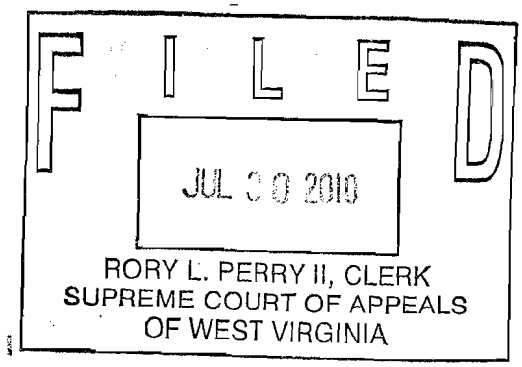
No. 35540

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Appellee,

v.

Tex B. Simmons,
Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

Debra MH McLaughlin
Prosecuting Attorney for Morgan County
77 Fairfax Street, Room 301
Berkeley Springs, WV 25411
304-258-8621
WV Bar ID. 7999

TABLE OF CONTENTS

Page

I. Kind of Proceeding

The matter before the Court pursuant to Tex. B. Simmons' ("Appellant") appeal from his conviction in the Circuit Court of Morgan County on one count of sexual assault in the first degree and one count of sexual abuse by a custodian. On appeal, the appellant is claiming that the court erred in allowing the mother, the forensic nurse and police officer to testify about statements made to them by the four (4) year old victim after the victim was declared unavailable due to lack of memory. The State disagrees.

II. Statement of the Facts

Sharlene K. Simmons is the mother of three children and was married to Tex B. Simmons (Appellant) in April, 2006. Sharlene was an employee of Arby's and occasionally worked nights cleaning apartments with a friend. (Trial Tr. vol.1, 222.) When Sharlene worked nights, Sharlene's three children were left in the care of the Appellant. April 6, 2006, was such a night when Sharlene left work at Arby's and went to work cleaning apartments until 3:00 am. (Trial Tr. vol. 1, 222.) On nights when Sharlene worked late, her daughter, four-year-old A.M., would wait up for her and fall asleep on the couch in the living room. (Trial Tr. vol. 2, 46, Nov. 19, 2008.) When Sharlene returned home on the morning of April 7, 2006, A.M. was asleep on the couch. (Trial Tr. vol. 2, 11.) The next morning, A.M.'s two brothers left for school. (Trial Tr. vol. 2, 13.) At 7:30 am, A.M. approached Sharlene and told her that during the night "Tex put his pee pee in my mouth and peed and kept it there until I swallowed." (Trial Tr. vol. 2, 13.)

Sharlene, unsure of what to do with this information, called her pastor, Tim Butler. (Trial Tr. vol. 2, 16.) Butler contacted Social Services who recommended that Sharlene take the child to a medical facility (Trial Tr. vol. 2, 58), and Sharlene then took A.M. to Winchester Medical Center (Trial Tr. vol. 2, 17). At Winchester Medical Center, Nurse Cynthia Leahy evaluated A.M. for medical purposes, and in doing so, collected possible evidence of potential sexual abuse. (Trial Tr. vol. 2, 68-69.) Leahy is a forensic nurse at Winchester Medical Center and collects information from patients about their past medical history, including information on medications, past surgeries, and any other pertinent health related issues. (Trial Tr. vol. 2, 64.)The SANE exam is equally important to physicians and to law enforcement. (Trial Tr. vol. 2, 64.) Leahy collected samples from A.M.'s mouth using two lip swabs, oral rinse, and floss. (Trial Tr. vol. 2, 69.) The lips swabs, oral rinse, floss, along with a sample of A.M.'s blood were then sealed in an evidence kit. (Trial Tr. vol. 2, 69.) During the examination, A.M. told Leahy that "I was asleep on the couch. Something came out it and went down my throat. It had a yucky taste. I was still asleep while he was doing that. I remember it. I still have a yucky taste from it. I cried this morning because I still had the taste." (Trial Tr. vol. 2, 71; R at 27.)

