

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

Impact of the Sixth Amendment
Confrontation Clause on
Admissibility of Hearsay

Post-Crawford U.S. Supreme Court

- Davis v. Washington, 547 U.S. 813 (2006)(911 calls; statements to police).
- Whorton v. Bockting, 549 U.S. 406 (2007)(Crawford does not apply retroactively on collateral review).
- Giles v. California, 554 U.S. 353 (2008)(forfeiture by wrongdoing).
- Melendez-Diaz v. Mass., 129 S. Ct. 2527 (2009)(testimonial documents).
- Michigan v. Bryant, 131 S. Ct. 1143 (2011)(ongoing emergency).
- Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)(testimonial documents).

If declarant testifies and is
subject to cross-examination
about the hearsay, the
Confrontation Clause is satisfied

Available for cross

- Declarant admits making the statement and remembers underlying events.
- Memory need not be complete for statements or event.
- If declarant answers cross-exam questions, the 6th amendment is usually satisfied.

Crawford does apply at
adjudicatory phase of
delinquency case. In re S.P. 215
P.3d 847 (Ore. 2009)

Crawford does not apply in civil cases

- Commonwealth v. Given, 808 N.E.2d 788 (Mass. 2004)(civil commitment of sexually dangerous person).
- In re J.D.C., 159 P.3d 974 (Kan 2007)(dependency).
- In re April C., 131 Cal. App. 4th 599 (2005)(dependency).
- In re T.W., 139 P.3d 810 (Mont. 2006)(dependency).
- Cabinet for Health & Family Services v. A.G.C., 190 S.W.3d 338 (Ky. 2006)(TPR).
- In re S.A., 708 N.W.2d 673 (S.D. 2005)(TPR).

Crawford does not apply at sentencing, including dispo in juvenile court

Crawford not applicable at probation revocation

- State v. Marquis, 257 P.3d 775 (Kan. 2011).

Crawford does not apply when
out-of-court utterances are
offered to prove something
other than the truth of the matter
asserted

Crawford

- “The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” p. 59, n.6.

Reasons for police conduct

- State v. Castaneda, 715 S.E.2d 290 (N.C. Ct. App. 2011)(detectives' references to statements by third parties not hearsay. The statements were offered to explain the detectives interviewing techniques.

Why investigation commenced

- State v. Wiggins, 648 S.E.2d 865 (N.C. Ct. App. 2007).
- Testimonial statements were admissible without offending confrontation because they were not offered for TOMA; but to show why police were involved in investigation.

Hodges v. Commonwealth, 634 S.E.2d 680 (Va. 2006)

- Some of murder victim's statements were admissible as non-hearsay, and because the statements were not offered for TOMA, the Confrontation Clause did not apply.

False statements

- Commonwealth v. Pelletier, 879 N.E.2d 125 (Mass. Ct. App. 2008).
- Defendant convicted of domestic assault. Victim/wife falsely told police she fell down stairs.
- “false statements generally do not fall within the rationale of the hearsay rule.” p. 130.

Developmentally unusual sexual knowledge

- In re Jean Marie W., 559 A.2d 625 (R.I. 1989).

Timing of disclosure

- State v. Pettrey, 549 S.E.2d 323 (W. Va. 2001).

Impact on Listener

- Young v. State, 987 So.2d 1074 (Miss. Ct. App. 2008).
- Defendant murdered his former girlfriend; victim's statements to defendant were not offered for TOMA, but for impact on defendant.

Motive—People v. Mendoza, 171 P.3d 2 (Cal. 2007)

- Defendant murdered victim; victim's out-of-court statement that defendant had molested her was admitted for the non-hearsay purpose of establishing defendant's state of mind and motive; no 6th amendment violation.

Victim's incompetence—People v. Cooper, 148 Cal. App. 4th 731 (2007)

- Elder financial abuse case; videotaped interview of victim was made while she was still alive; tape was admitted not for TOMA, but to show that victim was mentally incompetent.

Prior inconsistent statement impeachment

- State v. Cabbell, 24 A.3d 758, 772 (N.J. 2011).
- “when a witness testifies at trial inconsistent with a signed or sound-recorded statement, admissible under N.J.R.E. 803(a)(1), the Confrontation Clause is not offended by the reading or playing of the out-of-court statement to the jury provided that the defedant has the opportunity to cross-examine the witness.”

