**APPELLANT**: KURK DELAWRENCE JOHNSON
**APPELLEE**: State of Oklahoma
**JURISDICTION**: Court of Criminal Appeals of Oklahoma
**HEARING_DATE**: March 8, 2018

## Not Published

( Lumpkin )

OPINION

Appellant Kurk DeLawrence Johnson was tried by jury and convicted of Sexual Abuse of a Child Under 12 years (21 O.S. 843.5 (F) (2011)), After Former Conviction of a Felony, Case No. CF-2013-770 in the District Court of Tulsa County. The jury recommended as punishment life imprisonment without the possibility of parole and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Appellant and Sharee Galloway were in a dating relationship in 2013. Appellant occasionally watched Ms. Galloway's children at his apartment in Tulsa while she worked or was otherwise occupied. This included her ten year (10) old daughter A.J. and her eight (8) year old daughter E.G.

On January 6, 2013, Tulsa Police Officer Gregory Anderson responded to a call where he met Ms. Galloway. An emotional Galloway told the officer that E.G. had told her that she saw Appellant throw A.J. up against the wall and grab her "groin and chest area", Galloway said that A.J. repeatedly screamed for Appellant to stop but he refused, stopping only when he realized E.G. was watching. Appellant eventually released A.J. and she ran away screaming and crying. Galloway told Officer Anderson that she confronted Appellant about E.G.'s disclosure and he begged her to not call the police. Galloway also told Officer Anderson that she asked A.J. about E.G.'s disclosures, and A.J. confirmed Appellant's forceful touching.

On January 14, 2013, A.J. was interviewed at the Justice Center. She confirmed that Appellant had touched her on her breasts, buttocks and "privacy" a term she used for her vagina. A.J. said Appellant had been touching her inappropriately for about the last year with the most recent incident occurring on New Year's Day while her family was at Appellant's apartment. A.J. said that Appellant told her that if she told anyone, he would slap her in the face and kill her. A.J. said she had been too scared to tell her mother. At the close of the interview, A.J. tearfully thanked Ms. Gantz, the forensic interviewer, for talking with her explaining that what had happened to her "weighed on her mind." E.G. was also interviewed at the Justice Center on January 14 by Ms. Gantz. E.G. said that she was peeking through a door at Appellant's apartment when she saw Appellant touch A.J.'s "privacy" or vagina and buttocks.

She recalled that A.J. yelled for Appellant to stop.

Ms. Galloway was interviewed on January 14 by Detective Bishop of the Tulsa County Police Department. Ms. Galloway confirmed that E.G. had told her that Appellant molested A.J. by touching her chest, vagina and buttocks. She said that A.J. personally affirmed that Appellant had touched her on top of her clothes. Galloway said that when she approached Appellant about the accusations, he denied touching A.J. inappropriately and claimed the girls had made it up.

On February 15, 2013, Detective Carlock of the Tulsa County Police Department interviewed Appellant. He denied molesting A.J., stating that he and Ms. Galloway were still dating and planned to get married and move out of state with the children.

On February 19, 2013, Ms. Galloway took A.J. and E.G. back to the Justice Center. Ms. Galloway frantically told Detective Bishop there was new evidence in Appellant's case, that the girls were lying and she had brought them back so they could tell the truth. Det. Bishop observed that a "carload" of people had come with the girls and waited for them to finish their interviews. It was later learned that the people in the car were family members and friends of Appellant.

Ms. Turner, the managing director of the Justice Center, separately interviewed A.J. and E.G. A.J. told her that her initial disclosure about Appellant touching her was a lie and that Appellant did not touch her. A,J. claimed that E.G. made the whole thing up because she was angry at Appellant. A.J. also said that Aunt Shantel told E.G. to make up the story because she did not like Appellant. A.J. admitted that the night before the interview, Appellant had called her from jail and apologized to her; told her that he loved her; told her that when he got out of jail, they were going to be a family and have pictures made and go out to eat and were going to move to a state with a beach. A.J. repeatedly asked Ms. Turner if she could "drop the charges" against Appellant. A.J. told Ms. Turner that she had been around Appellant after her initial disclosure and she had faith in him and did not want to hurt him or put him in a bad situation. In her interview, E.G. denied recalling anything she had disclosed during her first interview and became withdrawn and "shut down."

As both children mentioned talking with Appellant on the phone while he was in jail, phone calls between Appellant and Ms. Galloway were reviewed. Based on evidence that Appellant had called Ms. Galloway numerous times, and statements by A.J. and E.G. that they had personally talked with Appellant, the children were removed from Ms. Galloway's custody by the Department of Human Services.

