Logan,* 419 F.3d 172, 177 (2d Cir.2005) (reviewing trial court's decision for plain error where defendant objected to admission of testimonial statements on hearsay grounds but did not raise a Sixth Amendment objection at trial); *United States v. Holmes,* 406 F.3d 337, 347 (5th Cir. 2005) (reviewing defendant's Confrontation Clause claim

Argument

In a pure credibility case, where there was no physical evidence or in-court testimony to support the allegations of misconduct, the judge violated McCrary's right to confrontation when, pursuant to 11 Del.C. §3513, (i.e., Delaware's "tender years" statute), he admitted into evidence J.Y.'s two out-of-court testimonial statements. Those statements went directly to the central issue at trial; the State relied on them; and McCrary testified, under oath, denying the allegations contained in them. Yet, due to the judge's decision, McCrary was unable to confront J.Y. on those statements.

Crawford v. Washington holds that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." Thus, §3513 is facially unconstitutional as it allows the judge to admit hearsay from children who are unavailable based on the judge's own subjective finding that the statement "possesses particularized guarantees of trustworthiness." As *Crawford* clarified, with respect to testimonial statements, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Even if this Court does not find §3513 facially unconstitutional, it must find that

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for plain error where defendant did not object to admission of co-conspirator's deposition testimony at trial).

application of that statute in our case violated McCrary's right to confrontation. Therefore, the introduction of either one or both of J.Y.'s testimonial statements requires McCrary's conviction on Counts 1 to be reversed.

J.Y.'s Out of Court Statements

Before trial, J.Y. made two recorded out-of-court statements: one to her father on May 16, 2019[32] and one to Courtney Sheats, the forensic interviewer at the CAC on May 23, 2019.[33] In each of these statements, she alleged that McCrary touched and rubbed her vagina area with lotion during nap time. She described her vagina as including her buttocks area.[34]

J.Y.'s Testimony

At trial, J.Y. testified that she did not remember where she attended pre-school nor any teacher at that school named "Mr. Tim." Consequently, she did not recall talking to either of her parents about anything a "Mr. Tim" may have done.[35] When the prosecutor reminded her that she had "watched a little bit on video in [the prosecutor's] office last week[,]"[36] J.Y.'s failed memory

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[32]A27-28.
[33]A34.
[34]J.Y.'s Statement to her father, Court Ex. 1; J.Y.'s Statement to CAC, Court Ex. 2.
[35]A22-23.
[36]A22-23.

was rehabilitated only to the point of remembering that she spoke to "Ms. Courtney" at the CAC.[37] However, she still could not remember what they talked about. In fact, when asked, she responded that she did not remember ever talking to anyone about good or bad "touches."[38] Due to J.Y.'s total lack of memory as to both the alleged events that formed the basis of her claims and her out-of-court statements, the State sought to introduce each of her statements pursuant to 11 Del.C. §3513.[39]

The Trial Court's Decision

Section 3513 applies to out-of-court statements made by "a child under 11 years of age ... concerning an act that is a material element of the offense[s] related to sexual abuse[or other delineated offenses or acts] that is not otherwise admissible in evidence." When statements are sought to be introduced under § 3513, the trial court is required "to make certain determinations concerning the child's ability to function as a witness."[40] These admissibility determinations are: whether the child is "unavailable;" and whether the statement(s) "possess particularized guarantees of trustworthiness."[41]

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[37]A22-23.
[38]A24.
[39]A23.
[40]*Thomas v. State*, 725 A.2d 424, 427 (Del. 1999).
[41] § 3513 (b) (2) (a) & (b).

Section 3513 (b) (2) (a) sets forth eight grounds upon which the judge may find a child "unavailable." If the trial court finds the declarant "unavailable," it moves on to consider whether the statement to be admitted possesses particularized guarantees of trustworthiness pursuant to § 3513 (b) (2) (b). In making this "reliability" determination, the trial court "may consider," but is not limited to considering, the 13 factors in § 3513 (e).[42]

Here, defense counsel agreed with the State that, based on her testimony, J.Y. was "unavailable" as defined by § 3513 (b) (2) (a) (3).[43] As a result, the trial court deemed J.Y. unavailable based on her "total failure of memory with regard to the incident; and also the contents of any such