Officer Tony Link took custody of the evidence kit collected at Winchester Hospital and proceeded to investigate the matter. (Trial Tr. vol. 1, 240.) Officer Link took possession of a black and orange pillow that A.M. had used on the night in question. (Trial Tr. vol. 1, 244.) The pillow and the evidence kit were sent to the West Virginia State Police for forensic testing. (Trial Tr. vol. 1, 244.) Soon after A.M.'s exam at Winchester Hospital, she was interviewed at the CAC by Officer Link and a case worker, Buffy Esquevil. (Trial Tr. vol. 1, 248.) On cross examination, in response to questions posed by counsel for the Defendant, Officer Link said the

interview with the victim was "difficult." (Trial Tr. vol. 1, 250.) However, Officer Link also said A.M. had told him that she had a "yucky taste in her mouth that went down her throat" and that "Tex had put that taste in her mouth." (Trial Tr. vol. 1, 249.)

Officer Link testified at trial that during questioning, the Appellant explained the possibility of there being his semen in A.M.'s mouth because of the mental condition of Sharlene Simmons, and the possibility that he had done "something while he was sleeping." (Trial Tr. vol. 1, 242.) When pressed further, Simmons claimed that Sharlene had one morning begun "playing with it", collected semen from him, and further implied that Sharlene may have given the semen to A.M. to drink. (Trial Tr. vol. 1, 242.) The samples of evidence collected from the lip swab around A.M.'s mouth revealed traces of seminal fluid. (Trial Tr. vol. 2, 82.) Unfortunately, the semen did not have any Y chromosomes, and therefor, DNA testing was inconclusive in identifying the male who deposited the seminal fluid. (Trial Tr. vol. 2, 95.)

The trial was held over two and half years after the incident on November 18-19, 2008. (Trial Tr. vol.1, 280.) A.M., then seven years old, was permitted to testify before the court. (Trial Tr. vol.1, 261-77.) Both the prosecution and defense had an opportunity to examine the witness. (Trial Tr. vol.1, 261-77.) Based on A.M.'s testimony regarding her recollection of Tex Simmons and the time period in which they had lived in Berkeley Springs, the trial court declared that the witness was unavailable due to lack of memory, pursuant to West Virginia Rule of Evidence 804(a)(3). The trial court found that A.M. had displayed a "lack of knowledge as to the statements" made to the mother and nurse. (Trial Tr. vol.1, 283.)

On November 19, 2008, Tex Simmons was found guilty on one count of sexual assault in the first degree under W. Va. Code § 61-8B-3 and one count of sexual assault by a custodian under W. Va. Code § 61-8D-5(a). (Trial Tr. vol. 2, 255.)

III. Assignment of Error

On appeal, the Appellant makes the following assignment of error:

> "The lower Court erred in allowing the testimony of the child to be admitted into evidence through the testimony of the mother, forensic nurse, and police officer after the child said she couldn't remember what happened."

The State responds that the statements to the mother and the nurse are non-testimonial. The statements to the mother and nurse are non-testimonial because of A.M.'s age, A.M. could not reasonably believe that the statements would later be used in a judicial proceeding, and neither the nurse or mother are agents of the state/law enforcment. The statement to the mother was unprompted and not the result of any questioning. The statement to the nurse is non-testimonial as the nurse is not an agent of law enforcement and is admissable because it was made for the purpose of a medical diagnosis.

IV. Standards of Review

"Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of statute, we apply a de novo standard of review". Syl. Pt. 1 *State v. Cecil*, 221 W. Va. 495, 655 S. E.2d 517 (2007) (per curiam).

"For a party to satisfy its burden of showing unavailability within the meaning of West Virginia Rules of Evidence 804(b)(5), so that the extrajudicial statement of an unavailable declarant is exempt from a hearsay objection, we require the proponent of such testimony to show the unavailability of the witness by proving that they made a good faith to secure the declarant as a witness for trial by using substantial diligence in procuring the declarant's attendance (or testimony) by process or other reasonable means." Syl. Pt. 2 *State v. Blankenship*, 198 W.Va. 290, 480 S.E.2d 178 (1996).

" 'The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.'" Syl. Pt. 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds.*

V. Argument

A. THE TESTIMONY OF THE MOTHER AND THE NURSE WERE PROPERLY ADMITTED INTO EVIDENCE BECAUSE THE CHILD WAS AN UNAVAILABLE. WITNESS DUE TO LACK OF MEMORY.