In preparation for trial, the Assistant District Attorney prosecuting the case, Nalani Ching, had scheduled numerous appointments with A.J.'s familial placement in order to interview A.J. but she was never able to make contact with A.J. Preliminary Hearing was set for July 12, 2013. A.J. was brought to the courthouse by an aunt, whose name Ms. Ching could not remember at trial. Ms. Ching and a Victim Witness Advocate met with A.J. in the Victim Witness Center. Ms. Ching thought A.J. appeared scared. A.J. told her that what she initially told police was true and that Appellant had touched her inappropriately, while forcefully holding her up against the wall. A.J. told Ms. Ching not only how Appellant touched her but how it felt. A.J. told her that during the second interview at the Justice Center she had lied when she said Appellant did not touch her.

Concerned by what A.J. had told her, Ms. Ching call defense counsel to the Victim Witness Center to meet A.J. After defense counsel listened to A.J., Preliminary Hearing was waived. Subsequently, the State gave notice that it intended to introduce the children's out-of-court statements pursuant to the child hearsay exception provided in 12 O.S. 2803.1 (2013) and the forfeiture by wrongdoing exception of 12 O.S. 2804 (B)(5) (2014). At the Reliability Hearing, held approximately six (6) months before trial, the court took testimony from numerous witnesses, including Galloway but not the children, and heard argument.

The trial court ruled that the particular circumstances of the case "lead to an inevitable conclusion of unavailability" as to Galloway, A.J. and E.G, The court noted that "it was clear" from Galloway's testimony that she was "clearly testifying to a lack of memory of the subject matter of her previous statements as well as the two children's statements to her regarding the subject matter."

The court also found the State had established that Appellant's conduct, "pressure and influence, both explicit and implicit on all three of these witnesses, wrongfully caused or through those means he wrongfully acquiesced in wrongfully causing all three witnesses or declarant's unavailability as witnesses. And that he did so intending that result as contemplated by 12 O.S. 2804 (B)(5) of the forfeiture statute." The court further recognized "the futility of any efforts to force Galloway to testify in this trial in light of the actual circumstances and realities of this case as pled and proven by the State." The trial court therefore found Galloway (and A.J. and E.G.) unavailable to testify pursuant to 12 O.S. 2804 (B)(5).

At trial, the State presented the children's recorded forensic interviews, testimony from the two forensic interviewers, Ms. Gantz and Ms. Turner; testimony from Assistant District Attorney Ms. Ching concerning statements made to her by A.J. prior to the scheduled Preliminary Hearing; and statements made by A.J. and E.G. to their mother, Ms. Galloway. The State did not call A.J., E.G. or Ms. Galloway as witnesses.

Additionally, the State presented four phone calls made to Galloway by Appellant while he was in the Tulsa County Jail. These calls were made before Galloway took the girls a second time to the Justice Center on February 19, 2013. During these phone calls, Appellant talked to Galloway as well as both girls. In a call on February 18, Galloway assured Appellant they were going to "talk to the D.A. tomorrow and make nothing of it. And [A.J.] is going to straight up tell them she lied." Galloway told Appellant she was waiting on him so they could move out of state.

During his conversations with A.J. and E.G., Appellant told them that they needed to get him out of jail as soon as possible and that he was miserable in jail. He apologized to the girls and told them he had been thinking about them, that he loved them and that he missed them on Valentine's Day. He told the girls that when he got out of jail, they would be a family and go out to eat and go to movies. He told them they would move to a state with a beach. He told them he loved their mother and that he would see them soon.

While A.J. and E.G. were in the Justice Center on February 19, Galloway waited for them outside in the car, talking with Appellant on the phone. Referencing A.J. and E.G., she told him

that she had "worked with them". She told Appellant that Det. Bishop gave her a hard time about her recantation of the molestation story.

The State also presented testimony from Demetrice Hardrick and her daughter J.H. Ms. Hardrick testified that in 2002 Appellant was her live-in boyfriend and that he had molested her then eleven year old daughter. J.H. testified that one morning when her mother was at work Appellant got into bed with her and kissed and fondled her. J.H. testified that she tried to fight off Appellant but he continued to fondle her and attempted to pry her legs apart.

Unsuccessful in his attempt, Appellant eventually left J.H.'s bed and room. When J.H. tried to go to her sister's room down the hall, Appellant grabbed her and dragged her down the hall telling the sister that the screaming J.H. "was tripping". With the help of her brother and sister, J.H. was able to get away from Appellant and she eventually told her mother what had happened. When Ms. Hardrick confronted Appellant, he denied any wrongdoing. Ms. Hardrick told Appellant to leave her house and she contacted police.