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[42] These factors are: (1) The child's personal knowledge of the event; (2) The age and maturity of the child; (3) Certainty that the statement was made, including the credibility of the person testifying about the statement; (4) Any apparent motive the child may have to falsify or distort the event, including bias, corruption or coercion; (5) The timing of the child's statement; (6) Whether more than 1 person heard the statement; (7) Whether the child was suffering pain or distress when making the statement; (8) The nature and duration of any alleged abuse; (9) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience; (10) Whether the statement has a "ring of verity," has internal consistency or coherence and uses terminology appropriate to the child's age; (11) Whether the statement is spontaneous or directly responsive to questions; (12) Whether the statement is suggestive due to improperly leading questions; (13) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

[43] A24.

statement made about the incident as is required by Section 3513."[44] The trial court was next required to make a decision with regard to the reliability of each of J.Y.'s statements. [45]

The State presented J.Y.'s father to lay the foundation for the introduction of her recorded statement made in response to his questioning. Following his testimony, the judge listened to the recorded interview. Thereafter, defense counsel objected to its admissibility due to its lack of particularized guarantees of trustworthiness.[46] However, the judge ruled J.Y.'s statement was reliable and, pursuant to § 3513, admitted the statement as substantive evidence at trial.[47]

The State next called Courtney Sheats, the forensic interviewer, to lay the foundation for introducing J.Y.'s statement to the CAC. As with J.Y.'s other statement, the judge watched the video-recorded statement,[48] defense counsel objected to its admissibility due to its lack of particularized guarantees of trustworthiness[49] and the judge admitted the statement as substantive evidence after finding it reliable pursuant to § 3513.[50]

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[44]A24.
[45]A25.
[46]A29.
[47]A26-31.
[48]A26-28.
[49]A36.
[50]A36-37.

11 Del.C. § 3513 Is Unconstitutional On Its Face

In *McGriff v. State*, this Court held that "[b]ecause 11 Del.C. § 3513 mandates a finding that the out-of-court statements 'possess particularized guarantees of trustworthiness' before such statements may be admitted at trial, […] § 3513 is facially valid under the standards for admissibility pursuant to both the State and Federal Confrontation Clauses."[51] That holding was based on the following standard, articulated in *Ohio v. Roberts* which controlled at the time *McGriff* was decided:[52]

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. ***In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness***.[53]

In 2004, *Crawford v. Washington* upended the *Roberts* rationale[54] when it announced that "[a]dmitting statements deemed reliable by a judge is

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[51] *McGriff v. State*, 781 A.2d 534, 539 (Del. 2001) (citing *Thomas,* 725 A.2d at 426 ("[T]he statute's requirement of a judicial determination of particularized guarantees of trustworthiness renders it not violative of the Confrontation Clause of the United States Constitution or the Delaware Constitution.").

[52] 448 U.S. 56 (1980).

[53] *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004) (emphasis added).

[54] *Crawford*, 541 U.S. 36 (2004).

fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee."[55] In cementing the end of *Roberts*, *Crawford* stated "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[56]

The *Roberts* "reliability test," which, according to *McGriff*, rendered §3513 constitutional, was found in *Crawford* to be "amorphous, if not entirely subjective" and "fundamentally at odds with the right of confrontation."[57] The subjective nature of *Roberts* led to unpredictable results and, as applied to testimonial statements, to the admission of the precise statements the Confrontation Clause is designed to exclude.

The unpredictability of *Roberts*' flows from one judge's ability to place weight on a specific factor opposing the weight which another judge might place. For example, one judge may find a statement made during a structured interview is more reliable than a spontaneous statement made to a parent while another judge might believe just the opposite.

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[55] *Crawford*, 541 at 61.
[56] *Id.* at 69.
[57] *Id.* at 63.

The admission of "untested testimonial statements" designed to be excluded by the Confrontation Clause flows from the judge's allowance to place weight on a finding of "reliability in the very factors that *make* the statements testimonial."[58] For example, a judge may find a statement more reliable if it has been made to a trained forensic investigator in a formal setting. Yet, the manner in which that statement was given reveals its testimonial nature. "That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands."[59] It is this "demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude" that *Crawford* characterized as *Roberts*' "unpardonable vice."[60]

Delaware's tender years statute conflicts with the principles of *Crawford* in that the statute erroneously allows the court to admit hearsay from children who are unavailable after the judge makes a subjective finding that the statement "possesses particularized guarantees of trustworthiness."

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[58] *Crawford*, 541 U.S. at 65.
[59] *Id.* at 65.
[60] *Id.* at 63.

