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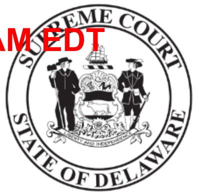

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Timothy McCrary's Opening Brief.

This is the State's Answering Brief in opposition to McCrary's direct appeal of his four convictions for first degree unlawful sexual contact after a September 2021 Kent County Superior Court bench trial.

SUMMARY OF ARGUMENT

I. DENIED. *11 Del. C. § 3513*, Delaware's Tender Years statute, is not facially unconstitutional. The prior out-of-court statements of a child complaining witness only raise a constitutional confrontation concern if those statements are testimonial. When the complaining witness appears at trial and is subject to defense cross-examination, the accused is not denied his right of confrontation because of the witness' memory lapse.

II. DENIED. There was no abuse of discretion in admitting L.F.'s 2019 CAC interview under 11 *Del. C.* § 3507. (A-73-76). The State's questioning of L.F. as a trial witness subject to defense cross-examination and the 7 year old's response were sufficient to touch upon the subject.

III. DENIED. Since there was no error in the admission of prior out-of-court statements of two minor complaining witnesses, there is no basis for a claim of cumulative error.

STATEMENT OF FACTS

In 2018-2019, four female preschoolers (J.Y., A.L., L.F., and M.G.) attended the Head Start program in Harrington, Delaware. (A-14-18, 45, 59; B-11-12, 41, 54, 57). Each of the four Head Start preschoolers was less than 7 years old. (A-14-18, 22; B-30, 34, 40, 50-51, 54). Timothy K. McCrary was hired in 2015 as a custodian at the Harrington Head Start. (B-1, 12). Later, McCrary became a bus monitor (B-12, 57-58), and then a Head Start Center aide. (B-1, 11-12, 23, 35, 53).

There were 3 classrooms at the Harrington Head Start. (A-45). Each classroom had a teacher and an assistant teacher. (A-46). There were always two adults in each classroom, and when a teacher needed a break, an aid would come into the classroom. (B-23). Kristen Chouinard, the teacher in classroom 2 (B-22-23), was usually assisted at breaks by McCrary or the Center cook Stacey Pender Layton. (B-23, 41). McCrary was referred to as Mr. Tim by the Head Start students. (B-25).

After lunch each day there was a 30-minute rest time in each Head Start classroom. (B-13, 23, 42, 58). At the September 2021 Kent County Superior Court bench trial for McCrary, teacher Chouinard identified a diagram (State's Exhibit # 20) she prepared of classroom 2 "where each child slept during rest time." (B-24). Chouinard added that during rest time "Tim would sit with [the students]." (B-24).

At McCrary's trial, Sarah Ford, the mother of J.Y., testified about an incident at her home on the evening of May 16, 2019. (A-19). Ford stated:

> . . . I was giving both my children a bath, my son also. And I was washing [J.Y.] and the next thing I know, like she freaked out – I was washing her vagina area and she freaked out and just said, like, don't touch me there. And I paused and she said don't touch me there, that's where Mr. Tim touches me. And just I immediately backed off and said: What did you just say? And then she repeated it again, and I just literally got her out of the bathtub, soap and all, and ran to my mom's house and had her tell my sister what she just told me, because my mom's house is connected to my house. And she told my sister exact same thing . . . .

(A-19).

Next, Ford telephoned her mother about the child's disclosure and then contacted J.Y.'s father. (A-20). Ford said the father ". . . was at the casino and he came straight home and [J.Y.] told him what happened. And pretty much word-for-word repeated it three times back to all three of us the exact same way." (A-20).

When J.Y.'s father returned home he made an audio recording "about what [J.Y.] had told Sarah earlier. . . ." (A-27). The father's audio recording of his 2019 conversation with J.Y. was admitted at McCrary's trial under 11 *Del. C.* § 3513 (A-30-31), and entered into evidence as Court Exhibit # 1. (B-6-7).

On the evening of J.Y.'s disclosure, her family contacted the Harrington Police and were advised to take the child to the Milford Hospital Emergency Room. (A-28). At the Milford Hospital the Night Charge Nurse, Andreal Nicki

Becket, saw J.Y. and her mother about a report that the child ". . . was sexually assaulted at her daycare." (B-8-9). Becket testified, "I asked her where the gentleman touched her . . . .," and when the nurse pointed to the vagina area, J.Y. "said yes." (B-9). J.Y.'s medical records from her May 16-17, 2019, hospital exam were admitted without defense objection at McCrary's trial as State's Exhibit # 2. (B-10).

On May 23, 2019 (A-34), Courtney Sheats, a forensic interviewer (A-32), conducted a recorded video interview of J.Y. about the allegation that Mr. Tim had inappropriately touched her at the Harrington Head Start. (B-5). During this taped interview at the Child Advocacy Center (CAC), J.Y. told Sheats that McCrary touched her skin (A-38) when he rubbed both her vagina and buttocks. (B-5). McCrary put lotion on J.Y.'s vagina. (B-5). Linda Jean Peifer, a bus driver at the Harrington Head Start (B-57), testified that McCrary was her bus aid (B-57-58), and that she had observed McCrary with lotion. (B-60).

Like the May 16, 2019 audio recording made by J.Y.'s father (A-28-31), the May 23, 2019 CAC interview of J.Y. was offered into evidence under 11 *Del. C.* § 3513 (A-34-35), and after hearing argument from counsel (A-34-36), the trial judge admitted the redacted CAC interview (A-36-37) as Court Exhibit # 2. (B-7). The state played J.Y.'s CAC interview for the judge at trial. (A-34).