While incarcerated, Appellant repeatedly phoned Ms. Hardrick saying he was sorry. Ms. Hardrick retrieved a letter in the mail addressed to J.H. from Appellant. In the letter, Appellant told the eleven (11) year old that he was sick, he missed her, and how he will "never have a Christmas". Appellant said that charges had been filed and "that's not so cool". He told J.H. "I [sic] not trying to bribe you, It's on you." "Can you help me just one more time? Please, I will do anything you want. I'll take you anywhere." Appellant also told J.H., "I got $300 big ones is all yours. Just fix the problem [J.H.]. I can't live without your mama. I want your mama back. [J.H.] please help me. . . Don't let nobody know that I wrote you this." Appellant then promised her $400.00 and said, "it's all in your hands, [J.H.]," "Drop the charges or tell your mama to." He closed the letter by stating, "[J.H.], do your magic. But [J.H.] I will do anything for you. Get me to talk to your mama."

A.J. and E.G. testified on behalf of the defense at trial. E.G. testified that she lied during her first forensic interview about Appellant inappropriately touching A.J. She said that her Aunt Shantel told her that if she did not say that Appellant touched A.J. that she [E.G.] would get in trouble and Aunt Shantel "would tell some lies on [E.G.] to [her mother]." E.G. said Aunt Shantel told her the story to make up. E.G. denied that Appellant inappropriately touched A.J. She said she didn't remember what she said the second time she went to the Justice Center. She said she was afraid if she said anything, her Aunt Shantel "would tell lies about [her]". E.G. said it made her mother sad when Appellant was arrested and that in turn made her sad.

A.J. also testified that Appellant never inappropriately touched her and that she had lied at her first forensic interview. She said her mother was sad until she learned that A.J. and E.G. had lied about the touching. She said E,G. made the whole thing up because she was mad at Appellant and because Aunt Shantel told her what to say. A.J. said Aunt Shantel also told her what to say and she went along with it because she was "really little".

Additionally, Appellant testified at trial. He admitted to molesting J.H. and to pleading guilty to the crime. However, he denied ever molesting A.J. He testified that E.G. made up the accusation

because she was mad at him. Appellant said that Ms. Galloway bonded him out of jail in May 2013 and they resumed their relationship.

In Propositions I and II, Appellant contends that he was denied his constitutional right to confront the witnesses against him when the court admitted into evidence the recorded forensic interviews of A.J. and E.G.; testimony regarding those interviews by the two forensic interviewers; Ms. Ching's concerning statements made to her by A.J. prior to the scheduled Preliminary Hearing; and statements made by A.J. and E.G. to their mother, Ms. Galloway. Appellant asserts that as the State never called A.J. or E.G. as a witness and he thus had no opportunity to cross-examine the children, admission of their hearsay statements violated his rights under the Confrontation Clause. Specifically, Appellant argues that the trial court erred in ruling that the out-of-court statements made by A.J. and E.G. were admissible hearsay pursuant to the forfeiture by wrongdoing doctrine under 12 O.S. 2804(B)(5) (2014) because the State did not show that either witness was unavailable or that the defense specifically intended to prevent them from testifying. Appellant also asserts the statements were inadmissible as child hearsay under 12 O.S. 2803.1 (2013).

The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment provides that all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him". Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004). In Crawford, the United States Supreme Court said that the Confrontation Clause is not violated when a testimonial, out-of-court statement offered against an accused to establish the truth of the matter asserted is admitted when the declarant is unavailable and where the accused has had a prior opportunity to cross-examine the witness. 541 U.S. at 68, 124 S.Ct. at 1374. However, "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." 541 U.S. at 59 n. 9, 124 S.Ct. at 1369 n. 9, citing California v. Green, 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).1 "The Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." California v. Green, 399 U.S. at 158, 90 S.Ct. at 1935.

These principles have been adopted by this Court. See Cuestra-Rodriguez v. State, 2010 OK CR 23, 30, 241 P.3d 214, 227 ("[t]he Confrontation Clause forbids the admission of testimonial hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant," citing Crawford, 541 U.S. at 68, 124 S.Ct. at 1374); Simpson v. State, 2010 OK CR 6, 24, 230 P.3d 888, 889 ("Crawford states, however, that 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"' citing Crawford, 541 U.S. at 59 n. 9, 124 S.Ct. at 1369 n. 9, citing California v. Green, 399 U.S. at 162, 90 S.Ct. 1930).

In the present case, the declarants of the out-of-court statements (the children) testified for the defense, not the prosecution which is the more usual circumstance in the above cited cases. However, that distinction does not make the principle cited in footnote 9 of Crawford and its progeny inapplicable. Those cases find the defendant's opportunity to examine the declarant about the out-of-court statement satisfies the Confrontation Clause. "Ordinarily a witness is

regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions". United States v. Owens, 484 U.S. 554, 561, 108 S.Ct, 838, 844, 98 L.E.2d 951 (1988).

Here, A.J. and E.G. were placed on the stand and subject to examination by the defense. Defense counsel specifically questioned both children about her prior statements to her mother regarding Appellant's touching, the interviews at the Justice Center, and the statements made to the interviewers. A.J. was also specifically questioned about her statements to Ms. Ching. Neither child refused to answer the questions posed to her.