Section 3513 is inherently flawed because, like *Roberts*, its reliability test is "amorphous, if not entirely subjective" and "fundamentally at odds with the right of confrontation." Because there is no check on what factors a judge can consider, there is no control over whether two different judges can assign opposite weight to the same factors that are found to exist. And, there is no way to prevent judges from relying on a statement's testimonial nature in finding it reliable.

Less than a month ago, in *Hemphill v. New York*,[61] the United States Supreme Court, repeated the *Crawford* principle that the "Confrontation Clause requires that reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court" at the admissibility stage. There can be no doubt that the law of the land, as articulated in *Crawford* and *Hemphill* is that when a witness is "unavailable" the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[62] Thus, predicating the admissibility of a child's out-of-court statement on a judicial determination that the statement bears

[61] 142 S.Ct. 681, 692 (2022) ("the Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court").
[62] *Crawford*, 541 U.S. at 62-63.

"particularized guarantees of trustworthiness" defies the defendant's right to confrontation.[63] Therefore, this Court must overturn *McGriff*, strike § 3513 as unconstitutional and, because both of J.Y.'s statements were admitted pursuant to § 3513, vacate McCrary's conviction on Count 1.

11 Del.C. § 3513 Is Unconstitutional
As Applied To The Admission Of Each Of J.Y.'s Statements

In our case, the judge followed the procedure set forth in §3513 when he admitted two out-of-court testimonial statements of an unavailable witness and denied McCrary the opportunity to cross examine that witness. Therefore, if this Court finds that §3513 is not unconstitutional on its face, it must find that its application in our case violated McCrary's right to confrontation.

J.Y.'s statement to the CAC.

The judge violated McCrary's right to confrontation when he admitted J.Y.'s testimonial CAC statement into evidence after making his own subjective reliability findings. When he made his decision, the judge stated that he "weighed and considered all 13 factors [in the statute] and the overall

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[63] *T.P. v. State*, 911 So. 2d 1117, 1123 (Ala. Crim. App. 2004). See *Pantano v. Nevada*, 138 P.3d 477 (Nev. 2006) (finding that, "if a testimonial hearsay statement is admitted under Nevada's Tender Years Statute, …, it will violate the Confrontation Clause when the child is unavailable and there has not been an opportunity to cross-examine); *Kansas v. Noah*, 162 P.3d 799 (Kan. 2007) (finding that the limited cross examination of the child in the preliminary hearing was not sufficient to meet *Crawford* requirements of a full opportunity to cross-examine the declarant in admission of testimonial hearsay).

circumstances involved in the interview."[64] He specifically found the following factors in §3513 (e) supported reliability: personal knowledge of the event; certainty that the statement was made; no apparent motive to have falsified or distorted events; no identified bias, corruption or coercion; the timing of the statement; more than one person heard the statement; she was suffering no pain or duress when she made the statement; her age made it less likely that she fabricated the statement; and the mode of questioning.[65]

The judge's decision reflects *Crawford*'s concern regarding unpredictability with respect to giving weight to opposing factors. Defense counsel's reliability argument provides a vivid example with respect to this issue. He argued that J.Y.'s repetition of her claims to multiple people (e.g., her mom, her aunt and her dad), prior to making her CAC statement cut against the trustworthiness of her statement.[66] He also said this lack of trustworthiness was underscored by her total lack of memory at trial. The judge disagreed and concluded that "for purposes of the trustworthiness evaluation, this cuts in favor of admissibility."[67] A pre-*Crawford* case in Utah noted that the state's then-existing hearsay exception for statements of child

[64] A36.
[65] A 36
[66] A 36
[67] A36.

victims required the court to assess the "number of times the statement was repeated or rehearsed" for purposes of determining reliability.[68] So, under a *Roberts*-like analysis, one judge can find that repetition cuts in favor of reliability while a good number of others would place opposing weight on that same factor.