The child, A.M., was ruled to be unavailable due to lack of memory after the Court herd her testimony and allowed counsel for defendant to cross examine the minor. (Trial Tr. vol. 1, 261-72.) According to West Virginia Rules of Evidence 804(a)(3), when a witness lacks the memory of the subject matter of his or her statements then the witness can be ruled to be unavailable. After hearing testimony of A.M., the court ruled that the words she used were those of a child and not those of a witness being coached by her mother. (Trial Tr. vol. 1, 282.) The court found that A.M. "had no memory of events that transpired at the time of the events alleged in this indictment." (Trial Tr. vol. 1, 281.) Because the witness lacked memory of the subject matter of her statement, the trial court properly found that the witness was unavailable.

When a declarant is determined unavailable, W. Va. R. Evid. 804(b)(5) allows statements with "circumstantial guarantee of trustworthiness" to be admissible if:

> "(A) a statement is offered as evidence of a material fact; (B) that statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will be best served by admission of the statement into evidence."

A.M.'s statements to her mother and the nurse are both evidence of material fact and probative because the statements led Sharlene to take her daughter to the hospital and seek treatment for A.M and led the nurse to perform an examination of A.M.

1. **Does the Mother's testimony of her daughter's statement 2 and ½ years ago, contain the "circumstantial guarantee of trustworthiness" required by Rule 804 in light of mother's past brain damage and memory problems.**

The Appellant challenges the admissibility of the mother's testimony as "inherently flawed" because of the mother's past brain damage. (Appellant's Brief, 8.). The Appellant then argues that the trial court should have declared a mistrial on the basis of the mother's bad memory. (Appellant's Br. 8.) However, the mother's memory of the statement made to her by her daughter never changed, despite the 2 and ½ years between trial and the assault. The mother reported A.M.'s statement to the pastor, the nurse, and to the police and testified to her recollection of the statement at trial and was subject to cross examination. The statement reported by the Mother is consistent with the evidence obtained on the lip swab showing the presence of semen on A.M.'s lips only a few hours after the reported sexual assault as well as the assault itself. This type of cooberation between the A.M.'s statement to Mom that "Tex put his pee pee in my mouth and peed and kept it there until I swallowed." and the presence of semen on the lip swab, is exactly what the Rules of Evidence call statements "having equivalent circumstantial guarantees of trustworthiness." Rules of Evidence 804 (b)(5).

2. **Did the State's late disclosure of A.M.'s unavailability as a witness effect the defenses ability to prepare a defense?**

The Appellant argues that the disclosure of A.M.'s unavailability as a witness at trial did not allow the defense enough time to prepare a defense. (Appellant's Br. 8.) However, the defense cross-examined the witness before she was ruled unavailable due to lack of memory. (Trial Tr. vol. 1, 270-77.) According to W. Va. R. Evid. 804(b)(5) as interpreted in *State v. Edward Charles L., Sr.*, 183 W. Va. 641, 656 398 S.E.2d 123, 138 (1990), "adequate notice of

the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence." The child's statements, made to both the Mother and the Nurse were contained in the police report and medical records provided to the defense on January 29, 2007 and May 18, 2007; more than a year before trial. The Appellant, as the trial court notes, had time to prepare for the testimony of the mother and the nurse. (Trial Tr. vol. 1, 202.) Because the Appellant had prepared for the statements of the mother and the nurse, the Appellant had a fair opportunity to meet the evidence and the statements were properly admitted into evidence.

B. CRAWFORD V. WASHINGTON DOES NOT APPLY.

The statements that A.M. made to the mother, Sharlene Simmons, and the nurse, Cynthia Leahy, were properly admitted into evidence because the statements were non-testimonial statements and therefore *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), does not apply.

According to the Confrontation Clause of the Sixth Amendment to the United States Constitution,

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense" (emphasis added).

This allows a person who is accused of a crime, the right to challenge a witness directly in court under cross-examination. In *Crawford*, the wife of the accused made a statement to the police after a stabbing. *Id.* at 38, 124 S. Ct. at 1357. The woman was prevented from testifying because

of state marital privilege and her previous statement to the police was admitted into evidence. *Id.* at 40, *id.* The United States Supreme Court held in *Crawford* that where a statement is testimonial, the testimony is barred unless the *witness is unavailable and the defense has had a prior opportunity to cross examine the witness. Id.* at 54, 124 S. Ct. at 1365 (emphasis added). In contrast, non-testimonial statements are allowed under *Crawford* provided the statement complies with the state's hearsay laws. *Id.* at 68,124 S. Ct. at 1374. The distinction or definition of what is testimonial or not testimonial was left unsettled in *Crawford. Id.*