Further, each witness who took an out-of-court statement from A.J. and E.G. that was introduced at trial also testified at trial, Appellant knew from well before the start of the trial that the prosecution was not going to call the children as witnesses and he has made no claim (nor does the record indicate) that he was in any way forced to call them as witnesses. Appellant has not shown any prejudice as a result of the children testifying for the defense.

Therefore, as the children actually testified at trial and were questioned by the defense, we find Appellant was not denied his Sixth Amendment right to confront his accusers.

Our analysis would be different if the defense had not called the children to testify. Any error in calling the children to testify out of the usual sequence of witnesses is harmless beyond a reasonable doubt as the defense was able to fully examine the children on their prior disclosures. See Bartell v. State, 1994 OK CR 59, 21, 881 P.2d 92, 99, citing Delaware v. Van Arsdall, 475 U.S. 673, 679, 684, 106 S.Ct. 1431, 1435, 1437-38, 689 L.Ed.2d 674 (1986) (violations of the Confrontation Clause are subject to harmless error analysis). See also Simpson v. State, 1994 OK CR 40 34, 876 P.2d 690, 702 citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) ("The standard for constitutional violations is well-known: reversal is in order unless the State can show the error was harmless beyond a reasonable doubt.").

However, the analysis does not end here though as we must next consider whether the children's statements were properly admitted under the forfeiture by wrongdoing hearsay exception. Title 12 O.S. 2804(B) (2014) has been called the "forfeiture by wrongdoing doctrine" exception to the hearsay rule allowing into evidence a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. Hunt v. State, 2009 OK CR 21, 8, 218 P.3d 516, 518.

Section 12 O.S. 2804 (B)(5) provides that out-of-court statements are not excluded by the hearsay rule if the declarant is unavailable as a witness and the statement is offered against a party that wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness, and did so intending that result.

Here, the evidence clearly supports the trial court's finding that Appellant's misconduct and influence persuaded the children to refuse to cooperate with the prosecution. However, in addition to finding the children unavailable to testify due to Appellant's actions, the trial court was required to find the children unavailable pursuant to our statutory definition of unavailability.

Title 12 O.S. 2804 (A) (2014) provides that a witness is deemed unavailable if the witness: 1) is exempt by ruling of the court on the ground of privilege from testifying concerning the subject matter or of the declarant's statement; 2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; 3) testifies to a lack of memory of the subject matter of the declarant's statement; 4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or 5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance.

A.J. and E.G. were in the custody of the Department of Human Services and living in a family foster care placement. In pre-trial hearings, the State argued it could bring the children before the court physically, but they were "not available to testify in the legal sense" as A.J. had persistently refused to testify as a result of Appellant's actions in persuading her to recant her allegations. The State informed the court that it had not been able to make contact with the children or with their guardian and that prior attempts to interview the children proved furtive as they simply would not talk with the prosecutor.

Therefore, the State argued the children should be declared unavailable to testify and their out-of-court statements admitted under the hearsay exception. In finding the children unavailable, the trial court relied in part on Thompson v. State, 2007 OK CR 38, 169 P.3d 1198. In Thompson, this Court acknowledged the "futility" of efforts to force a witness to testify in a gang related murder case and said it would give broad deference to the trial court's appraisal of the "realities of a particular case". 2007 OK CR 38, 19, 169 P.3d at 1205-1206. Thompson is distinguishable from the present case in that the witnesses in that case were subpoenaed and appeared at trial for the prosecution but refused to testify pleading their rights under the Fifth Amendment. During in-camera questioning, it became clear that both witnesses would refuse to answer any questions.

Despite applying "reasonable pressure on the witnesses to testify", the trial court ultimately found both witnesses "unavailable" and allowed the State to introduce their preliminary hearing testimony. 2007 OK CR 38, 18, 169 P.3d at 1204: The facts in the present case are far different.

The trial court's finding of unavailability is not supported by the record. The children never refused any court order to testify and never testified to a lack of memory. They were not physically beyond the reach of the court's compulsory process - the prosecution knew where the children were, they could have subpoenaed them, and if necessary, secured the attachment of their guardian to produce the children as witnesses at trial. Therefore, the children's statements were not properly admitted under a hearsay exception requiring the unavailability to the declarant.

However, the statements were admissible under a hearsay exception where the availability of the declarant is immaterial. Pursuant to 12 O.S. 2803.1 (2013), which does not require the declarant of the out-of-court statement to be unavailable, a statement made by a child under thirteen (13) years old, which describes any act of sexual contact performed on the child is admissible if: the court finds the circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy and the child testifies or is available to testify in open court.