If the Declarant does not testify, is
the hearsay “testimonial”?

Cox v. State, 28 A.3d 687, 698-699 (Md. 2011)

- “whether a reasonable person in the declarant’s position would have made the statement with a primary purpose of creating an out-of-court substitute for trial testimony. Thus, if the primary purpose of the statement is made under circumstances that would not lead an objective declarant reasonably to believe that the statement would be available for use at a later trial, then it is not testimonial and the Confrontation Clause does not bar its admission.”

Statements to friends, family,
teachers, etc.

Mom ain't a cop

- Pantano v. State, 138 P.3d 477 (Nev. 2006) (“A parent questioning his or her child regarding possible sexual abuse is inquiring into the health, safety, and well-being of the child. To characterize such parental questioning as the gathering of evidence for purposes of litigation would unnecessarily and undesirably militate against a parent’s ability to support and nurture a child at a time when the child most needs that support.”)

United States v. Brown, 441 F.3d 1330 (11th Cir. 2006)

- “We need not divine any additional definition of ‘testimonial’ evidence to conclude that the private telephone conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial.”

Foster parents ain't cops

- State v. Brigman, 615 S.E.2d 21 (N.C. Ct. App. 2005)

Statements to CPS social workers?

- State v. Mack, 101 P.3d 349 (Ore. 2004)(testimonial).
- Flores v. State, 120 P.3d 1170 (Nev. 2005)(testimonial).

Children's Advocacy Center Interviews?

- People v. Sisavath, 118 Cal. App. 4th 1396 (2004)(testimonial).
- State v. Snowden, 867 A.2d 314 (Md. 2005)(testimonial).
- State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006)(non-testimonial).
- State v. Krasky, 721 N.W.2d 916 (Minn. Ct. App. 2006)(testimonial).

Child Advocacy Centers

- State v. Contreras, 979 So.2d 896 (Fla. 2008)(testimonial).
- State v. Pitt, 147 P.3d 940 (Ore. Ct. App. 2006)(testimonial).

Statements to mental health and medical professionals

- Giles v. California, 128 S. Ct. 2678 (2008).
- “statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules” p. 2693.

Statements to mental health and medical professionals?

- State v. Blue, 717 N.W.2d 558 (N.D. 2006) (“if an interview is done strictly for medical purposes and not in anticipation of criminal proceedings, the statement would be nontestimonial.”).
- Commonwealth v. DeOliveria, 849 N.E.2d 243 (Mass. 2006)(nontestimonial statements to ER doctor).
- State v. Kirby, 908 A.2d 506 (Conn. 2006)(statement to first responder in the field nontestimonial).

State v. Stahl, 855 N.E.2d 834 (Ohio 2006)

- Adult rape victim's statements to nurse practitioner not testimonial, but there was a strong dissent.

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

- “Courts have also concluded that a child victim’s statements to a medical professional are not testimonial when the statements regard the nature of the alleged attack or the cause of the child’s symptoms and pain.”

Statements to police; 911 calls?

Davis v. Washington, 547 U.S. 813 (2006)

- “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” p. 822.

Davis involved two IPV cases

- Davis: 911 call; “He’s here jumpin’ on me again” and “He’s usin’ his fists.”
Statements to 911 operator were during ongoing emergency.
- Hammond: Responding police found victim on her front porch. Police separated victim and perp. Emergency was over.

Davis

- Speaking about events as they were actually happening.
- Level of formality.

Michigan v. Bryant, 131 S. Ct. 1143 (2011)

- “We now face a new context: a non-domestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim.” p. 1156.
- Victim’s statements were non-testimonial due to ongoing emergency.

Bryant

- “To determine whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency, . . . we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.” p. 1156.

Bryant

- “The statements and actions of the parties must also be objectively evaluated. This is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.” p. 1156.

Bryant

- “In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and answers.” pp. 1160-1161.

Bryant

- “The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight.” p. 1157 n. 8.

Bryant

- “whether an emergency exists and is ongoing is a highly context-dependent inquiry.” p. 1158.
- “Because Davis and Hammon were domestic violence cases, we focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat *to them*.” p. 1158.