The chief investigating officer, Deputy Chief Keith Shyers of the Harrington

Police Department (B-1), attended the May 23 CAC interview of J.Y. (B-1-2). After the child's CAC interview, Officer Shyers got subpoenas for the Harrington Head Start records. (B-16). The Head Start had a surveillance camera system. (B-14). Two video cameras on different angles were located in the front and back of each Head Start classroom. (B-14). The camera system's hard drive was located in the office of the Center Director Jose Garcia. (A-45; B-14). A second camera system was maintained on the Head Start bus used to transport some of the preschoolers. (B-17).

On May 23, 2019, Officer Shyers retrieved the SD card from the Head Start bus camera recording system (State's Exhibit # 17). The following day, May 24, Shyers also got the hard drive for the Head Start classrooms (State's Exhibit # 18) from Director Garcia's office. (B-16, 18-19). The classroom video hard drive contained footage from May 19-23, 2019. (B-19).

Delaware State Police Detective Terrence Smith of the High-Tech Crimes Unit (B-20) downloaded the classroom hard drive to an external hard drive (B-18), and then combined the file images to zoom in on McCrary in classroom 2. (B-21). Without objection, the court admitted an enhanced video in classroom 2 starting at 12:38 P.M. on May 20, 2019, as State's Exhibit # 19. (A-49, 51-52). The hour-long video (B-21) showed nap or rest time in classroom 2. (A-47-52). The enhanced video showed McCrary sitting in one spot next to resting student A.L.

and reaching under A.L.'s blanket. (B-24-26, A-47-48). When a teacher, Kristen Chouinard (B-22), walked by, McCrary appears to jump and removes his arm from under A.L.'s blanket. (A-47-48). When the teacher leaves, McCrary again places his hand under A.L.'s blanket. (B-65-66).

In 2019, Yamiler Garcia also worked as a teacher aide at the Harrington Head Start. (B-27). She testified that bookshelves in the classroom obstructed a panoramic view of the entire classroom. (B-28). Because of the bookshelves, Chouinard could not always see McCrary sitting on the floor. (B-25). Aid Garcia recalled seeing McCrary sitting near both J.Y. and A.L. during different rest times. (B-28-29). At other times Garcia observed McCrary near two other Head Start students, M.G. in classroom 1 (B-29), and L.F. in classroom 3. (B-29).

A.L. was a 7-year old second grader by the time of McCrary's trial. (B-30, 34). In 2019 A.L. was in classroom 2 at the Harrington Head Start, and her mother Stacey Pender worked in the Head Start kitchen. (B-29). Officer Shyers told A.L.'s parents that on the enhanced video from classroom 2, McCrary could be seen placing his hand under A.L.'s blanket during nap time. (B-33, 47-48, 65-66).

A recorded CAC interview of A.L. was done on June 21, 2019. (B-31-33). At McCrary's trial defense counsel waived all prerequisites to admission of A.L.'s CAC statement under 11 *Del. C.* § 3507. (B-31-32). There was also a joint trial application under 11 *Del. C.* § 3513(b)(1) to admit A.L.'s 2019 CAC statement.

(B-38-40). The trial judge admitted the CAC interview of A.L. under § 3507 (B-39-40), the State played the video at trial (B-39), and the Court admitted a written transcript of A.L.'s CAC interview as Court Exhibit # 3. (B-39).

Initially, A.L.'s parents did not cooperate with the police investigation of McCrary. (B-32, 43-44). During the recorded CAC interview A.L. did not disclose any abuse. IB-33). A.L.'s mother testified that her daughter was in classroom 2 in the Harrington Head Start preschool program in 2018-2019 (B-41), and towards the end of her time at the Head Start program, A.L. did not want to nap. (B-42).

Although A.L. did not disclose any abuse during the 2019 CAC interview (B-33), shortly after the interview A.L. showed her mother how McCrary touched her. (B-44-46). Months later in the shower at home A.L. pointed to her vagina and confirmed to her mother that McCrary "touched her there." (B-44-45). When asked if another person in classroom 2 would "always be able to see what [McCrary] was doing from where he was sitting by the bookshelf," A.L.'s mother answered, "No." (B-45).

Following the disclosure of sexual abuse by A.L. to her mother (B-44-45), Officer Shyers obtained an arrest warrant for McCrary on June 21, 2019. (B-47). Center Director Garcia had suspended McCrary from work at the Head Start in May. (B-15). On June 24, 2019, the Harrington Police Department issued a press

release about the allegations in McCrary's arrest. (B-47).

A.L. testified about her sexual abuse by McCrary at trial. (B-34-37). The then 7-year old witness said McCrary was in classroom 2 with her teacher, Ms. Kristen. (B-35). A.L. said she was assaulted underneath her clothes (B-36) by Mr. Tim always at nap time. (B-37). A.L. said the sexual assault happened more than one time. (B-37). Referring to McCrary, A.L. testified at trial, "So when he went in, he put his hand in my vagina." (B-35).

Shawntia McLeish, the mother of L.F. (B-54), said at McCrary's trial that her daughter did not want to ride the bus or attend Head Start in March/April 2019. (B-54). Although she was also 7 years old at the time of McCrary's trial (B-34, 40, 50), L.F., unlike A.L. (B-34-37), was unable to testify in as much detail as A.L. (A-59-66; B-50). As a result, the State sought to admit L.F.'s July 10, 2019, CAC interview under 11 *Del. C.* § 3507. (A-67-76; B-51).

L.F. was 4 years old at the time of her July 2019 recorded CAC interview (Court's Exhibit # 5 (B-52-53)). (B-51). At that time, L.F. told Sheats that there were bad touches of her by McCrary on the school bus (A-59; B-54), and when L.F. was lying on a mat during nap time. (A-82; B-54). The State played L.F.'s 2019 CAC interview at trial (A-106-07; B-53), and the court admitted a transcript of L.F.'s CAC interview as Court Exhibit # 4. (B-52).

