

Keeping the Balance True: Admitting Child Hearsay in the wake of Crawford v. Washington

Hearsay Evidence: Why bother?

Victim unavailable, uncorroborated confession

Recantation

The original statement is powerful

Reduces importance of child's testimony

In civil cases, hearsay admitted in lieu of child's testimony

Definition of Hearsay:

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c)

Hearsay Exceptions:

Excited Utterance: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FRE 803(2)

Is child abuse a "startling event"?

How much time has lapsed?

With children of tender years, long delays have been allowed by several courts

Does your jurisdiction allow "rekindled excitement"?

Is a nightmare an excited utterance?

How will you show the child was excited?

Present Sense Impression: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." FRE 803(1)

Sibling Accounts

Statements for Medical Diagnosis: “Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” FRE 803(4)

The rule is premised on the belief that we have a selfish motive to be truthful to our doctors.

But you have to know the statement will be used in treatment and the statement must be pertinent to treating you.

State of Mind: “A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) but not including a statement of memory or belief to prove the fact remembered or believed...” FRE 803(4)

Must be a then-existing state of mind (my private parts really hurt vs. my private parts hurt yesterday)

Use state of mind exception to prove a wide variety of relevant emotions (fear, affection, jealousy, anger, hate, prejudice, happiness, etc).

Mom to child: “I don’t believe you.”

Look for corroborating evidence

Catchall Exception: Statutory exception to the hearsay rule (Illinois statute 115-10(b)(2) (statement is reliable and child testifies or is unavailable and there is corroborating evidence)

Idaho v. Wright, 497 U.S. 805 (1990)

A child’s hearsay statement may be admissible under the residual exception if deemed “reliable.”

Reliability is based on the “totality of the circumstances.”

When examining the totality of the circumstances, “the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.”

Factors Indicating Reliability

Videotaped Statements:

Though not required, videotaping “may well enhance the reliability of out of court statements of children regarding sexual abuse.”
Idaho v. Wright, 497 U.S. at 819

“...the videotape is more reliable than other forms of hearsay because the trier of fact could observe for itself how the questions were asked, what the declarant said, and the declarant’s demeanor.” *State v. Rojas*, 524 N.W.2d 659, 663

Emotional Display at time of Statement

Play and gestures during disclosure

Developmentally unusual sexual knowledge

Child appropriate terminology

Idiosyncratic detail (smell, tastes, etc)

Statement against interest

Motive to fabricate

Child disagrees or corrects interviewer

Child will testify

“Spontaneous” statements

What is a Spontaneous Statement?

“(A)ny statements made that are not the result of leading or suggestive questions are spontaneous.” *In the Matter of the Dependency of S.S. David Sampson*

*v. The Department of Social and Health Services
Sampson*, 814 P.2d 204, 210 (Wash. Ct. App. 1991)

Recantation:

If the child has recanted, can the original statement still be “reliable”?

“We believe there are significant indicia of reliability in the present case...we also believe there is a strong need for these statements. The victim was the only one who could identify her abuser. Where she later recanted...it was important for the government to show she had earlier made a consistent series of accusations naming Renville as her abuser.” *U.S. v. Renville*, 779 F.2d 430, 432 (8th Cir. S.D. 1985).

Crawford v. Washington 541 U.S. 36 (2004)

When hearsay statements of an unavailable witness are “testimonial,” the 6th amendment right of confrontation requires the accused be afforded a prior opportunity to cross-examine the witness

As a result, a statement admissible under any hearsay exception is in peril if it’s deemed testimonial

Where Crawford does NOT apply

Civil child protection proceedings

confrontation clause applies only to criminal prosecutions

Cabinet for Health and Family Servs. v. A.G.G., 190 S.W.3d 338 (Ky. 2006); *People v. Maxwell* (In re C.M.), 351 Ill. App. 3d 913 (Ill. App. Ct. 4th Dist. 2004)

Criminal prosecutions in which child testifies

Crawford specifically states “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”

If the prior statement is not testimonial: “...we read *Crawford* to allow the admission of a nontestimonial statement over the

defendant's right of confrontation if the hearsay is inherently reliable" *Miller v. State*, 98 P.3d 738 (Okla. Crim. App. 2004)

Where Crawford DOES apply

Prior hearsay statements that are "testimonial"

Unfortunately, the court chose to "leave for another day any effort to spell out a comprehensive definition of 'testimonial'"

However, the court gave clues ...