The judge also considered the testimony of the CAC interviewer "with regard to her mode of questioning."[69] In addressing the "mode of questioning" he stated,

> The questions were not – the Court finds them not to be leading, generally open-ended questions. Certainly, the Court is aware of the questioning technique where it's a very open-ended question, and then to keep the question moving it's a reiteration of what the answer was before, but that doesn't make the questions improper or leading.[70]

Prior to the judge viewing the interview, Sheats testified as to her qualifications, training and experience. She had conducted about 750 interviews and was trained in very specific interviewing techniques.[71] One particular protocol in which she was trained is the Cornerhouse Forensic Interview Protocol.[72] That protocol requires the interviewer to "elicit[] details

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[68] *State v. Nelson*, 725 P.2d 1353, 1355 (Utah 1986).
[69] A 36.
[70] A 37
[71] A 32-33
[72] A 33.

of abuse to 'understand the multifaceted perspectives of law enforcement, child protection, and prosecuting attorneys[.]'"[73] It also "requires interviewers to gather facts that can be corroborated" and "suggests that interviewers 'elicit information from the child, which in turn could be used for corroboration by investigators.'"[74] Sheats testified that she questioned J.Y. according to the principles she was taught.[75]

Sheats explained that J.Y.'s forensic interview was scheduled by law enforcement and the Division of Family Services and is "a structured conversation with a child to gain experience from the child when there's an allegation of abuse or a suspicion of abuse."[76] She consulted with the lead investigator just before the interview which was observed by members of law enforcement and the Department of Justice. Following the interview, Sheats again met with law enforcement. This time, she handed over the interview and any drawings/diagrams from the interview.[77]

It is clear from Sheats' testimony that the mode of questioning and circumstances surrounding the CAC interview rendered J.Y.'s statement

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[73] "The Cornerhouse Forensic Interview Protocol: RATAC," 12 T.M. Cooley J. Pract. & Clinical L. 193, 299 (2010).
[74] *Id.* at 306–07.
[75] A 34.
[76] A 32.
[77] A 33-34, 37-38.

"testimonial in nature" and, thus, the judge's admission of that statement reflects the "unpardonable vice" described in *Crawford*. The judge admitted an untested testimonial statement based on a finding of reliability after considering the very factors that *made* the statement testimonial.[78]

Accordingly, the admission of the CAC statement based on the application of the § 3513 reliability assessment violated McCrary's right to confrontation. Pursuant to *Crawford*, none of the factors which the court relied upon were a substitute for confrontation.

J.Y.'s statement to her father.

The judge also violated McCrary's right to confrontation when he admitted J.Y.'s recorded testimonial statement made in response to her father's questioning. The circumstances surrounding this statement "objectively indicate" that there was not an "ongoing emergency" at the time

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[78] The majority of courts that have considered the issue have found statements made to CAC to be testimonial. See, e.g., *State v. Blue*, 717 N.W.2d 558, 567 (N.D. (2006)(finding statement of 4 year old to CAC interviewer testimonial); *N.W. v. State*, 454 S.W.3d 271, 278 (Ark.App. 2015) (finding statement given for purposes of collecting information for law enforcement was testimonial); *Vega v. State*, 236 P.3d 632, 636 (Nev. 2010) (statements by child at CAC were testimonial); *In re Rolandis G*. 902 N.E.2d 600, 611-12 (Ill. 2008) (error to admit child's statement to children's center); *State v. Hooper*, 176 P.3d 911, 917 (Idaho 2007) (error to admit videotaped statements by six-year-old to forensic examiner as they were testimonial); *United States v. Bordeaux,* 400 F.3d 548, 555–56 (8th Cir.2005) (finding statements to forensic interviewer during video-recorded interview by child in sexual abuse case were testimonial).

it was made and that the "primary purpose" of the questioning was "to establish or prove past events potentially relevant to later criminal prosecution."[79] J.Y.'s statement was not spontaneous, it was the result of an interview orchestrated and recorded by the father.[80]

When J.Y. was interviewed by her father, she was not in any immediate danger. 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.

When her father arrived, he questioned J.Y. and decided to record the interview. The recorded nature of the statement "add[ed] an element of formality and greatly increase[d] the[statement's] usefulness to the

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[79] *Davis v. Washington*, 547 U.S. 813, 822 (2006). See *Crawford*, 541 U.S. at 51-52.

[80] Cases where courts found statements to parents and caretakers non-testimonial generally involve scenerios where a parent did not specifically question a child for the purpose of obtaining evidence for use in court. *See, e.g., Bishop v. State,* 982 So.2d 371, 375 (2008) (citing spontaneousness of the child's statement to her mother as one factor pointing to its non-testimonial nature); *Seely v. State*, 282 S.W.3d 778, 788 (2008) (holding child's statements to her mother were not testimonial because they were made for the purpose of seeking relief from pain not for reporting perpetrator's actions); *State v. Ladner,* 644 S.E.2d 684, 689–90 (2007) (holding child's statement to her caretaker about blood in her diaper was not testimonial where the questions and response were "not designed to implicate the criminal assailant, but to ascertain the nature of the child's injury").

prosecution."[81] This, alone, "should be taken as a strong indication of [the] testimonial purpose"[82] of the statement. The questioning was designed to elicit a statement inculpating McCrary and it was provided to law enforcement.[83] And, no other purpose was placed on the record.