McCrary testified at trial and denied inappropriate touching of any of the

Harrington Head Start children. (B-61). McCrary conceded that he sat next to A.L. at nap time as shown in the Head Start classroom 2 video and agreed that he put his hand under A.L.'s blanket multiple times. (B-63). Nonetheless, McCrary maintained that he only touched A.L. "[O]n her back or on her hands." (B-62).

After hearing five days of trial testimony and closing arguments, the Superior Court Judge on September 15, 2021, found McCrary guilty of four counts of first degree unlawful sexual contact, one count each for J.Y. and L.F. and two counts for A.L. (A-97-109).

I. 11 *DEL. C.* § 3513 IS NOT FACIALLY UNCONSTITUTIONAL

QUESTION PRESENTED

Is 11 *Del. C.* § 3513 unconstitutional on its face after *Crawford v. Washington*[1]?

STANDARD AND SCOPE OF REVIEW

A trial court's evidentiary rulings are reviewed on appeal for an abuse of discretion; however, alleged constitutional violations relating to evidentiary rulings are reviewed *de novo*.[2] When a claim that a statute is unconstitutional on its face was not previously raised at trial, the contention is waived and may now only be reviewed on appeal for plain error.[3]

MERITS OF THE ARGUMENT

On appeal, McCrary first argues that 11 *Del. C.* § 3513 is facially unconstitutional because it violates the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. Second, McCreary contends that admission of the two recorded prior out-of-court statements of J.Y. to her father and to the CAC interviewer Sheats, if not unconstitutional on their face, still violated McCrary's right to confront J.Y. under the circumstances of this

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[1] 541 U.S. 36, 53-54 (2004).

[2] *Milligan v. State*, 116 A.3d 1232, 1235 (Del. 2015); *Swan v. State*, 248 A.3d 839, 856 (Del. 2021) (constitutional claims reviewed *de novo*).

[3] Del. Supr. Ct. R. 8; *Brown v. State*, 897 A.2d 748, 753 (Del. 2006).

prosecution. Neither of these arguments is availing. 11 *Del. C.* § 3513 is not facially unconstitutional. Likewise, there was no abuse of discretion in the evidentiary rulings admitting the two prior recorded statements of J.Y. (A-30-31, 36-37).

At McCrary's Superior Court bench trial, Sarah Ford, the mother of then 8-year old J.Y. (A-19, 22), testified, without defense objection, that when she was bathing J.Y. on May 16, 2019, the child said not to wash her vagina area because ". . . that's where Mr. Tim [as the preschoolers referred to McCrary] touches me." (A-19; B-25). After J.Y. repeated the sexual abuse disclosure to her mother, Ford took her daughter next door where the child again stated the abuse claim to Ford's sister, Erika Johnson. (A-19; B-3-4).

When Johnson attempted to testify about her niece's 2019 abuse disclosure, defense counsel for McCrary objected based upon hearsay, and the Superior Court Judge sustained the objection. (B-4). Similarly, when J.Y.'s father attempted to testify concerning what Ford told him on the telephone about his daughter's abuse disclosure that evening, defense counsel again objected to the evidence as hearsay, and the court sustained this objection. (A-27).

When J.Y. was later taken on May 16 to the Milford Hospital (A-20), she was seen by the Night Charge Nurse Andreal Becket. (B-8). At trial Becket testified, without defense objection, that Ford told her ". . . there was a chance that

[J.Y.] was sexually assaulted at her daycare." (B-9). Becket testified that J.Y. told her that a man touched her vagina. (B-9). The court admitted Milford Hospital records of J.Y.'s 2019 visit, without defense objection, as State's Exhibit # 2. (B-10).

At McCrary's trial J.Y. did not remember attending pre-K when she was 5 years old or recall Mr. Tim at Head Start. (A-22). Nor could J.Y. recall speaking with her parents or the CAC interviewer Courtney Sheats about what Mr. Tim did. (A-22-23).

Given her lack of memory, the State moved to admit J.Y.'s prior out-of-court 2019 statement to her father, an audio recording, and her May 23, 2019, videotaped CAC interview under 11 *Del. C.* 3513. (A-23). The State argued that J.Y. was under 11 years of age, her lack of memory at trial made her unavailable, and her in-court responses to questioning (A-22-24) demonstrated "a total failure of memory." (A-23-24). Defense counsel responded: "It's difficult for the defense to disagree that there's a failure of memory under these circumstances, Your Honor." (A-24). The trial judge then found J.Y. unavailable as a witness as required by § 3513. (A-24).

After hearing the statement recorded by J.Y.'s father (A-28) and viewing her CAC video interview (A-34), the trial judge overruled the defense objection (A-29, 35-36) and found both prior recorded statements to be trustworthy and admissible

under § 3513. (A-30-31, 36-37). The audio recording was marked as Court's Exhibit # 1 (B-6-7), and the redacted CAC interview became Court's Exhibit # 2. (B-7).

In concluding that McCrary was guilty of one count of first degree unlawful sexual contact with J.Y. (A-100-03), the trial judge stated: "Here, the Court finds that [J.Y.] told her parents that Mr. Tim inappropriately touched her vagina. [J.Y.] repeated the allegations to the CAC interviewer." (A-101).