The Unites States Supreme Court addresses what qualifies as a testimonial statement more clearly in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266 (2006). In *Davis*, the Court consolidated two cases in which the witnesses did not appear at trial. In the first case, *Davis v. Washington*, a 911 call identifying the perpetrator of domestic violence was admitted into evidence and was not considered a testimonial statement. The Court reasoned that there was an ongoing emergency and the 911 call was a non-testimonial statement because the call "described current circumstances requiring police assistance." *Id.* at 827, 126 S. Ct. at 2276. In the second case in *Davis*, *Hammon v. Indiana*, the Court determined that statements given to the police during interrogation at scene of the incident were testimonial. *Id.* at 830, 126 S. Ct. at 2278. In this case the Court reasoned that there was no ongoing emergency and that the responding officers were trying to investigate "what happened", not "what is happening" to determine if a crime took place. *Id.*

Subsequent to *Crawford*, the West Virginia Supreme Court adopted the standard barring testimonial statements of a witness who does not appear at trial "unless the witness is unavailable to testify and the accused had a prior opportunity to cross examine the witness."

State v. Mechling, 219 W. Va. 366, 373, 633 S.E.2d 311, 318 (2006). In other words, The West Virginia Supreme Court's interpretation of the Sixth Amendment of the Unites States Constitution and Section 14 of Article III of the West Virginia Constitution is in line with the *Crawford* decision. *Id.* The West Virginia Supreme Court has noted that "we do not perceive that *Crawford*'s largely unexplored ban on 'testimonial hearsay' that has not been tested by cross-examination extends to statements to non-official and non-investigatorial witnesses, made prior to and apart from any governmental investigation . . . ." *State v. Ferguson*, 216 W. Va. 420, 423, 607 S.E.2d 526, 529 (2004). This Court notes in *Mechling* that the "existence or lack of government interrogation does not necessarily determine whether a statement is testimonial" and that the guidelines are "flexible and inherently fact based." *Mechling*, 219 W. Va. at 376, 633 S.E.2d at 321. *Mechling* does not fully resolve the question of whether the statements to a non-governmental interrogation are testimonial.

Mechling does provide some help in determining a testimonial statement. *Mechling* distills *Crawford* and *Davis* to three guiding points:

> "First, *a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.* Second, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency. And third, a court assessing whether a witness's out-of-court statement is "testimonial" *should focus more upon the witness's statement, and less upon any interrogator's questions.*"

Id. at 376-77, 633 S.E.2d at 321-22 (emphasis added).

For the present case, the first point is most relevant because A.M. cannot reasonably expect that the statements made to the mother and nurse would be used at trial. The second point is not relevant to A.M's statement to the mother or nurse because the statements were not made to a law enforcement officer. The third point is less clear, but emphasize a need for an "inherently fact based" analysis of the statements. After examining the facts of the current case and applying the *Mechling* decision, the circumstances will objectively show the statements to the mother and the nurse were non-testimonial and therefore *Crawford* does not bar the statements from admission into evidence.

A.M.'s statement to Sharlene Simmons and Nurse Cynthia Leahy are non-testimonial statements because of A.M.'s age and because the statements were made under circumstances in which A.M. would not believe the statement would be used in a judicial proceeding. A.M's statements to her mother were not in response to any questions asked by the mother, but was an unsolicited statement to her mom first thing in the morning after the sexual assault. The statement made to Nurse Leahy is also non-testimonial because it was made for the purpose of a medical diagnosis. Because of the declarant's age and because neither statement was made under circumstances in which the 4 year old declarant would expect the statement to be used later in a judicial proceeding, the statements made to the mother and the nurse are non-testimonial.