A.J. and E.G. testified in court. Their out-of-court statements had been found reliable in pre-trial hearings. The defense was informed as least ten (10) days in advance of trial that the prosecution would present the out-of-court statements at trial. We find the requirements of 12 O.S. 2803.1 were met and the children's out-of-court statements were properly admitted. As long as evidence is admissible under any valid legal theory, we will not find an abuse of the trial court's discretion in admitting the evidence. See Jacobs Ranch, L.L.C. v. Smith, 2006 OK 34, 58, 148 P.3d 842, 857 ("[w]here the trial court reaches the correct result for the wrong reasons or on incorrect theories, it will not be reversed.").

This proposition is denied.

In Proposition III, Appellant again raises a violation of his confrontation rights by the admission of hearsay statements made by Ms. Galloway to law enforcement regarding what A.J. and E.G. had disclosed to her and the admission of an audio recording of Galloway's interview with law enforcement. As with the statements of A.J. and E.G., the trial court ruled that Galloway's statements were admissible under the forfeiture by wrongdoing exception to the hearsay rule, 12 O.S. 2804 (B)(5) (2014). However, unlike A.J. and E.G., Ms. Galloway did not testify at trial.

As we found with A.J. and E.G., the trial court improperly found Ms. Galloway to be an unavailable witness. While Galloway testified at the Reliability Hearing to a lack of memory regarding A.J.'s claims of abuse and contradicted her initial reports to police, this is not sufficient to render her unavailable under 12 O.S. 2804 (A) or in the sense required by the Sixth Amendment. She was reasonably able to physically appear and testify (Appellant admits she was present at trial) pursuant to a State's subpoena or even an attachment for her arrest. While any effort to present Galloway's testimony at trial might have been in vain, it would establish what the record does not, that Galloway was indeed unavailable to testify as a result of Appellant's wrongful acts with the intent to prevent her testimony. Admission of Ms. Galloway's out-of-court statements when she did not appear as a witness subject to cross-examination was a violation of Appellant's rights under the Confrontation Clause of the Sixth Amendment. Violations of the Confrontation Clause are subject to harmless error analysis. Bartell, 1994 OK CR 59, 21, 881 P.2d at 99. "That is, a violation of a defendant's confrontation right does not require automatic reversal where the weight of the rest of the evidence is overwhelming and the prejudicial effect of the inadmissible evidence is insignificant." Cuestra-Rodriguez, 2010 OK CR 23, 40, 241 P.3d at 230.

The admission of Ms. Galloway's statements did not affect the outcome of the trial because A.J. and E.G. testified for the defense and were examined about their prior disclosures. As Ms. Galloway's statements were based on the children's disclosures, Appellant was not prejudiced by the admission of her statements as the children testified that their prior disclosures about Appellant sexually molesting A.J. were lies. We find the error in admitting Ms. Galloway's out-of-court statements harmless beyond a reasonable doubt.

This proposition is denied.

In Proposition IV, Appellant again asserts a violation of his rights under the Confrontation Clause but this time he argues it was by the testimony of Ms. Ching regarding statements made

to hear by A.J. Appellant also argues that Ms. Ching's testimony constituted vouching for the credibility of A.J. Appellant further argues that Ms. Ching's testimony about defense counsel waiving the Preliminary Hearing made it appear that defense counsel vouched for A.J.'s credibility and was an advocate for the State. Appellant asserts this deprived him of the right to effective assistance of counsel. Raising these three separate allegations of error in one proposition is a violation of Rule 3.5(A)5), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2017), which requires each proposition of error shall be set out separately in the appellate brief. The failure to follow this rule waives consideration of the issue on appeal. See Cuestra-Rodriguez v. State, 2011 OK CR 4, 12, 247 P.3d 1192, 1197. We will address the first claim of error raised in this proposition and find the additional claims of error are waived for appellate review.

Ms. Ching was the prosecutor in Appellant's case during its early stages. However, by the time of trial she had left the Tulsa County District Attorney's Office and was employed as a prosecutor in Muskogee County. She testified at Appellant's trial to statements made to her by A.J. prior to the scheduled Preliminary Hearing. Appellant was not denied his rights under the Confrontation Clause as both Ms. Ching and A.J. were cross-examined on A.J.'s prior out-of-court statements.

This proposition is denied.

In Proposition V, Appellant argues that even if none of the previously discussed allegations of error, when viewed in isolation, necessitate reversal of his convictions, the combined effect of these errors deprived him of a fair trial and requires relief. A cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. Warner v. State, 2006 OK CR 40, 223, 144 13.3d 838, 896. However, when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. Id. While we have found errors in this case, even considered together, they were not so egregious as to have denied Appellant a fair trial. Therefore, no new trial or modification of sentence is warranted.

This appeal is denied.

DECISION

The Judgment and Sentence is AFFIRMED. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2018), the MANDATE is ORDERED issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY

THE HONORABLE WILLIAM D. LAFORTUNE, DISTRICT JUDGE

OPINION BY: LUMPKIN, P.J.