Now, although this Court in *McGriff v. State*[4] found 11 *Del. C.* § 3513 constitutional under both the Delaware and United States confrontation clauses, McCrary for the first time on appeal claims that ". . . § 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.'"[5] As a consequence, McCrary asserts: ". . . 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."[6]

McCrary failed to raise the issue of the facial unconstitutionality of 11 *Del.*

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[4] 781 A.2d 534, 539 (Del. 2001).

[5] Opening Brief at 9. *See Thomas v. State*, 725 A.2d 424, 426 (Del. 1999) (rejecting claim of facial unconstitutionality of 11 *Del. C.* § 3513).

[6] Opening Brief at 18.

C. § 3513 in light of *Crawford v. Washington* at his Superior Court nonjury trial in the first instance. Accordingly, the claim may now be reviewed on appeal only for plain error.[7] To be plain, the error must affect substantial rights, generally meaning that it must have affected the outcome of the trial.[8] In demonstrating that a forfeited error is prejudicial, the burden of persuasion is on the McCrary,[9] He cannot establish plain error in the admission of two recorded prior out-of-court statements of the child complaining witness J.Y.

In 2001 in *McGriff v. State*, this Court stated:

> Pursuant to 11 *Del. C.* § 3513, Delaware's 'tender years' statute, a child victim's prior out-of-court statements pertaining to instances of physical or sexual abuse may be admitted even though the child does not testify and is not available for cross-examination. This exception to the general prohibition against the admission of hearsay statements may be applied even where the child witness does not testify if: (i) the child is declared unavailable, and (ii) the out-of-court statements are found to possess particularized guarantees of trustworthiness.[10]

11 *Del. C.* § 3513 may only be used if the child victim witness is less than 11 years old at the time of the sexual abuse trial.[11] All four of

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[7] Del. Supr. Ct. R. 8; *Capano v. State*, 781 A.2d 556, 653 (Del. 2001).

[8] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del.), *cert. denied*, 479 U.S. 869 (1986).

[9] *Brown v. State*, 897 A.2d 748, 753 (Del. 2006); *Sullivan v. State*, 636 A.2d 931, 942 (Del. 1994).

[10] *McGriff v. State*, 781 A.2d 534, 537 (Del. 2001) (footnotes omitted).

[11] 11 *Del. C.* § 3513(a); *Thomas v. State*, 725 A.2d 424, 427 (Del. 1999).

McCrary's sexual abuse victims were less than 11 years of age at the time of McCrary's trial.

"In order to protect the welfare of children, most states have passed statutes to provide alternative methods for children's statements to be admitted against the accused."[12] "It is a sensitive subject to possibly strike down a statute that protects child sexual abuse victims. . . ."[13]

McCrary's argument that 11 *Del. C.* § 3513 is facially unconstitutional in light of the holding in *Crawford v. Washington*[14] that "Where testimonial evidence is at issue . . ., the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination" is unavailing. Michael Crawford stabbed a man who allegedly tried to rape his wife. In the attempted murder prosecution, Crawford claimed self-defense. Crawford's wife made an out-of-court tape-recorded statement to the police describing the stabbing, but she did not testify at trial because of the state marital privilege which bars a spouse from testifying without the other spouse's consent. As a result of his wife's non-

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[12] Wesley Fain, "The Constitutionality of Alabama's Tender Years Statute Under Crawford," 40 Cumb. L. Rev. 919, 919 (2010). *See Snowden v. State*, 846 A.2d 36, 39 n. 7 (Md. Ct. Sp. Appls. 2004) (at least 40 States have Tender Years statutes).

[13] 40 Cumb. L. Rev. at 945.

[14] 541 U.S. 36, 68 (2004).

appearance at trial, Crawford had no opportunity for cross-examination when the State played the wife's prior recorded statement for the jury.[15]

Crawford restricts the use of prior "testimonial" out-of-court statements of unavailable declarants.[16] As to "testimonial" out-of-court statements of a non-appearing declarant, *Crawford* overruled *Ohio v. Roberts*.[17] Nonetheless, *Crawford* did not eliminate all traditional hearsay exceptions[18] as Confrontation Clause violations.[19] Furthermore, "Non-testimonial statements . . . do not implicate the Confrontation Clause and are subject only to the State's traditional hearsay rules."[20] *Crawford*[21] acknowledged that "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law. . . ."[22]

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[15] 541 U.S. at 38, 40.

[16] 541 U.S. at 68.

[17] 448 U.S. 56 (1980).

[18] *See* D.R.E. 803 (1-25).

[19] *Banther v. State*, 977 A.2d 870, 888 (Del. 2009).

[20] *Banther*, 977 A.2d at 888 (citing *Jones v. State*, 940 A.2d 1, 13 (Del. 2007)).

[21] *Crawford*, 541 U.S. at 51.

[22] 541 U.S. at 68.

Statutes are presumed to be Constitutional.[23] ". . .[O]nce a party has established that the constitutionality of the statute is fairly debatable, he must, in order to overcome the presumption of constitutionality, establish clearly and convincingly the lack of constitutionality of the statute."[24] If a portion of a statute is invalid, it may be severed and the remainder of the provision upheld.[25]

11 *Del. C.* § 3513 is not wholly unconstitutional under *Crawford* as McCrary argues. "[B]efore deciding whether a statement violates the Confrontation Clause, it must first be determined whether a statement is testimonial in nature. The *Crawford* Court defined 'testimony' as '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . .'"[26] Nontestimonial statements do not implicate the Confrontation Clause and are subject only to the State's traditional hearsay rules.[27]

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[23] *See Hoover v. State*, 958 A.2d 816, 821 (Del. 2008); *Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974) ("Every presumption is in favor of the validity of a legislative act. . . .").

[24] *State v. Blount*, 472 A.2d 1340, 1346 (Del. Super. 1984).