Bryant

- “Domestic violence cases like Davis and Hammon often have a narrower zone of potential victims than cases involving threats to public safety.” p. 1158.
- “the duration and scope of an emergency may depend in part on the type of weapon employed.” p. 1158.
- Medical condition of the victim is a factor.

Bryant

- “the questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion.” p. 1160.

Bryant

- First case involving a gun.
- “The physical separation that was sufficient to end the emergency in Hammon [where the offender used his fists on the victim] was not necessarily sufficient to end the threat in this case” p. 1164.

Bryant

- “In determining whether a declarant’s statements are testimonial, courts should look to all of the relevant circumstances.” p. 1162.
- “the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.” p. 1162.

Bryant

- “We reiterate, moreover, that the existence vel non of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, the ultimate inquiry is whether the primary purpose of the interrogation was to enable police assistance to meet the ongoing emergency.” p. 1165.

Double hearsay

- State v. Lahai, 18 A.3d 630 (Conn. Ct. App. 2011).
- First layer: victim's statements were non-testimonial.
- Final layer: police report repeating victim's statements testimonial.
- Author of report not available for cross.
- Report inadmissible.

Dying declarations not subject to Crawford

- State v. Beauchamp, 796 N.W.2d 780 (Wis. 2011).

CSI meets the Sixth Amendment

- Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).
- Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).

Melendez-Diaz

- A forensic lab report identifying a substance as cocaine was testimonial. The report was prepared to serve as evidence.

Bullcoming

- A forensic lab report certifying Bullcoming's blood-alcohol concentration was testimonial.
- At trial, prosecutor did not call the tech who signed the analysis.
- Rather, prosecutor called another tech who was familiar with the lab's operations, but who did not participate in the test of Bullcoming's blood.

Bullcoming

- Does Confrontation Clause allow admission of testimonial lab report through in-court testimony of person who did not sign or perform the test?
- “We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused’s right is to be confronted with the analyst who made the certification”

Sanders v. Commonwealth, 711 S.E.2d 213 (Va. 2011)

- Pediatrician examined child for possible CSA. Doctor ordered test for STI. Report came back positive for chlamydia. Doctor testified to diagnosis of STI based on lab report. Is the lab report testimonial?
- No. “There is no evidence here that the laboratory technicians that tested CL’s samples understood that the report would be used to prosecute Sanders for a crime.”

Waiver and Forfeiture of Confrontation Right

- Failure to object waives error.
- Forfeiture by wrongdoing.

Forfeiture by wrongdoing

- D commits a crime, and is awaiting trial.
- To prevent a potential witness from testifying at trial, D threatens or murders the witness.
- At trial, the prosecutor offers testimonial hearsay.
- D can forfeit both Confrontation Clause and the hearsay objections.

Render v. State, 347 S.W.3d 905, 918 (Tex. Ct. App. 2011)

- “A defendant does not forfeit the right of confrontation by merely engaging in conduct that causes the witness to be absent. Rather, to establish a forfeiture of the right, it must be shown that the defendant engaged in wrongful conduct specifically for the purpose of preventing the witness from testifying.”

Giles v. California, 554 U.S. 353 (2008)

- Court suggests forfeiture applies beyond the situation where defendant's intents to prevent testimony in court.
- Forfeiture extends to cases in which defendant intends to keep declarant from making hearsay statements the declarant would utter to get help.

If forfeiture applies, no need to
assess reliability

How about a little hearsay, just
for fun!

Present Sense Impression

- FRE 803(1): A statement describing an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Minutes too long

- In re J.A., 949 A.2d 790 (N.J. 2008).

State v. Bergevine, 942 A.2d 974 (R.I. 2008)

- Father went to work, but returned home because he forgot something. At home he discovered defendant molesting his toddler. Father's call to 911 describing what was going on was present sense impression and excited utterance.

Excited Utterances

- FRE 803(2): A statement relating to a startling event made while the declarant remains under the stress of excitement induced by the startling event.

Elements of excited utterance

- 1. Startling event.
- 2. Statements relates to the event.
- 3. Statement made while child still under the stress of the startling event.