1. A.M. COULD NOT REASONABLY BELIEVE THAT HER STATEMENTS WOULD BE USED IN A JUDICIAL PROCEEDING BECAUSE OF HER AGE.

A.M. could not reasonably believe that her statement would later be used in a judicial proceeding because of her age. A.M.'s age of four years, at the time of the statement, make it very unlikely that she could comprehend, let alone anticipate, that her statements to the mother

and the nurse would be used for trial in the future. The West Virginia Supreme Court has not considered if age is a factor in determining whether the declarant was making a testimonial statement. Other jurisdictions have taken age into consideration. In *Colorado v. Vigil*, the Colorado Supreme Court notes that "expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic." *Colorado v. Vigil*, 127 P.3d 911, 925 (Colo. 2006). *See also Lagunas v. Texas*, 187 S.W.3d 503 (Tex. Ct. App. 2005), (Age and sophistication of the declarant to be a factor in determining if a statement is testimonial); *Minnesota v. Scacchetti*, 711 N.W.2d 508, 516 (Minn. 2006) (unclear if three year old "understood the purpose of the statements" she made to a attending nurse practitioner.)

Both the age and sophistication of A.M. are clearly relevant. A.M. stated to her mother that the Appellant had "peed" in her mouth. (Trial Tr. vol. 2, 13.) This demonstrates the victim's lack of understanding as to the nature of the act perpetrated on her because she did not understand that what she was forced to ingest was semen rather than urine. Because A.M. did not understand the nature of the act perpetrated on her, it is highly unlikely that she could understand or comprehend that the Appellant's actions constituted sexual assault and were illegal. Because of this lack of comprehension of the nature of the act, A.M. could not reasonably be expected to know her statement to her mother would be later used at a judicial proceeding.

This is also true for A.M.'s statement to the nurse. Common sense tells us that a 4 year old speaking to a nurse about the "yucky taste" would be hoping the nurse could make her feel better. Common sense tells us a child in A.M.'s position would likely believe that the nurse would make her feel better and rid her of the sore throat and "yucky taste" that she stated she had in her mouth. (Trial Tr. vol. 2, 71; R. at 27.) In *Colorado v. Vigil*, the Colorado Supreme Court

examined the question of whether an objective witness from the position of the declarant, a seven-year-old sexual assault victim in this case, could reasonably believe that the statements given to a doctor would later be used in trial. *Vigil*, 127 P.3d at 924. The court held that an objective witness, in the child's circumstance, would not reasonably believe that statements made to the doctor would later be used at trial and non-testimonial because the declarant would "intend his statements to describe the source of the pain and his symptoms." *Id.* at 926. The declarant in *Vigil* is very similar to the declarant in this case, A.M. An objective witness in A.M.'s position could not reasonably believe that the statement given to Nurse Leahy would later be used at trial and would be more interested in getting rid of the "yucky taste". It is clear, that A.M.'s motive for giving a statement as such would be in an effort to obtain a medical diagnosis and not made with the "expectation of being used prosecutorially." *Crawford* 541 at 51, 124 S. Ct. at 1364.

2. A.M. COULD NOT REASONABLY BELIEVE THAT HER STATEMENT WOULD BE USED IN A JUDICIAL PROCEEDING BECAUSE OF THE CIRCUMSTANCES IN WHICH THE STATEMENT WAS MADE.

A.M. could not reasonably believe her statements would be used in a judicial proceeding is because the circumstance, in which, A.M.'s statements were made to the mother and the nurse. In the case of the mother, there was no investigation or interrogation that elicited the statement and the statement was made in the home of A.M. and her mother. The statement was unprompted. This bears some resemblance to the situation found in *Mechling* where the declarant volunteered the information that her boyfriend had hit her. *Mechling*, 219 W. Va. at 370, 633 S.E.2d at 315. This Court did not decide whether this was a testimonial statement, but

did seem to indicate a statement that describes "what happened" is potentially a testimonial statement[1]. *Id.* at 379, 633 S.E. at 324.

The circumstances in *Mechling* are very different from the present case because the victim in *Mechling* made the statement immediately following the incident and to a party that was aware there may have been an altercation. *Id.* at 370, 633 S.E.2d at 315. An objective witness in the position of the declarant in *Mechling*, could reasonably expect that his or her statement to an intervening neighbor would later be used at trial because the declarant would know the neighbor played a role in preventing more harm and ending the altercation. An objective witness could reasonably anticipate the neighbor would play a role in a later judicial proceeding. As well, because the declarant in *Mechling* was much older and has a higher level of sophistication than A.M., the declarant in *Mechling* could anticipate the volunteered statement would be used at a later trial. In contrast to this, A.M. made this statement randomly, at her home, to the mother immediately upon awakening and upon first seeing her mother after the incident and A.M. knew the mother had no knowledge of what had happened (as she had not been home). A four-year-old is much younger and less sophisticated and would not reasonably believe that excited comments made at home would be used at trial.