LEWIS, V.P.J.: Concur

HUDSON, J.: Specially Concur

KUEHN, J.: Concur in Results

ROWLAND, J.: Concur in Results

HUDSON, JUDGE: SPECIALLY CONCURS

I concur in affirming Johnson's conviction and sentence. However, I write specially to express concern regarding the Court's finding that the children's statements were admissible pursuant to 12 o.s. 2803.1 (2013). In reaching this determination, the Court submits the availability of the declarant is "immaterial" under this hearsay exception. I fear this characterization of 12 O.S. 2803.1(A)(2) is an overgeneralization, which, could result in the erroneous admission of a child's statements in violation of a defendant's right to confrontation. Section 12 O.S. 2803.1 (A) (2) requires the child either "testif[y] or be available to testify" or be "unavailable as defined in Section 12 O.S. 2804 as a witness." The children in the present case were not only available to testify, but ultimately did testify, Yet, what if they had not testified?

Section 12 O.S. 2803.1 (A) (2) (a) permits admission of a child's statements merely upon a finding that the child is available to testify at the proceeding. Trial courts must be mindful that if a child is available to testify at the criminal proceedings, but does not, admission of the child's testimonial hearsay risks violating a defendant's right to confrontation. Thus, trial judges must use utmost care when addressing the admissibility of a child's statements pursuant to 12 O.S. 2803 . 1 (A) (2) (a) .

KUEHN, J., CONCURRING IN RESULT:

I concur in affirming Appellant's convictions, but write separately to discuss two issues that I believe are not fully developed in the Majority's opinion, but which are of paramount importance for future cases: (1) the State's obligations under the Sixth Amendment's Confrontation Clause, and (2) the contours of the forfeiture by wrongdoing doctrine. The unique fact pattern in this case presents an excellent opportunity to give the bench and bar guidance on how to approach issues of witness intimidation.

The State accused Appellant of molesting one of his girlfriend's minor daughters. The complainant, her younger sister, and their mother all gave statements to authorities about what Appellant did and said. However, as time went on, all three witnesses changed their stories, recanting their prior statements and/or claiming they could not remember the events in question. The State then prepared to present its case to a jury solely on the weight of the witnesses' initial accusations - which, of course, were not made under oath, or in circumstances where Appellant had an opportunity to cross-examine his accusers.

With very few exceptions, the Sixth Amendment to the United States Constitution guarantees the accused the right to confront his accusers before the tribunal deciding his fate. A prosecution witness offering a statement that is "testimonial" in character must do so in person at trial if available. If the witness is unavailable, the prosecution bears the burden of demonstrating that

fact - even if there has been a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1368, 158 L. Ed. 2d 177 (2004).1

Ultimately in this case, Appellant called the victim and another primary eyewitness (the victim's sister) in his own defense. Thus, as the Majority stresses, he can hardly complain at this juncture that he was convicted without the benefit of facing his accusers. 2 However, I strongly disagree with the Majority's resolution of the Confrontation Clause claim. No matter the Appellant's trial gambit to call the witnesses himself, it is important to stress that he could not have been required to bring these witnesses into court. The real issue before this Court is whether the District Court was incorrect in finding forfeiture by wrongdoing; if it was, there is a potential Confrontation Clause violation.

The Confrontation Clause places the burden of marshaling the accusing witnesses on the State, not the accused. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324, 129 S. Ct. 2527, 2540, 174 L. Ed. 2d 314 (2009) ("fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court"). At the pretrial hearing, the State had to convince the court that a case built solely on hearsay was constitutionally permissible under the circumstances - in other words, that it had met its Sixth Amendment obligations. The State did not try to shift this burden to Appellant's shoulders. Rather, it presented overwhelming and compelling evidence that Appellant had forfeited his right to demand that the State meet its usual obligation.

A rare exception to the Confrontation right, forfeiture by wrongdoing was well-established at common law. The State is absolved of its responsibility to bring the accuser to court if the defendant has taken part in a scheme to keep her away. Giles v. California, 554 U.S. 353, 366-68, 128 S.Ct. 2678, 2687-88, 171 L.Ed.2d 488 (2008); Davis v. Washington, 547 U.S. 813, 833, 126 S.Ct. 2266, 2280, 165 L.Ed.2d 224 (2006); Hunt v. State, 2009 OK CR 21, 8, 218 P.3d 516, 518.3 The reasoning for this exception is summarized (with characteristic pithiness) by Professor Wigmore:

"[A defendant who procures the absence of a witness] ought justify the use of [the witness's] testimony whether the offering party has or has not searched for him, whether he is within or outside of the jurisdiction, whether his place of abode is secret or open; for any tampering with a witness should once and for all estop the tamperer from making any objections based on the results of his own chicanery."