[25] 1 *Del. C.* § 308. *See State v. White*, 395 A.2d 1082, 1091 (Del. 1978).

[26] *Milligan v. State*, 116 A.3d 1232, 1236-37 (Del. 2015) (quoting *Crawford*, 541 U.S. at 51).

[27] *Jones v. State*, 940 A.2d 1, 13 (Del. 2007) (citing *Crawford*, 541 U.S. at 68).

Prior testimony at a preliminary hearing, before a grand jury, or at a former trial is testimonial in nature, as is most police interrogation.[28] By contrast, a nontestimonial statement is one made for the purpose of acquiring immediate emergency aid and/or assistance of public safety officials.[29] "A statement is 'testimonial' if it is provided during an investigation for the purpose of fact gathering for a future criminal prosecution."[30]

In addition, statements made by an eyewitness to a shooting in a 911 telephone call describing the incident and identifying the defendant as the perpetrator have been properly admitted under the excited utterance hearsay exception,[31] without violating the accused's Sixth Amendment Confrontation right.[32]

This Court has found prior out-of-court statements to be nontestimonial in a variety of circumstances not involving police investigative interrogation. In *Nalley v. State*, a bystander's statements to police describing the clothing and direction of travel of a car driver were

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[28] *Crawford*, 541 U.S. at 50-53.

[29] *Wheeler v. State*, 36 A.3d 310, 318 n. 28 (Del. 2012)

[30] *Wheeler*, 36 A.3d at 318.

[31] D.R.E. 803(2).

[32] *Dixon v. State*, 996 A.2d 1271, 1277-79 (Del. 2010).

properly admitted as nontestimonial excited utterances.[33] Statements by a fellow gang member to his girlfriend in *Jones v. State* were deemed to be casual remarks that were nontestimonial in nature even though the girlfriend revealed the remarks in a testimonial setting.[34] "[W]iretap recordings are not testimonial under the Sixth Amendment because the declarants obviously did not expect their statements to be used against them, and because the statements were made in furtherance of a conspiracy."[35]

There are two different tests for deciding whether a prior out-of-court statement is testimonial for Constitutional Confrontation Clause analysis. The objective witness test focuses on whether a declarant could reasonably expect his statement to be used at trial. Some states also utilize a primary purpose test by examining whether the primary purpose in obtaining the evidence involved its relevance to a subsequent criminal prosecution.[36] Arkansas, in applying the primary purpose test, focuses on whether the prior out-of-court statement is to a government official or to a non-official.[37] The

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[33] *Nalley v. State*, 2007 WL 2254539, at * 2-4 (Del. Aug. 6, 2007).

[34] *Jones v. State*, 940 A.2d 1, 13 (Del, 2007).

[35] *Ayers v. State*, 97 A.3d 1037, 1040 (Del. 2014). *See also State v. Phillips*, 2015 WL 5332388, at * 8 (Del. Super. Sept. 3, 2015).

[36] Wesley Fain, "The Constitutionality of Alabama's Tender Years Statute Under Crawford," 40 Cumb. L. Rev. 919, 940-41 (2010).

[37] *Seeley v. Arkansas*, 282 S.W.3d 778, 787 (Ark. 2008).

Montana Supreme Court has observed that the objective witness test is not workable for a three and a half year old declarant.[38]

Applying these analytical principles to J.Y's two recorded out-of-court statements admitted at McCrary's bench trial, it appears that the videotaped CAC interview (Court Exhibit #2) is testimonial in nature, implicating the Sixth Amendment Confrontation Clause. The videotaped CAC interview was scheduled by law enforcement and Harrington Police Deputy Chief Keith Shyers attended the CAC interview. The primary purpose of the recorded CAC interview was to obtain evidence that might be relevant to any criminal prosecution of McCrary. J.Y.'s initial disclosure of unlawful sexual contact occurred a week earlier on May 16, 2019, and there was no emergency situation at the time of the May 23 CAC interview.

The May 16, 2019 audio recording of J.Y.'s conversation with her father (Court Exhibit # 1) presents a different factual circumstance from the CAC interview of J.Y. The father's audio recording of his daughter occurred shortly after the initial disclosure to J.Y.'s mother at bath time, when law enforcement had not yet been contacted by J.Y.'s parents, and there was no official involvement by any government officer in the father's recording of the conversation with J.Y. The audio recording also occurred

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[38] *Montana v. Spencer*, 169 P.3d 384, 389-90 (Mont. 2007) (statements by three

prior to J.Y. being taken by her parents to the Milford Hospital for medical examination. Given this factual background the recorded conversation between J.Y. and her father was not for the primary purpose of gathering evidence as part of a police investigation of McCrary. As such, the audio recording of J.Y. made by her father was nontestimonial and not violative of the accused's confrontation right under *Crawford.*

Once it is determined whether a prior out-of-court statement is testimonial or nontestimonial, the next step is to determine if the defendant is actually denied his right to confront a witness whose accusatory prior out-of-court statement is admitted at trial.

J.Y. appeared as a witness at McCrary's 2021 bench trial (A-22-27), and she was subject to defense cross-examination although defense counsel made an apparent tactical decision to end his cross-examination of J.Y. after asking two questions. (A-24). The difficulty in then 8-year-old J.Y.'s trial testimony (A-22) is that she did not remember the defendant (Mr. Tim) or speaking with the CAC interviewer over two years earlier about Mr. Tim, but she was available for cross-examination. (A-22-23). McCrary thus has not established that he was denied his constitutional right to confront and cross-examine the witness.

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and a half year old to foster parent found to be nontestimonial).