The New Jersey Supreme Court considered a very similar situation in *New Jersey v. Buda*, 195 N.J. 278, 949 A.2d 761 (N.J. 2008). In *Buda*, a three-year-old boy, without any prompting, told his mother that "Daddy beat me." *Id.* at 304, 949 A.2d at 777. The court had to determine if the statement to the mother was testimonial because the boy did not testify. The court found that the declarant's statement to the mother was non-testimonial and therefore did not violate

[1] It is necessary to note that in *Mechling* the Court found that the record on the statement given to the neighbor was incomplete and that the issue as to whether the statement was testimonial would have to be resolved on remand. Statements given to two policemen investigating the dispute were ruled testimonial. *Id.*

Crawford. *Id.* The court reasoned that a "spontaneous statement do[es] not bear the indicia of a 'formal statement to government officers.'" *Id.* In *Buda*, the court notes *Crawford* defines testimony as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" and a statement to a government official "bears testimony in a sense that a casual remark to an acquaintance does not." *Id.* at 300, 949 A.2d at 775. The *Buda* Court found the spontaneous comment to the mother was much more like the casual comment to an acquaintance than a statement to government officials. *Id.* at 304, 949 A.2d at 777. Similar to the declarant in *Buda*, A.M.'s statement was an excited and unprompted comment which is not what the United States Supreme Court intends to be a testimonial statement. The statement is not a solemn declaration or affirmation intended to prove a fact. Rather this statement is one made in childlike manner and does not resemble, as *Crawford* suggests is testimonial, a "formal statement to government officers." *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364.

In addition to the statement to the mother, the statement to Nurse Leahy is non-testimonial because the circumstance in which the statement was made would not lead the witness to believe it would later be used at a judicial proceeding. Law enforcement was neither involved in the examination of A.M. nor was the exam conducted at a police station. Only Nurse Leahy, the mother, and the child were present during the examination and the examination was conducted at Winchester Medical Center. (Trial Tr. vol. 2, 73.) The absence of law enforcement would lead the declarant to believe that the statement was being used for a medical diagnosis and not for the purposes of being used at trial.

3. A.M.'S STATEMENT TO THE NURSE IS NON- TESTIMONIAL BECAUSE IT WAS MADE FOR THE PURPOSE OF A MEDICAL DIAGNOSIS AND THE NURSE IS NOT AN AGENT OF LAW ENFORCEMENT.

A.M.'s statement to Nurse Leahy is non-testimonial and therefore would be admitted under the hearsay exception for medical treatment and diagnosis under W. Va. R. Evid. 803(4). o Nurse Leahy's purpose in speaking with A.M. was to assist the doctor in determining what tests may need to get ordered and what treatment might be necessary, and not strictly for the purpose of collecting forensic evidence. Furthermore, A.M.'s statement to the nurse is non-testimonial because the nurse is not an agent of law enforcement and A.M. could not reasonably believe that the statement would later be used at trial.

A.M.'s statement to the forensic nurse is not a testimonial statement because it was made for the purposes of a medical examination. In *State v. Edward Charles L.*, *supra*, that "statements made for the purpose of medical diagnosis or treatment and describing . . . present symptoms, pain or sensations" is not excluded by the hearsay rule. *Id.* at Syl. Pt. 4 . In *State v. Pettrey*, 209 W. Va. 449, 549 S.E.2d 323 (2001), this Court held that

> "[w]hen a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), *if the declarant's motive in making the statement is consistent with the purposes of promoting treatment* and the content of the statement is reasonably relied upon by the therapist for treatment. *The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes*" (emphasis added).

The West Virginia Supreme Court has very recently decided the question of whether a forensic nurse serves a dual purpose of medical and forensic. In *State v. Payne*, No. 34889, 2010 WL 1838363 (W. Va. May 6, 2010), this Court extended the *Pettrey* standard to forensic nurses and held a "child of sexual abuse or assault victim . . . examined by a forensic nurse trained in

sexual assault examination" is admissible provided that "the declarant's motive for making the statement was consistent with promoting treatment . . . ." Syl. Pt. 6, *Payne*, 2010 WL 1838363, at *1. In *Payne*, the boyfriend of the victim's mother placed his mouth on the vaginal area of the twelve-year-old victim. *Payne*, 2010 WL 1838363, at *3. The victim was then taken to Winchester Medical Center where forensic nurse, Cynthia Leahy, performed an examination on her. *Id.* This Court held in *Payne* that the evidence gathered was for the dual purpose of a medical examination as well as gathering forensic evidence. *Payne*, 2010 WL 1838363, at *7.