Justification for excited utterance exception

- U.S. v. Jennings, 496 F.3d 344 (4th Cir. 2007).
- “The justification for admitting an excited utterance as an exception to the hearsay rule is based on the ‘assumption that an excited declarant will not have had time to reflect on events to fabricate.’”

Justification

- State v. Lopez, 974 So.2d 340 (Fla. 2008).
- “A person who is startled and excited does not have the capacity to analyze the facts or to make a conscious misrepresentation of the event.” p. 345.

Recantation does not defeat admission

- State v. Young, 161 P.3d 967 (Wash. 2007).
- 11-year-old recanted her hearsay statement describing sexual abuse; the fact that a hearsay statement is recanted does not mean it cannot be admitted as an excited utterance.

The startling event

- State v. Griffith, 161 P.3d 675 (Idaho Ct. App. 2007).
- Defendant murdered 4-year-old declarant's sibling; "it is hard to imagine a more startling or distressing event for a four-year-old than being present during the violent death of a sibling." p. 682. Four-year-old's statement 3 hours after event was an excited utterance.

The startling event

- Warner v. State, 218 S.W.3d 330 (Ark. Ct. App. 2005).
- 5-year-old was molested; some weeks later, victim saw defendant getting into a car with victim's sister; victim said, "Robert, don't you hurt my sister the way you hurt me." p. 333. Seeing defendant get into the car was a startling event.

Was the declarant still excited?

Spontaneity

- Mitchell v. State, 120 P.3d 1196 (Okla. Crim. App. 2005).
- “Even if we were to find Kyree was still under the stress of excitement caused by the startling event, the facts do not show any of his statements to Detective Edwards were spontaneous; rather, they were made in response to direct questions whether Appellant did anything to him or his sister.” p. 1206.

Spontaneity

- People v. Lisle, 877 N.E.2d 119 (Ill. Ct. App. 2007).
- “a delarant may make a spontaneous declaration to a person even after having spoken previously to another.” p. 128.

Questioning

- *Reyes v. U.S.*, 933 A.2d 785 (D.C. 2007).
- Statements to police officers were excited utterances; “we have found that responses to preliminary investigative questions, made while the declarant is still under the spell of the startling event, may qualify as spontaneous utterances because the questions are asked to ascertain the nature of the emergency and do not provide an opportunity for the declarant to reflect on the event or to premeditate a response.” p. 791.

Lapse of time

- U.S. v. Arnold, 486 A.2d 177 (6th Cir. 2007).
- “our cases do not demand a precise showing of the lapse of time between the startling event and the out-of-court statement.” p. 185.

Lapse of time

- Williams v. State, 967 So.2d 735 (Fla. 2007).
- “If sufficient time passed for reflective thought, the proponent for admission of the statement must show that reflective thought did not occur.”
p. 748.

Lapse of time

- In re J.S.B., 644 S.E.2d 580 (N.C. Ct. App. 2007).
- TPR case; 9-year-old witnessed her mother hit the 9-year-old's baby sibling on the head, killing the baby; 9-year-old's statement 16 hours later was an excited utterance.

Lapse of time

- Simmons v. U.S., 945 A.2d 1183 (D.C. 2008) (“Rucker was unable to say exactly how soon after the shooting she spoke with the agitated elderly gentleman, but such exactitude is not demanded. It suffices that the record in the present case provides a substantial basis for concluding that the declaration was made within a reasonably short time of the shooting, while the declarant ‘was still reacting to the excitement of the incident.’” p. 1189).

Lapse of time

- People v. Blacksher, 52 Cal. 4th 769 (2011) (“Although they were made well over an hour after the murders, this lapse of time did not purge Eva’s statements of their spontaneity.”)

Lapse of time

- *Brown v. United States*, 27 A.3d 127 (D.C. 2011) (“even where a startling occurrence happened hours before an utterance was made, the utterance may be admissible under the exception if it was made when an ensuing event made the speaker newly aware of the gravity of the occurrence.”)

Emotional condition

- State v. Morales, 895 A.2d 114 (R.I. 2007)(7-year-old was crying).

Physical condition

- People v. Pedroza, 147 Cal. App. 4th 784 (2007)(Victim's statement minutes after being severely burned was an excited utterance).
- Williams v. State, 967 So.2d 735 (Fla. 2007)(victim had been stabbed 7 times, and both her lungs were punctured).