Crawford cited 1828 dictionary definition of testimonial being a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."

Crawford: formal statement to government officers, affidavits, depositions, police interrogations

Two Possible Rules from Crawford:

Ex parte in court testimony or its functional equivalent or extrajudicial statements—affidavits, custodial examinations, prior testimony defendant could not cross-examine, depositions, or confessions.

Statements made under circumstances that would lead an objective witness reasonably believe the statement would be available for use at a later trial (541 U.S. at 51)

Crawford Revisited: Davis v. Washington & Hammon v. Indiana

In 2006, the United States Supreme Court released a joint opinion captioned *Davis v. Washington*, 547 U.S. 813 (2006). This case consolidated two cases involving the prosecution of domestic violence, and addressed a defendant's Sixth Amendment right to confront the witnesses who testify against him. In *Davis v. Washington*, the defendant was convicted of a felony violation of a domestic no-contact order filed by his ex-girlfriend. At issue in this case was the admissibility of statements the ex-girlfriend made to a 911 operator as the defendant fled the scene. In *Hammon v. Indiana*, the defendant was convicted of domestic battery and a probation violation. In this case, the issue was whether the statements the victim gave law enforcement were admissible. Neither of the witnesses in these cases testified at trial.

Two DV cases:

Davis v. Washington, 547 U.S. 813 (U.S. 2006): 911 call from victim with D having left

Non-testimonial

Davis v. Washington, 547 U.S. 813 (U.S. 2006): Police respond to report, separate combatants, take oral and written statements

Testimonial

In both cases victims fail to show for court and statements admitted as excited utterances

Court did not provide a comprehensive definition of testimonial statements

“Statements are **nontestimonial** when made in the course of police interrogation under circumstances objectively indicating that the **primary purpose** of the interrogation is to enable police assistance to meet an **ongoing emergency**.”

“They are **testimonial** when...there is no such ongoing emergency, and the **primary purpose**...is to establish or **prove past events** potentially relevant to later criminal prosecution.”

Primary Purpose: In determining the “primary purpose” of the interrogation, do we examine the intent of the investigator/interviewer or the declarant?

“We acknowledge that, even though most of the Supreme Court’s discussion in *Davis* focuses on the primary purpose of the police interrogation, the Supreme Court also stated that ‘in the final analysis’ it is ‘the declarant’s statements, not the interrogator’s questions, that the Confrontation clause requires us to evaluate.’” *Anderson v. State*, 163 P.3d 1000 (Alaska Ct. App. 2007)

Hammon & Davis Comparison

Testimonial:

Interrogation/accusatory
What happened?

Questions regarding past crime

Calm declarant

Police on scene after emergency
ends

Non-Testimonial:

Request for help
What is happening?

Questions to resolve crime on-going
emergency

Frantic declarant

Declarant unprotected and in danger

Hearsay exceptions after Crawford:**Present Sense Impressions**

Dying victim says to police officer “Meeks shot me.”

Court: may have been testimonial but we don’t have to decide
because Defendant forfeited right of confrontation by killing
victim

Excited Utterances

Courts: is it a cry for help and did the recipient of the statement
question the declarant?

People v. Cortes, 2008 N.Y. LEXIS 747 (N.Y. 2008): 911 call
testimonial because adult was reporting crime and 911 operator
asked a number of questions

Hypothetical: child calls 911 “daddy’s hurting mommy. Please
stop him!!”

In *Davis*, U.S. Sup. Ct. found 911 call non-testimonial but said that
when the emergency stops, it may become testimonial

Medical Diagnosis Exception

State v. Vaught, 682 N.W.2d 284 (Neb. 2004) :

Statement of 4 yr old SA victim to treating physician identifying perpetrator not testimonial. The child was taken to the hospital by a family member.

Court: “There was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation of the examination.”

Remember to cite the Hippocratic Oath

Note Tom Harbinson’s law review article (Mercer Law Review 2007)

State of Mind

People v. Beccera, 2004 Cal. App. Unpub. LEXIS 2692 and 3702 (2004) (unpublished): child abuse victim’s statement to mother that her head hurt non-testimonial child because the child could not have reasonably intended the statement to be used later at trial.