Similar to *Payne*, A.M.'s statement to Nurse Leahy was for the purpose of a medical diagnosis and was describing present symptoms. The medical report that Leahy filed states,

> "I was asleep on the couch. Something came out of it and went down my throat. It had a yucky taste. I was asleep while he was doing that. I remember it. I still have a yucky taste from it. I cried this morning because I still had that taste."

(Trial Tr. vol. 2, 71; R. at 27.) The report also notes that symptoms A.M. experienced at the time of the examination were a "hurt throat" and a remaining "yucky taste." (Trial Tr. vol. 2, 71; R. at 27.) As noted in *Payne*, there is a "large medical component" to the job of a forensic nurse. *Payne*, 2010 WL 1838363, at *8. The Court found that conversations with the victim are done in order to collect information to make a medical diagnosis and this falls within the hearsay exception. *Payne*, 2010 WL 1838363, at *8. Because the A.M. was describing present symptoms she was experiencing, this fits another exception to the hearsay Rule.

The role of Nurse Leahy was to provide a medical diagnosis as well as collect forensic evidence. Appellant argues that Leahy's examination of A.M. was a forensic investigation where DNA evidence was gathered. (Appellant's Br., 4.) However, Leahy's examination of the victim also includes gathering information about the patient's medical, medicinal, and surgical past in

addition to a physical examination of the patient's body. (Trial Tr. vol. 2, 64.) The Appellant asserts that "given the nature of this offense there was no physical treatment that was necessary or even possible." (Appellant's Br., 10.) This is simply incorrect. As previously noted, in *Payne*, the sexual assault was a result of the assailant placing his mouth on the vaginal area of the victim." *Payne*, 2010 WL 1838363, at *3. This Court found that there is need to screen for "sexually transmitted illnesses or other injuries that may require further medical evaluation" and the statements made were for the purposes of medical diagnosis. *Payne*, 2010 WL 1838363, at *7-8. The same is true presently. A.M. suffered a sexual assault when genitals were placed in her mouth and because of this assault, similar to *Payne,* there is a need to screen for sexually transmitted illness. Because of this need, Nurse Leahy's examination of the victim is medical in nature as well as forensic. A.M.'s statement satisfies the *Pettrey* requirement because the statement was consistent with the purpose of promoting treatment and Nurse Leahy reasonably relied on the information to make a diagnosis.

The statement given to Nurse Leahy was non-testimonial statement because it was made in order to provide a medical diagnosis and treatment and the nurse was not an agent of law enforcement. The West Virginia Supreme Court has not directly addressed the question of whether *Crawford* applies to statements made in order to obtain a medical diagnosis. As previously discussed, a statement made in order to establish a medical diagnosis is admissible hearsay under Rule 803(4). However, the question remains if a statement made to a nurse or a physician in order to obtain a medical diagnosis is considered testimonial. Other jurisdictions have concluded that statements given to a doctor or a nurse is non-testimonial if the purpose is to obtain a medical diagnosis and seek treatment.

In a recently decided case, *Ohio v. Arnold*, No. 2008-1693, 2010 WL 2430965 (Ohio June 17, 2010), the Ohio Supreme Court held that a statement made for a medical diagnosis is non-testimonial and therefore admissible and statements made primarily for forensic and investigative purposes is testimonial and inadmissible. In *Arnold*, a social worker interviewed a four year old girl at a hospital after the girl had been raped. *Arnold*, 2010 WL 2430965, at *1. The Court found that the interviewer served a "dual capacity" in obtaining information needed for a medical diagnosis and collecting information for law enforcement. *Arnold*, 2010 WL 2430965, at *12.