Sleep

- D.G.B. v. State, 833 N.E.2d 519 (Ind. Ct. App. 2005)(6-year-old received genital injuries requiring surgical repair; she made statements after awakening from anesthesia; on facts of this case, child's statement was an excited utterance).

Content of statement

Speech pattern

- Exclamation point rule!

Age

- Bell v. State, 266 S.W.3d 696 (Ark. 2007) (“In addition, it is unlikely that, at such a young age, S.C. reflected on the content of his statement before it was made. We note that this court and other courts have expressed a preference for leniency as to the contemporaneous requirement when the declarant is a young child.” p. 706).

Nature of event

- State v. Slater, 939 A.2d 1105 (Conn. 2008).
- Adult victim was raped and threatened with a knife; her statement shortly following the assault and while she was still very upset given to men who came to her aid was a nontestimonial excited utterance.

First safe opportunity

- U.S. v. Wilcox, 487 F.3d 1163 (8th Cir 2007)(14-year-old victim called the police at the first safe opportunity).
- People v. Lisle, 877 N.E.2d 119 (Ill. Ct. App. 2007)(“The fact that a declarant’s statement is made at the first opportunity to speak supports a finding of spontaneity.” p. 128).

Rekindled excitement

- Bayne v. State, 632 A2d 476 (Md. Ct. App. 1993).

Totality of the circumstances

- *Simmons v. U.S.*, 945 A.2d 1183 (D.C. 2008).
- *State v. Young*, 161 P.3d 967 (Wash. 2006)(if there is undisputed evidence that a declarant fabricated a statement, the statement cannot be an excited utterance).

Fresh Complaint of Rape

- Commonwealth v. King, 834 N.E.2d 1175 (Mass. 2005).

Dying declaration

- People v. Stamper, 742 N.W.2d 607 (Mich. 2008).
- A 4-year-old can be aware that he is dying and can make a dying declaration.

Diagnosis or Treatment Exception

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

Rationale

- State v. Muttart, 875 N.E.2d 944 (Ohio 2007).
- “a fundamental assumption underlying the medical-treatment exception is that that particular hearsay is reliable. . . . But the presumption of reliability in the medical hearsay exception is not based exclusively on selfish-motive doctrine. It is also premised on the professional-reliance factor.” pp. 952-953.

Not everything you tell the doc
is admissible; only that which is
“pertinent”

Coates v. State, 950 A.2d 114 (Md. 2008)

- 8-year-old was examined by nurse 14 months after abuse ended; many of child's statements to nurse were not pertinent to diagnosis or treatment, and were not admissible.

ID of perp—CSA cases

ID of perp—DV cases

- Moore v. City of Leeds, 1 So.3d 145 (Ala. Crim. App. 2008)(ID can be pertinent).
- People v. Jaramillo, 183 P.3d 665 (Colo. Ct. App. 2008)(ID of perp in DV cases not pertinent).

ID of perp—DV cases

- State v. Williams, 154 P.3d 322 (Wash. Ct. App. 2007).
- “In domestic violence and sexual abuse situations, a declarant’s statement disclosing the identity of a closely-related perpetrator is admissible under ER 803(a)(4) because part of reasonable treatment and therapy is to prevent recurrence and future injury.” p. 328.

Id of perp—DV cases

- Perry v. State, 956 N.E.2d 41 (Ind. Ct. App. 2011) (“we have noted that in cases involving child abuse, sexual assault, and/or domestic violence, courts may exercise their discretion in admitting medical diagnosis statements which relay the identity of the perpetrator.”).

Statements to non-docs

Declarant need not be the child

Psychotherapy

Do little kids understand the importance of telling the truth to the doctor?

Cases

- United States v. Russell, 66 M.J. 597 (Army Ct. Crim. App. 2008).
- State v. Telford, 948 A.2d 350 (Conn. Ct. App. 2008).
- State v. Coates, 950 A.2d 114 (Md. 2008).
- State v. Butcher, 866 N.E.2d 13 (Ohio Ct. App. 2007).