5 Wigmore, Evidence 1405 (Chadbourn rev. 1974) (emphasis added).

The nature and extent of the forfeiture by wrongdoing exception is important. It has been called an equitable remedy, based on fairness rather than any inherent reliability in the extrajudicial statements themselves. Crawford, 541 U.S. at 62, 124 S.Ct. at 1370 ("the rule of forfeiture by wrongdoing . . extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability"). A judge considering a claim of forfeiture by wrongdoing does not balance or weigh reliability factors. Id. Rather, the doctrine requires a factual finding of a specific type of wrongdoing by the defendant. "The rule has its

foundation in the maxim that no one shall be permitted to take advantage of his own wrong." Reynolds v. United States, 98 U.S. 145, 158-159, 25 L.Ed. 244 (1879).

Statutes and rules regarding the admission of hearsay undoubtedly stem from the same concerns as the Confrontation Clause. But the two must not be confused. That was the basis for the Supreme Court's watershed opinion in Crawford: Evidence rules cannot be allowed to relax or dilute constitutional guarantees. But by the same token, evidence rules cannot limit well-seated exceptions to those guarantees.4 Put simply, whether the State in this case met the criteria for forfeiture by wrongdoing cannot be judged by whether the witnesses were "unavailable" by the terms of the Oklahoma Evidence Code. Many courts - including the Supreme Court in Giles - have noted this confusion, and observed that forfeiture of the constitutional right to confrontation necessarily includes forfeiture of the right to complain that the same statements are inadmissible hearsay.

"No case or treatise that we have found, however, suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights. And the distinction would have been a surprising one, because courts prior to the founding excluded hearsay evidence in large part because it was unconfronted."

Giles, 554 U.S. at 365, 128 S.Ct. 2678, 2686 (emphasis in original).5

Well aware of Appellant's confrontation rights, the State presented evidence at a pretrial hearing that he, and members of his family, had cajoled, coerced, manipulated, and threatened all three witnesses to disclaim their accusations. The State also gave the court a preview of the hearsay evidence it intended to present at trial: the girls' statements to their mother and a forensic interviewer, the complainant's statements to a former prosecutor, and the mother's statements to police. The State even presented video recordings of the girls' follow-up forensic interviews, where their demeanor was at least as telling - and arguably at odds with - their recantations and professed lack of memory.

Considering the evidence presented at that hearing, the trial court did not abuse its discretion in concluding that Appellant had forfeited his constitutional right to confront his accusers, in person and under oath, by participating in a scheme to intimidate them to the point where they would not appear in court - or, if they did appear, that they would not give meaningful evidence. Once the State had made a sufficient showing of forfeiture by wrongdoing, no additional Evidence Code hurdles - except general rules on relevance and unfair prejudice - could serve to exclude the statements. Dragging the intimidated witnesses before a judge and jury, simply to demonstrate their technical "availability" under the Evidence Code, would have been nothing but a cruel charade.6

It is appropriate for this Court to give guidance on these important issues, as this is a case of first impression. 7 To support a finding of forfeiture by wrongdoing, the State must prove in a pretrial hearing, by a preponderance of evidence, that the defendant wrongfully caused the declarant's unavailability as a witness, and did so intending that result. 12 O.S. 2804 (B)(5) (2014). The exception applies "only if the defendant has in mind the particular purpose of making the witness unavailable." Giles, 554 U.S. at 367, 128 S.Ct. at 2687.

The court can consider the totality of the circumstances, including both pre-arrest and post-arrest conduct, which may include the charged crime if it was committed to prevent a witness from testifying. However, the context of the conduct is important to establish the defendant's intent, and to show what, specifically, the defendant did that made the witness choose not to testify. Only conduct which intends to prevent, and actually prevents, testimony will meet the requirements of Giles and 12 O.S. 2804(B)(5) (2014). As well, hearsay evidence (not limited to the statements themselves) may be considered at that hearing. Davis, 547 U.S. at 833-34, 126 S.Ct. at 2280; 12 O.S. 2103 (B)(1) (2011) (the Evidence Code does not apply to "determination of questions of fact preliminary to admissibility of evidence").

Such a hearing should be held in conjunction with any relevant considerations under the Evidence Code for admitting hearsay (e.g., reliability of a child's statements regarding abuse under 12 O.S. 2803.1, and unavailability of a witness in order to admit their hearsay statement under 12 O.S. 2804), because these rules will determine admissibility if (1) the court finds the statements are not "testimonial" in nature under Crawford, and therefore not barred by the Sixth Amendment, or (2) the court finds the evidence is insufficient to show forfeiture by wrongdoing. In this case, the State wisely combined its forfeiture/reliability presentations into a single hearing. If the State loses on its forfeiture by wrongdoing theory, it may need to present the witnesses for examination by the court and defense counsel at the time of trial, in order to admit their statements under the Evidence Code and not violate a defendant's confrontation rights.