As with the judge's decision on admissibility of the CAC statement, the decision with respect to J.Y.'s statement to her father was the result of the judge's own subjective determination of reliability made pursuant to § 3513 and contrary to the dictates of *Crawford*. The judge stated that he was not limited to the 13 factors in the statute, noting that "they are helpful factors in making a decision with regard to admissibility." [84] He then found "some of the factors" in the statute led him to conclude the statement was trustworthy.[85] A few of the factors the judge pointed to include: the certainty that the statement was made because it was recorded; J.Y.'s apparent lack of motive "to falsify or distort the event, including bias, corruption or coercion;" that the statement was made shortly after the alleged events; and that the statement

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[81]Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them"*, 82 Ind. L.J. 917, 974–75 (2007).
[82] Mosteller, 82 Ind. L.J. at 974–75.
[83]*Crawford*, 541 at 53 n.4 (noting there are "various" definitions of interrogations).
[84] A 30.
[85] A 30.

was made to more than one person. He did note that cutting against reliability was the fact that she was reluctant to answer questions.[86]

The judge's citation to other listed factors in his assessment of reliability is illustrative of *Crawford*'s concerns regarding subjectivity. For example, the judge found there were leading questions. However, he balanced that with his own factor from outside the list that J.Y.'s will was not overborne by her father.[87] He also recognized how, from his subjective view, the "age" factor can cut different ways: she was less likely to fabricate the statement but more likely to have a poor memory. Further, he noted the existence of the factor that J.Y. appeared to be under distress. Yet, somehow, that she did not also appear to be suffering pain seemed to mitigate that for him. Further, he failed to consider in his assessment the fact that the parents had filed a law suit based on these alleged events seeking money damages.[88]

Pursuant to *Crawford*, the application to J.Y.'s testimonial statement of this *Roberts* test as built in to §3513 is unconstitutional.

Admission of J.Y.'s Statements Pursuant To §3513 Requires Reversal

It is undisputed that McCrary did not have an opportunity to cross-examine J.Y. during either recorded out-of-court testimonial statement. And,

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[86] A30.
[87] A30.
[88] A21.

J.Y. was unavailable at trial. This was a pure credibility case, where there was no physical evidence or in-court testimony to support the allegations of misconduct. The out-of-court statements went directly to the central issue at trial; the State relied exclusively on them to prove its case on Counts 1; and McCrary testified, under oath, denying the allegations contained in the statements. As the judge revealed when he announced his verdict, he found McCrary guilty on Counts 1 and 2 based on J.Y.'s out-of-court statements.[89]

Accordingly, admission of both or either one of J.Y.'s out-of-court statements "was plainly erroneous"[90] requiring McCrary's conviction on Counts 1 be reversed.[91]

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[89]A101-102.

[90] *State v. Pitt*, 147 P.3d 940, 945 (2006) (reversing on plain error where State's evidence derived from statements of multiple girls, whose credibility was linchpin of the case). *People v. Sharp*, 155 P.3d 577, 581–82 (Colo. App. 2006).

[91]See *Blake v. State*, 3 A.3d 1077, 1083 (Del. 2010) (holding erroneous admission of statements under §3507 without proper foundation required reversal where the State offered no physical evidence linking the defendant to the charged offenses).

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.

Question Presented

Whether the admission of L.F.'s hearsay statement under 11 Del.C. § 3507 amounted to an abuse of discretion when the prosecutor never attempted to elicit testimony from her about the events she purportedly perceived which formed the basis of her allegations contained in her hearsay statement.[92]

Standard and Scope of Review

This Court "review[s] a trial judge's ruling on the admissibility of a Section 3507 statement for an abuse of discretion."[93]

Argument

The trial court erroneously permitted the State to introduce L.F.'s out-of-court CAC statement into evidence pursuant to 11 Del.C. § 3507 even though the State did not meet the foundational requirements. "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." [94] Further, the

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[92] A68-72.
[93] *McMullen v. State*, 253 A.3d 107, 113–14 (Del. 2021).
[94] *Keys v. State*, 337 A.2d 18, 20 n.1 (Del. 1975).

witness must testify as to whether or not her statement is true. "Finally, in order to conform to the Sixth Amendment's guarantee of an accused's right to confront witnesses against him, the victim must also be subject to cross-examination on the content of the statement as well as its truthfulness."[95] Here, the State failed to elicit any testimony from L.F. about the events she allegedly perceived.