J.Y.'s appearance as a trial witness and her responses to defense cross-examination questioning are sufficient to satisfy the defendant's right of confrontation. This is true whether one or both of the subsequently admitted recorded prior out-of-court statements of J.Y. are deemed testimonial.

As "a matter of first impression," this Court in 1999 upheld the constitutionality of 11 *Del. C.* § 3513, Delaware's "tender years" statute.[39]

In 1984 this Court also addressed the issue of whether a constitutional confrontation violation occurs if a trial witness' loss of memory prevents an effective defense cross-examination when the witness' prior out-of-court statements are admitted in a rape prosecution.[40] Finding no confrontation violation when the adult witness claimed no recollection of her three prior out-of-court statements, this Court in *Burke v. State* agreed with Justice Harlan's concurring opinion in *California v. Green*,[41] that ". . . the Confrontation Clause [is not] . . . an absolute guarantee of the right to cross-examine, but rather as an 'availability rule, one that requires the production of a witness when he is available to testify.'"[42] The 2004 decision in

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[39] *Thomas v. State*, 725 A.2d 424, 426 (Del. 1999).

[40] *Burke v. State*, 484 A.2d 490, 494-96 (Del. 1984).

[41] 399 U.S. 149, 182, 188-89 (1970).

[42] *Burke*, 484 A.2d at 494-95.

Crawford has not changed this interpretation. As pointed out by this Court in 2005:

> In *Crawford*, the United States Supreme Court did 'not expressly require any specific quality of cross-examination . . . .' All that is required is that a defendant have the opportunity for effective cross-examination of the declarant, not effective cross-examination in whatever way and in whatever manner a defendant may wish.[43]

This teaching of *Burke* about the availability rule and the quality of defense cross-examination has been repeatedly followed by subsequent Delaware decisions.[44] A defendant's right of confrontation is not denied when a witness has memory loss if the witness is otherwise present on the witness stand, testifying under oath, and there is an opportunity for defense cross-examination.

McCrary was not denied his constitutional confrontation right because J.Y. appeared on the witness stand and answered questions from both the prosecutor and defense counsel. 11 *Del. C.* § 3513 is not facially unconstitutional after *Crawford*; rather, the statute does not allow for the

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[43] *Randolph v. State*, 2005 WL 1653635, at * 3 (Del. June 30, 2005) (footnotes omitted; quoting *Burke*, 484 A.2d at 494). *See also United States v. Owens,* 484 U.S. 554, 560 (1988) ("successful cross-examination is not the constitutional guarantee").

[44] *See Roberts v. State*, 2006 WL 941968, at * 1 (Del. Apr. 10, 2006); *Johnson v. State*, 878 A.2d 422, 428-29 (Del. 2005); *State v. R.,* 2002 WL 31464375 at * 3 (Del. Fam. June 6, 2002); *Feleke v. State*, 620 A.2d 222, 228 (Del. 1993); *Tucker v. State*, 564 A.2d 1110, 1120-22 (Del. 1989).

admission of a child declarant's prior out-of-court testimonial statement at trial if the complaining witness is not presented as a trial witness subject to defense cross-examination.

In any event, any error in the admission of J.Y.'s two recorded prior out-of-court statements at a bench trial is harmless beyond a reasonable doubt.[45] "[M]ost claims of constitutional error are subject to a harmless error analysis . . . ."[46] Here, there was other unobjected to incriminatory testimony of the mother and the examining nurse that was sufficient to convict McCrary. The May 16—17 hospital records were also properly admitted incriminatory evidence.[47] There is a presumption that a bench trial verdict is based on admissible evidence.[48]

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[45] D.R.E. 103(a); Del. Super. Ct. Crim. R. 52(a); *Chapman v. California*, 386 U.S. 18, 24 (1967); *Jackson v. State*, 643 A.2d 1360, 1369 (Del. 1994).

[46] *Wilkerson v. State*, 953 A.2d 152, 158 (Del. 2008). *See Flonnory v. State*, 893 A.2d 507, 522 (Del. 2006) ("any *Crawford* error that resulted from the defendant being unable to cross-examine the out-of-court declarant was harmless beyond a reasonable doubt."); *Delaware v. Van Arsdall*, 475 U.S. 673, 680-81 (1986) ("Confrontation Clause violations are subject to harmless error analysis . . . .").

[47] *See* D.R.E. 803(4) (statements made for purpose of medical treatment), and D.R.E. 803(6) (business records hearsay exception); *Crump v. State*, 2019 WL 494933, at * 3 * (Del. Feb. 7, 2019) (hospital records).

[48] *See Arbolay v. State*, 2021 WL 5232345, at * 5 (Del. Sept. 14, 2021).

II. L.F.'S CAC INTERVIEW WAS ADMISSIBLE UNDER 11 *DEL C.* § 3507

QUESTION PRESENTED

Did the in-court questioning and response of L.F. satisfy the foundational requirement of touching upon the event and prior statement to permit the admission of L.F.'s CAC interview under 11 *Del. C.* § 3507?

STANDARD AND SCOPE OF REVIEW

This Court reviews a trial judge's ruling on the admissibility of an out-of-court statement under 11 *Del. C.* § 3507 for an abuse of discretion.[49]

MERITS OF THE ARGUMENT

On the third day of McCrary's 2021 Superior Court nonjury trial, then 7-year-old L.F. appeared as a complaining witness. (B-50). During direct examination L.F. was first questioned by the prosecutor about the difference between telling the truth and a lie. (B-50). Next, L.F. was asked where she went to school, and the child answered that she was in the second grade at Reily Brown in Spanish immersion. (B-50). L.F. then testified that when she attended preschool, she rode a bus. (A-59). Also present on the preschool bus were an older girl who drove the bus and an older boy. (A-59-60). L.F. did not know what the boy on the bus looked like (A-60), but she was able to point out McCrary in the

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[49] *See McMullen v. State*, 253 A.3d 107, 113-14 (Del. 2021); *Flonnory v. State*, 893 A.2d 507, 523 (Del. 2006).

courtroom as the boy on the preschool bus. (A-61). L.F. added that she did not like McCrary, but she could not say why. (A-61).