Admissibility of Forensic Interviews

Crawford’s Applicability to Firmly Rooted Hearsay Exceptions

More than 5200 appellate opinions (as of 11/10)

Depends on the circumstances: a child blurting out a statement to a parent, teacher or friend is likely making a “casual remark” and is not appreciative the statement can be used at trial

At CAC, interviewer sees some blood and asks 2 year if she has an “owie” & child replies “Dale hurts me here.” Court found this was not testimonial. *People v. Geno*, 683 N.W.2d 687 (Mich. Ct. App. 2004)

Are interviews testimonial?

Not primarily for the purpose of criminal litigation (meets needs of CPS, doctors, etc).

“Child First Doctrine.”

Interview is about preventing false accusations as much as proving guilt

Interview is often only the beginning of an investigation, with final decision to prosecute made later

Not testimonial if it is an emergency (if alleged perpetrators has access to child)

Truth-lie inquiries, asking the child what should happen to perpetrator, etc, may make the statement testimonial. *People v. Vigil*, 2004 Colo. App. LEXIS 1024 (2004)

Young children unlikely to comprehend forensic interview may be used at trial

Even older children may be confused as to purpose of interview

Reasonable Child Standard

Colorado

People v. Vigil, 127 P.3d 916 (Colo. Sup. Ct. 2006)

7 yr old at medical exam

People v. Sharp, 2005 Colo. App. LEXIS 1761 (Colo. App. 2005)

5 yr old at forensic interview

Massachusetts

Commonwealth v. DeOliveira, 2006 Mass. LEXIS 335 (Mass. Sup. Ct. 2006)

6 year old at medical exam

Minnesota

In re A. J. A., 2006 Minn. App. Unpub. LEXIS 988 (Minn. Ct. . LEXIS 988 App. 2006)

5 year old statements to a nurse 5 year old statements to a nurse

North Carolina

State v. Blount, 2005 N.C. App. LEXIS 2606 (N.C. Ct. App. 2005)

3 yr old with DSS counselor

State v. Brigman, 2006 N.C. App. LEXIS 1071 (N.C. Ct. App. 2006)

3 yr old at medical exam

Ohio

State v. Copley, 2006 Ohio 2737 (Ohio Ct. App. 2006)

3 yr old statement to mom

In re D.L.L., 2005 Ohio 2320 (Ohio Ct. App. 2005)

3 yr old at medical exam

Texas

McDonald v. State, 2006 Tex. App. LEXIS 7416 (Tex. App. 2006)

2 yr old statement to a nurse

Lagunas v. State, 187 S.W. 3d 503 (Tex. App. 2005)

4 yr old witness statement to police

But see Rangel v. State, 2006 Tex. App. LEXIS 6655 (Tex. App. 2006)

4 yr old statement to CPS interviewer

Washington

Miller v. Fleming, 2006 U.S. Dist. LEXIS 17284 (W.D. Wash. 2006)

7 yr old at medical exam

State v. Dezee, 2005 Wash. App. LEXIS 104 (Wash. Ct. App. 2005)

9 yr old statements to mother

Military Court of Criminal Appeals

United States v. Coulter, 62 M.J. 520, (N-M.C.C.A. 2005)

2 yr old disclosure to parents

Massachusetts

Commonwealth v. Hutchinson, 2008 WL 4975829 (Mass. App. Ct. Nov. 25, 2008)

Ohio

State v. Barnes, 896 N.E.2d 1033, (Ohio, Com. Pl., Jun 27, 2008)

***State v. Mack*, 337 P.3d 586 (Ore. 2004)**

A social worker interviewed a murder victim's 3 year old brother

Interview was videotaped

Court: social worker was serving as a proxy for the police, taking over after the officer was unable to establish a dialogue

***State v. Bobadilla* 690 N.W.2d 345 (Minn. Ct. App. 2004)**

3 yr. old boy makes disclosure to mom and then to a CornerHouse-trained forensic interviewer that his "booty hurt" after Δ anally penetrated with finger. Interview done by a SW at the police station. Officer was present. Medical evidence was found.

Child found incompetent to testify but forensic interview admitted as reliable

Appellate court reversed conviction based on Crawford but MN S. Ct. reversed

***State v. Bobadilla* 709 N.W.2d 243 (Minn. 2006)**

Statement not testimonial when neither the child nor the child protection worker were acting "to a substantial degree" to produce statements at trial

Court commented on the RATAC protocol: “if part of the purpose of this interview was to produce a statement for use at a future trial, such a purpose was at best incidental to the main purpose: assessing and responding to imminent risks to TB’s health and welfare.”