On direct examination, 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.[96] At no time did the prosecutor ask L.F. any questions about the alleged misconduct itself.

The State sought to introduce L.F.'s CAC statement into evidence under §3507. In her statement, she claimed that McCrary touched her vagina

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[95] *Ray v. State*, 587 A.2d 439, 443 (Del. 1991) (citing *Johnson v. State*, 338 A.2d 124, 127 (Del. 1975)).
[96] A 58-61.

and her butt in a classroom during nap time.[97] She also made indistinct allegations of similar misconduct occurring on the bus. The prosecutor was barely able to elicit some testimony from L.F. regarding the statement. After much prodding L.F. finally acknowledged that she talked to someone, identified for her in a photo by the prosecutor as the CAC interviewer, about bad touches. Defense counsel objected to the introduction on the grounds that L.F.'s testimony did not "touch on the event" as required. 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."[98]

"The admission of out-of-court statements is inextricably linked to the witness' ability to at least 'touch on the events perceived." It has been 46 years since this Court first addressed, in *Keys v. State*, the foundational requirements necessary to admit a declarant's out-of-court statements under §3507. As the *Keys* Court noted, "[§ 3507] was not intended by the General Assembly to dispense with the traditional requirement that the State produce the live

[97] L.F. CAC Statement, (Transcript, Court Ex. 4); (DVD, Court Ex.5).
[98] A73.

testimony."[99] This is because "[§ 3507] becomes meaningless if there is no opportunity to test the truth of the statements offered."[100]

The only testimony by L.F. that went beyond that which was necessary to "touch on the statement" was that McCrary rode the bus and she did not like him. There was no mention of a classroom, naptime, or any misconduct. There was no suggestion in L.F.'s testimony of any possible misconduct in the classroom, on the bus or anywhere.

This is not simply a dispute over whether the witness simply failed to provide sufficient details of the event.[101] There was nothing remotely connected to an actual event. Therefore, admission of the statement in this case without testimony about the underlying event deprived McCrary of the opportunity to have the factfinder assess "contradictions which [are] the consequence of live testimony."[102] It also allowed L.F.'s prior statements to become a substitute for substantive testimony.[103]

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[99] 337 A.2d at 22.
[100] *Ray*, 587 A.2d at 444.
[101] See, e.g., *Woodlin v. State*, 3 A.3d 1084, 1089 (Del. 2010) (finding testimony that defendant did "something wrong" to her, and that "it's nasty" was sufficient for "touching on event"); *Feleke v. State*, 620 A.2d 222, 227 (Del. 1993) (finding defendant "did something bad to her that involved touching" sufficient for "touching on event").
[102] *Keys*, 337 A.2d at 26.
[103] *Id.* at 27.

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 those charges.[104] 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.[105]

[104] A 92.

[105] 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).

III. THE PREJUDICIAL EFFECT OF THE SEVERAL ERRORS IN THIS CASE DEPRIVED McCRARY OF A FAIR TRIAL.

Question Presented

Whether the totality of errors in this case cumulatively deprived McCrary of a fair trial.[106]

Standard and Scope of Review

"[W]here there are several errors in a trial, a reviewing court must also weigh the cumulative impact to determine whether there was plain error from an overall perspective."[107]

Argument

The State's primary sources of evidence in the charges related to J.Y. and L.F. were the out-of-court statements. McCrary testified, under oath, denying all of the allegations in those statements. J.Y. was deemed unavailable because she had a total lack of memory of the underlying events and her statements. L.F. barely recalled making her statement and did not testify to the underlying events. There was no physical evidence presented in support of the charges related to J.Y. or L.F. Here, the Court cannot be confident that the totality of errors did not have a cumulative prejudicial on the trial as a whole. Thus, all of McCrary's convictions be reversed.

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[106] Del. Sup. Ct. Rule 8.
[107] *Michael v. State,* 529 A.2d 752 (Del. 1987).

CONCLUSION

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

Respectfully submitted,

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DATED: February 18, 2022