(footnotes):

1 While I continue to follow U.S. Supreme Court precedent finding that issues contained in footnotes are dicta and not holdings of the Court, see Bosse v. State, 2015 OK CR 14, 360 P.3d 1203, 1240 (Lumpkin, V.P.J., concurring in part/dissenting in part citing United States v. Dixon, 509 U.S. 688, 706, 113 S.Ct. 2849, 2861, 125 L.Ed.2d 556 (1993) and Wainwright v. Witt, 469 U.S. 412, 422, 105 S.Ct. 844, 851, 83 L.Ed.2d 841 (1985)), it is necessary to rely on the law in footnote 9 as the issue has been directly presented to us by Appellant's allegation of error.

(footnotes):

1 See Crawford, 541 U.S. at 51-52, 124 S. Ct. at 1364-65, for an explanation of when a statement is considered "testimonial." There is no dispute that the statements at issue here were "testimonial" under Crawford.

2 The victim's mother was not called by the defense, but the Majority finds admission of her hearsay statements harmless beyond a reasonable doubt.

3 Our Legislature adopted the doctrine in 12 O.S. 2804 of the Evidence Code, which now makes it clear that statements of an unavailable witness may be admitted if they are "offered against a party that wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness, and did so intending that result." 12 O.S. 2804 (3)(5) (2014).

4 California v. Green, 399 U.S. 149, 157-58, 90 S.Ct. 1930, 1934-35, 26 L.Ed.2d 489 (1970) ("hearsay rules and the Confrontation Clause are generally designed to protect similar values");

Dutton v. Evans, 400 U.S. 74, 86, 91 S.Ct. 210, 218, 27 L.Ed.2d 213 (1970) ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two." (emphasis added)); Chambers v. Mississippi, 410 U.S. 284, 297-98, 93 S.Ct. 1038, 1047, 35 L.Ed.2d 297 (1973) (under the circumstances of the case, state evidentiary "voucher rule" denied defendant a fair trial).

5 Other courts have reached the same conclusion.

"[If the statement] clears the Sixth Amendment hurdle, rule against hearsay poses no further obstacle to admission . . . . Because both the hearsay rule and the confrontation clause are designed to protect against the dangers of using out-of-court declarations as proof, a defendant's actions that make it necessary for the government to resort to such proof should be construed as a forfeiture of the protections afforded under both."

United States v. White, 116 F.3d 903, 912 (D. C. Cir. 1997). See also United States v. Dhinsa, 243 F.3d 635, 652 (2nd Cir. 2001) (a defendant who wrongfully procures witness's silence has 'waived his sixth amendment rights and, a fortiori, his hearsay objection" to the witness's out-of-court statements (citation omitted)); United States v. Houlihan, 92 F.3d 1271, 1281 (1st Cir.1996) (defendants' misconduct "waived not only their confrontation rights but also their hearsay objections, thus rendering a special finding of reliability superfluous"); United States v. Theuis, 665 F.2d 616, 633 (5th Cir.1982) (defendant's waiver of his confrontation rights "also acted as a waiver of the right to raise a hearsay objection once the prosecution demonstrated a need for the evidence"); United States v. Rodriguez-Marrero, 390 F.3d 1, 17 (1st Cir. 2004) (forfeiture by wrongdoing is "an independent ground for the admissibility of hearsay that survives Crawford").

6 As I discus above, clearly forfeiture by wrongdoing does not require a finding that the witness was unavailable under Evidence Code provisions. However, because the district court made such a finding, I briefly address it. The district court found the witnesses "unavailable" under 12 O.S. 2804 (2) (2011), because they "persist[edi in refusing to testify concerning the subject matter ... despite an order of the court to do so." Yet the witnesses didn't actually refuse to testify; they didn't even appear at the hearing. I do not believe, for example, that the State was required to place the witnesses on the stand, swear them in, ask them their names, and tender them for cross-examination. Even if the State had not proven that Appellant forfeited his confrontation rights, I believe that coercion and undue influence can (and did in this case) render the witnesses "unable to be present" due to "mental infirmity," sufficient to find them unavailable under 12 O.S. 2804(A)(4). In re K. U., 2006 OK CIV APP 88, 22, 140 P.3d 568, 575 (holding that, although child in parental-rights termination hearing was physically present, she was "unavailable" as a witness due to her susceptibility to trauma from testifying). See McClendon v. State, 1989 OK CR 29, 7, 777 P.2d 948, 951 (this Court may sustain an evidentiary ruling on a different theory than the one relied upon by trial court, so long as the alternative finds support in the record).

7 Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction. Allen v. Dist. Court of Washington Cty., 1990 OK CR 83, 13, 803 P.2d 1164, 1167; see also Burks v. State, 1979 OK CR 10, 49, 594 P.2d 771, 774-75, overruled in part on other grounds by Jones v. State, 1989 OK CR 7, 8,

772 P.2d 922, 925, where this Court developed a framework for trial courts to determine the admissibility of other crimes evidence under 12 O.S. 2404.