When L.F. did not recall ever talking to anybody about McCrary (A-61), the prosecutor showed her a photograph of her with Courtney Sheats at her July 10, 2019 recorded CAC interview. (A-62, 67, State's for Identification Q). Although L.F. was able to identify herself in the CAC interview when she was 4 years old (B-51) and remembered being in the photograph or where it was taken, she did not recall what she was doing when the 2019 photograph was taken. (A-62). L.F. testified that she knew the other person in the CAC photograph (Sheats) and remembered talking to her, but she did not recall what the two discussed. (A-63). L.F. did testify that she told the truth to the CAC interviewer. (A-63).

As L.F.'s direct examination continued, L.F. said she talked to Sheats ("the lady in that photograph") about bad touches. (A-64-65). The prosecutor then asked, "When you talked about bad touches, did you tell that lady about any – about a person?," and L.F. answered, "Yes," but she could not say who the person was. (A-65-66). While L.F. talked at the CAC interview about bad touches (A-66), at trial in 2021, she could not recall what she might have said about receiving bad touches. (A-66).

At that point the State interrupted the direct examination of L.F. to bring in Sheats, the CAC interviewer, to lay a foundation for admission of L.F.'s

videotaped CAC interview pursuant to 11 *Del. C.* § 3507. (A-66-67). Sheats then took the witness stand and stated that she interviewed L.F. on July 10, 2019. (A-67). L.F. was 4 years old at the time of the recorded CAC interview, and Sheats said the interview recording was accurate. (B-51).

After Sheats' direct examination concluded, defense counsel objected to the admission of L.F.'s videotaped CAC interview, and said, ". . . I would argue at this point the proper foundation has not been layed to introduce the statement pursuant to 3507." (A-68). The Superior Court then heard argument from the parties and. the State cited the decision in Damien Wilkinson.[50] (A-68-72).

Following argument (A-68-72), the Superior Court Judge determined that the videotaped CAC interview of L.F. was admissible as evidence under 11 *Del. C.* § 3507. (A-73-76). Initially, in deciding whether "the questioning touched on the event," the trial judge cited with approval *Johnson v. State*.[51] (A-73). Focusing on the evidence in McCrary's prosecution, the judge thought the touching upon the event requirement of *Keys*[52] was met, and stated:

> Here we have questions that did. We also have an answer from [L.F.] that both touched on – at least indicated that there was some type of a bad touch. And then also mentioned or identification of the defendant. . . .

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[50] *Wilkinson v. State*, 2009 WL 2917800, at * 5 (Del. Sept. 14, 2009).

[51] *Johnson v. State*, 338 A.2d 124, 126-27 (Del. 1975).

[52] *Keys v. State*, 337 A.2d 18, 23 (Del. 1975).

(A-73).

The Superior Court Judge specifically ruled: "I do find that the requirement in *Keys* has been met under the circumstances of this case. . . ." (A-73-74). Elaborating on this conclusion, the judge stated:

> [L.F.]'s testimony did touch on the events received [sic] and there was a reference, at least developed by the State, with regard to a bad touch. And also references to the bus and that there was a man on the bus and a woman on the bus. And also an identification of the defendant. And I do believe that requirement of foundational requirement is met.
>
> Also, they are based on the photograph and the acknowledgment by [L.F.] that she participated in the CAC interview. That touches on the out-of-court statement.

(A-74).

The judge overruled the defense objections, noting that "the only objection was the 3507 foundational objections," (A-76), and further stated, "But I do find that the State has met the threshold of admissibility for that statement and we'll consider it as substantive evidence." (A-75). The next day at trial a transcript of L.F.'s CAC interview was admitted as Court's Exhibit # 4, and the DVD recording of the CAC interview was Court's Exhibit # 5. (B-52). The prosecutor thereafter played the DVD when the testimony of the CAC interviewer Sheats resumed. (B-53). In the CAC statement 4-year-old L.F. said there were bad touches at preschool with the boy teacher on the bus (McCrary), and that these touches occurred at nap time in the area of the classroom where the blocks were located.

(B-53).

The Superior Court did not abuse its discretion in admitting L.F.'s prior CAC interview under 11 *Del. C.* § 3507. 11 *Del. C.* § 3507(a), adopted by the Delaware Legislature in 1970, provides: "In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value." In *Keys*,[53] this Court observed: "We do not mean to suggest any precise form of direct examination except that it should touch both on the events perceived and the out-of-court statement itself." Later, this Court added the requirement that the declarant's direct examination also needed to establish that the prior out-of-court statement was voluntary.[54] The declarant's limited recall on direct examination may still be sufficient to satisfy the *Keys* requirement of touching on the events perceived.[55]

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[53] *Keys v. State*, 337 A.2d at 23.

[54] *Hatcher v. State*, 337 A.2d 30, 32 (Del. 1975).

[55] *Johnson v. State*, 338 A.2d 124, 127 (Del. 1975).

The age, maturity, vocabulary, education and level of sophistication of the child witness should be considered in a decision to admit a prior statement under 11 *Del. C.* § 3507 so as not to frustrate the legislative purpose in enacting § 3507. Pedophiles prey upon children who are selected for their lack of maturity and sophistication. There is no reason to assist pedophiles by placing unreasonable burdens on admission of evidence concerning a child complaining witness who is present in court, testifying, and subject to cross-examination by defense counsel.