Court also noted MDT investigation served multiple purposes such as protecting the health & welfare of the child

Finally, court found a 3 year old child could not possibly appreciate his forensic interview could be used for testimonial purposes

U.S. Supreme Court denied cert

***Bobadilla*, 570 F. supp 2d 1098**

Reverses MN Supreme court on grounds it is “clearly established that statements taken by police officers in course of interrogation” are “testimonial.”

The “main purpose” was not in responding to “imminent risks” (interview was five days after the sexual assault and parents were protecting child from perpetrator)

Objective Reasonable Child Standard Rejected

Missouri

State v. Justus, 205 S.W. 3d 872 (2006)

4 year old statements to social worker

Oregon

State v. Pitt, 209 Ore. App. 270 (2006)

4 year old interview at CAC by forensic interviewer

Pennsylvania

In re S.R., 920 A. 2d 1262 (2007)

4 year old statements to a forensic interviewer

More Factors to Consider after Crawford:

Do not discuss court in a forensic interview

Avoid a truth/lie task at a forensic interview

Gather forfeiture evidence

First disclosure/Tender Years statements are generally non-testimonial

Spontaneous statements are non-testimonial

Child freezes on the witness stand

Child has a poor memory on the witness stand

Testimony by closed-circuit television

SANE/SAFE examinations

Forfeiture of Wrongdoing:

Wrongdoing by defendant may forfeit confrontation right on equitable confrontation

Crawford, Davis & Hammon relied on *Reynolds v. U.S.*, 98 U.S. 145, 158-159, 25 L. Ed. 244 (1879) which created the forfeiture by wrongdoing exception

FRE 804(b)(6)

Crawford does not apply if defendant's conduct made the child unavailable

Child dies from abuse

If the child was intimidated by the abusive conduct or a threatening statement such as "don't tell anyone." *New Jersey v. Shepherd* (10 year old girl says step-father told her during abuse he would kill her if she told).

Always investigate the possibility of threats, fear, etc.

Davis/Hammon: preponderance of E, hearsay admissible (*Stechly* case in Illinois agrees)

Forfeiture of Confrontation Right

“One who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” (*Davis & Hammon*)

Killing the witness

Missing witness

Traumatized witness

Threats to witness, family, pets

Telling a child to “not tell”

Having others secure witnesses unavailability

Need not be wrongful

Gifts, money, promises can be procurement

Different rulings on specific intent

804(b)(6) = specific intent

Forfeiture Hearing

Hearsay evidence, including unavailable witness’s out of court statements, are admissible

***Giles v. California*, 128 S. Ct. 2678 (2008)**

Defendant had murdered domestic abuse victim and claimed self defense

State asked to rebut defense by introducing substantively victim’s prior statements to police defendant had threatened to kill her earlier

Defense argued statements not admissible substantively because statements were testimonial and admission violated Confrontation Clause

California Supreme Court held forfeiture by wrongdoing permissible because defendant forfeited his right of confrontation

by murdering the witness and no “intent to silence” had to be shown

Prosecutors should not be quick to concede specific intent

Not traditional specific intent

Intent can be shown inferentially

Pattern of behavior

History of relationship

Child Abuse After *Giles*

Argue for a narrower definition of testimonial and that the out-of-court statements are not testimonial

If the abuser is someone who lives with or cares for the child argue *Giles* governs because the case involves domestic abuse and “abuse related intent” can be inferred by showing the “dynamics of abuse”

Use a motion in limine, attach copies of child abuse literature indicating child abuse has dynamics of abuse similar to domestic abuse cases involving adults

Argue children are even more isolated and vulnerable than adult victims of domestic abuse...

Argue mandated reporting laws were passed because it is widely known that young children cannot report abuse.

See Ben Matthews and Donald C. Bross, *Mandated Reporting is Still a Policy With a Reason: Empirical Evidence and Philosophical Concerns*, 32 *CHILD ABUSE AND NEGLECT*, 511-516 (2008)

Argue adult DV victims have the ability physically to go to police and choose to testify; young children cannot go to the police and are often ruled incompetent and do not get to choose to testify

Argue a defendant who chooses a child who is too young to testify should not be able to complain that he is unable to cross-examine the

child when he chose a child who is too young to physically go report to police and probably will be unable to testify because she will be ruled incompetent or will be too scared to testify.