Similar to the social worker in *Arnold*, Nurse Leahy serves a "dual purpose" that is both medical and forensic and this Court reached that very conclusion in *Payne*. Statements made to a nurse or doctor for purposes of medical diagnosis and medical treatment are non-testimonial because the statements do not serve an investigatory purpose. A.M.'s statement to the nurse, describing the symptoms she was experiencing, was for the purpose of receiving a medical diagnosis and treatment. The declarant only describes how she feels and the taste she has in her mouth in the statement given to the nurse. Further the declarant does not identify the Appellant in her statement to the nurse[2]. This indicates that the focus of the statement was made in order to provide a medical diagnosis and was not taken for the purpose of being used later at trial because it was describing what caused the declarant's symptoms and not who caused her symptoms.

Various jurisdictions, in addition to Ohio, have reached similar conclusions and held that statements made for the purposes of medical diagnosis and treatment do not violate the

[2] A.M.'s statement to Nurse Leahy does not specifically identify the Appellant. It should be noted that the Appellant is identified as the "assailant" in the nurse's record. ®. at 27.) It is not clear from the record, who identified the Appellant as the assailant to Nurse Leahy. However, at trial, Nurse Leahy read for the jury A.M.'s statement and the Appellant was not specifically identified in it. (Trial Tr. vol. 2, 71.)

Confrontation Clause of the Sixth Amendment of the United States Constitution as interpreted in *Crawford* and *Davis*. *See Colorado v. Vigil*, 127 P.3d 911 (Colo. 2006); *Minnesota v. Krasky*, 736 N.W.2d 636 (Minn. 2007); *Massachussetts v. DeOliveira*, 849 N.E.2d 218 (Mass. 2006); *Connecticut v. Arroyo*, 935 A.2d 975 (Conn. 2007). This Court's conclusion in *Payne* that the nurse serves dual purposes is very similar to the reasoning of the Ohio Supreme Court in *Arnold*. Because of the medical component of a forensic nurse's job, statements made for the purpose of a medical diagnosis will be made to the nurse. The Court is urged to extend the ruling of *Payne* to circumstances where the witness is unavailable and hold that statements for the purpose of a medical diagnosis are non-testimonial and admissible under Rule 803(4).

C. THE APPELLANT ELICITED THE DECLARANT'S STATEMENT TO OFFICER LINK DURING CROSS-EXAMINATION AND WAS PROPERLY ADMITTED INTO EVIDENCE.

The Appellant elicited A.M's statement from Officer Link during cross-examination and therefore, he can not now claim the statement was admitted in error. This Court has previously held that "[a] judgment will not be reversed for any error in the record introduced by the party seeking reversal." Syl. Pt. 7 *State v. Hughes* 225 W. Va. 218, 691 S.E.2d 813 (2010). The Appellant assigns error on the part of the trial court for allowing the declarant's statement to Officer Link into evidence. (Appellant's Br. 4.) However, the declarant's statement to Officer Link was revealed first, upon cross-examination of Officer Link. (Trial Tr. vol. 1, 249.) At trial, the Appellant, asked Officer Link if his interview with A.M. "revealed no real statement on her part about the alleged incident?" (Trial Tr. vol. 1, 249.) Officer Link responded that A.M. had told him that she had a "yucky taste in her mouth" and "Tex had put the yucky taste in her

mouth." (Trial Tr. vol. 1, 249.) In fact, the content of Officer Link's interview of A.M. was central to Appellant's theory at trial that the mother was coaching A.M. on what to say.

Wherefore, this Court should disregard any assignment of error because the Appellant introduced A.M.'s statement to the Officer Link at trial; not the State.

IV. Conclusion

For the foregoing reasons, the judgment of the Circuit Court of Morgan County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,

Appellee,

Debra MH McLaughlin
Prosecuting Attorney for Morgan County
77 Fairfax Street, Room 301
Berkeley Springs, WV 25411
304-258-8621
WV Bar ID. 7999

TABLE OF AUTHORITIES

CASES

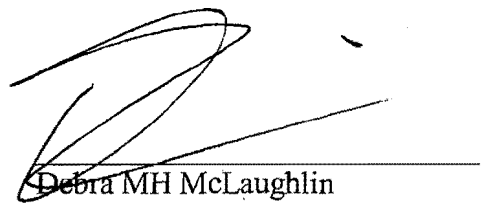
STATUTES

OTHER

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served a true copy of the foregoing Brief of Appellee, State of West Virginia, by first class mail postage prepaid, this 29th day of July, 2010, upon:

James Kratovil, Esquire
211 Washington Street
Charles Town, WV 25414



Debra MH McLaughlin