L.F. was 7 years old at the time of McCrary's trial and she was being questioned about events and a CAC interview that occurred over 2 years earlier when she was 4 years old. The situation presented here is a very different than the situation in *Miller v. State*, where a 14-year-old victim who is able to testify about six different sexual assaults by her father and provide Florida police with her handwritten statement about the events, but it is no less admissible[56] In addition, this Court has approved the admission under § 3507 of prior statements when a turncoat witness claims no memory of the events,[57] or denies even making a prior statement to a police detective.[58]

It is unnecessary for the declarant to testify "as to every detail of the attack"

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[56] *See Miller v. State*, 893 A.2d 937, 952-55 (Del. 2006).

[57] *Berry v. State*, 2013 WL 1352424, at * 3 (Del. Apr. 3, 2013).

[58] *Turner v. State*, 5 A.3d 612, 615-17 (Del. 2010).

in order to touch upon the events he perceived.[59] A rape victim who testified that the defendant did "something bad" to her and this involved a "touching" met the touch upon requirement of 11 *Del. C.* § 3507.[60] A 4 year old rape victim who testified that seeing the defendant made her feel sad and that she did not want to answer questions about the defendant because "I don't like him" was also sufficient to "touch on" the event for admission of a recorded CAC interview under 11 *Del. C.* § 3507.[61]

The "touch on" requirement of *Keys* has also been found to be satisfied for admission of prior out-of-court statements by a non-victim witness even when the witness denies making the statement,[62] or the witness cannot remember what she said in a prior police interview.[63]

While L.F.'s recall of events involving McCrary and her 2019 CAC interview when she was 4 years old may have been limited, the Superior Court correctly determined that it was sufficient to meet the "touch on" requirement of § 3507.[64]

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[59] *Washington v. State*, 2013 WL 961561, at * 3 (Del. Mar. 12, 2013).

[60] *Feleke v. State*, 620 A.2d 222, 227 (Del. 1993).

[61] *Wilkinson v. State*, 2009 WL 2917800, at * 5 (Del. Sept. 14, 2009).

[62] *Collins v. State*, 56 A.3d 1012, 1018-19 (Del. 2012).

[63] *Miles v. State*, 2009 WL 4114385, at * 3 (Del. Nov. 23, 2009).

[64] *See Woodlin v. State*, 3 A.3d 1084, 1088 (Del. 2010) (7 year old rape victim).

III. THERE WAS NO CUMULATIVE ERROR

QUESTION PRESENTED

Did cumulative error in two evidentiary rulings deprive McCrary of a fair trial?

STANDARD AND SCOPE OF REVIEW

"[W]here there are several errors in a trial, a reviewing court must weigh the cumulative impact to determine whether there was plain error."[65] The cumulative impact of error is weighed to determine whether there was plain error.[66]

MERITS OF ARGUMENT

McCrary claims that two errors in admission of prior out-of-court statements by two of the complaining witnesses requires reversal of all four of his convictions.[67] McCrary makes this all-encompassing argument even though he has not raised any issues regarding the propriety of his two convictions for the third complaining witness A.L.

"Cumulative error must derive from multiple errors that caused 'actual prejudice.'"[68] Because both of McCrary's claims of error as to his convictions

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[65] *Wright v. State*, 405 A.2d 685, 690 (Del. 1979).

[66] *See Hoskins v. State*, 102 A.3d 724, 735 (Del. 2014); *Ashley v. State*, 85 A.3d 81, 86 (Del. 2014).

[67] Opening Brief at 32.

[68] *Michaels v. State*, 970 A.2d 223, 231-32 (Del. 2009). *See also Abbatiello v. State*, 2020 WL 7647926, at * 6 (Del. Dec. 22, 2020).

involving sexual assaults upon J.Y. and L.F. are not meritorious, he has failed to establish prejudice and any cumulative error.[69] Likewise, McCrary has demonstrated no plain error.

[69] *See Crump v. State*, 2019 WL 494933, at * 6 (Del. Feb. 7, 2019); *Johnson v. State*, 2015 WL 8528889, at * 3 (Del. Dec. 10, 2015).

CONCLUSION

The judgment of the Superior Court should be affirmed.

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Dated: April 27, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

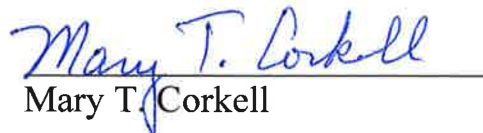
AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 27th day of April 2022, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on April 27, 2022, she did serve electronically the attached State's Answering Brief properly addressed to:

Nicole M. Walker, Esquire
Office of Public Defender
Carvel State Office Building
820 North French Street
Wilmington, DE 19801



Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

John Williams
Notary Public

Member of the Delaware Bar
authorized to act as a Notary Public
pursuant to 29 Del. C. § 4323(a)(3)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times Roman 14-point typeface using Microsoft Word.

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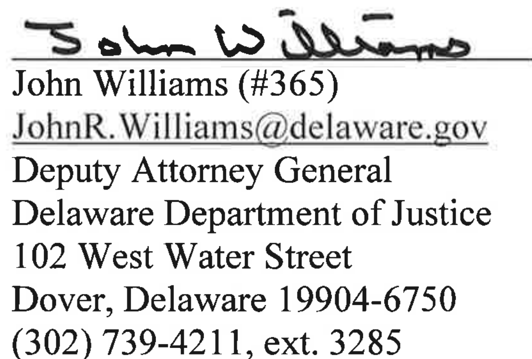

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Dated: April 27, 2022