See, e.g. Thomas Lyon and Raymond LaMagna, A History of Children's Hearsay: From Old Bailey to Post Davis, 82 IND. L. J. 1029, 1058 (2007)

Try to argue dynamics of domestic abuse exist whether crime was committed by a family member or a stranger

What About Civil Child Protection Cases?

South Carolina DSS v. Wilson, 574 S.E. 2d 730 (S.C. 2002)

DSS brings neglect proceeding on behalf of child against divorced parents

Allegation of sexual abuse by father Scott Wilson

At the beginning of the intervention hearing DSS moved to allow 17 year old daughter to testify out of the presence of her father

Family court issued an order finding DSS met its burden of proof for abuse and neglect

“Like criminal matters, an important liberty interest is also at issue in an intervention proceeding. Accordingly, in an intervention proceeding, the child witness’ testimony should be given in the presence of the parent/defendant. However, the Court recognizes that in some circumstances it is necessary to protect sensitive witnesses, especially minors, from the trauma of testifying.” Id. at 6.

“...we conclude that all the procedures established...in criminal matters provide guidance for intervention hearings.... Accordingly, we adopt a procedure by which the family court may permit a child witness to testify outside the presence of the parent/defendant. The family court must first determine the child would be traumatized by testifying in the presence of the parent / defendant...the family court may consider the child’s age, mentality, and any other pertinent information....” Id. at 7.

Is Confrontation Required?

In the Matter of the Child of L.D., Parent, 2005 Minn. App. Lexis 222 (2005) (unpublished opinion)

“Mother also argues, without citing authority, that because parents have a fundamental interest in the custody and companionship of their children, and because the standard of proof is higher in termination proceedings, than other civil cases termination proceedings are quasi-criminal in nature “... and therefore under *Crawford v. Washington* (citations omitted), courts should be vigilant about admitting out-of-court statements that have not been tested by meaningful cross-examination. Termination proceedings are civil proceedings; they are not quasi-criminal.” *Id.* at 17.

Other Cases:

In re Fessler, 2005 Mich. App. LEXIS (2005, unpub.) Child protective proceedings are not criminal and, therefore, *Crawford* does not apply

Most courts agree (NC, Wash, NY, Ill, etc)

Cabinet for Health and Family Serv. v. AGG, 190 S.W.3d 338 (Ky. 2006)

But see *OK* (child protection case), SC

Forensic Interviews

State v. Arroyo, 935 A.2d 975 (Conn. 2007)

State v. Bentley, 739 N.W.2d 296 (Iowa Sept. 2007)

In re Welfare of S.L.G., 2007 WL 2609801 (Minn. 2007)

3 year old at CAC

State v. Sosnoskie, 2009 Ohio App. Lexis 1986

Prior opportunity to cross examine

State v. Nyhammer, 197 N.J. 383 (2009)

Standard of availability

Wright v. State, 2009 WL 424322 (GA., Feb. 23, 2009)

3 year old child statements

In the Matter of S.P., 215 P.3d 3847 (Or. Aug. 13, 2009)

State Contreras, 979 So. 2d 896 (2008)

Police not in room but connected electronically to interview
conducted by CPT Director at domestic violence shelter

Held testimonial

Seely v. State, 373 Ark 141 (2008)., 2008)

3 year old statements to social worker at a hospital

Court held non-testimonial because interviewer was defining the
scope of the medical exam

State v. Arnold, 2010 Ohio Lexis 1398 (June 17, 2010)

Whether statements that contain forensic and diagnostic
information are testimonial

Gathers v. U.S., 977 A.2d 969 (D.C. App. 2009)

Crawford not applied retroactively

Justice Benjamin N. Cardozo *Snyder v Massachusetts*, 291 US 97 (1934)

**“But justice, though due the accused, is due the accuser also. The
concept of fairness must not be strained till it is narrowed to a filament.
We are to keep the balance true.”**

Resources

Tom Harbinson, *Crawford v. Washington and Davis v. Washington’s
Originalism*, 58 Mercer Law Review 569 (2007)

Tom Harbinson, *Using the Forfeiture by Wrongdoing Exception after Giles
v. California*, 1(1) CenterPiece (2008) (available at www.ncptc.org)

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