Children's understanding of illness, medical care, and the role of medical providers follows a developmental continuum

Caroline Redpath & Cosby Rogers

- Healthy Young Children's Concepts of Hospitals, Medical Personnel, and Illness, *9 Journal of Pediatric Psychology* 29 (1984).
- Preschoolers understood that doctors “look at you” and “fix up.”
- Most preschoolers in this study did not know what nurses do.

Arlene Brewster

- Chronically Ill Hospitalized Children's Concepts of Their Illness, 69 *Pediatrics* 355-362 (1982).
- “Logical concepts such as cause of illness, necessity of treatment, and role of medical personnel are often beyond the inherent developmental ability of the young patient.” p. 361.

Margaret Steward

- Three-year-old Sammy was knocked off his tricycle by a passing car, resulting in a concussion. Dr. Steward visited Sammy in the hospital and asked, “Are the doctors helping you get well?”
- Sammy replied, “No, the doctors are berry mean.”

Sammy

- Did not understand that the unfamiliar and sometimes painful things the doctors did were designed to help.
- For Sammy, nurses—not doctors—were “helpers.”
- Margaret Steward & David Steward, Children’s Conceptions of Medical Procedures. In Roger Bibrace & Mary E. Walsh (Eds.), *New Directions for Child Development: Children’s Conceptions of Health, Illness, and Bodily Functions*, p. 67 (1981).

Some 3- to 6-year-olds

- Believe medical procedures are administered as punishment.
- Roger Bibace & Mary E. Walsh, Children's Conceptions of Illness. In Roger Bibace & Mary E. Walsh (Eds.), *New Directions for Child Development: Children's Conceptions of Health, Illness, and Bodily Functions*, p. 31 (1981).

Ellen Perrin & Susan Gerrity

- “Children’s ideas regarding illness frequently involve punishment, guilt, and self-blame. . . . Hospitalized children often ascribe the cause of their illness to disobedience of parental commands and interpret their hospitalization as rejection or punishment.”
- Ellen C. Perrin & Susan Gerrity, There’s a Demon in Your Belly: Children’s Understanding of Illness, *67 Pediatrics* 841-849m at 846 (1981).

Here's a doozy

- Some preschoolers think people get sick *after* they arrive at the hospital, and that doctors *cause* illness.
- Caroline C. Redpath & Cosby S. Rogers, Healthy Young Children's Concepts of Hospitals, Medical Personnel, Operations, and Illness, 9 *Journal of Applied Pediatric Psychology* 29 (1984).

Yet, kids are not entirely in the dark

- Young children frequently say that medicines are “good” because they make you feel better.
- Roger Bibace & James J. Dillon, What Children Want to Know About Medicine. In Roger Bibace, et al. (Eds.), *Partnerships in Research, Clinical, and Educational Settings* 63 (1999).

4-year-olds

- understand some aspects of routine medical visits.
- Janice L. Genevro, et al., Young Children's Understanding of Routine Medical Care and Strategies for Coping with Stressful Medical Experience. In Marc Bornstein & Janice Genevro (Eds.), *Child Development and Behavioral Pediatrics* 59 (1996).

Young children have some idea of what causes pain

- “Pain is less likely to be regarded as a form of punishment for wrongdoing than as due to a biological or physical/behavioral cause.”
- John E. Taplin, et al., Children in Pain. In Michael Siegal & Candida C. Peterson (Eds.), *Children’s Understanding of Biology and Health* pp. 131-160, at 134 (1999).

Taplin concluded

- “From a relatively young age [children] have acquired a basic understanding of pain as a biological phenomenon and already know a little about how it may be caused.” p. 151.

Pamela M. Kato, Thomas D. Lyon & Christina Rasco

- Reasoning About Moral Aspects of Illness and Treatment by Preschoolers Who Are Healthy and Who Have Chronic Illness, 19 *Developmental and Behavioral Pediatrics* 68 (1998).

Kato, Lyon & Rasco

- Many studies underestimate children's understanding and reasoning abilities.
- “When children as young as 4 years are asked to recognize the causes of illness rather than to generate explanations, they show impressive understanding. . . . As in many contexts, children can recognize what they cannot articulate.” p. 69.

Kato, Lyon & Rasco

- “We found that significant numbers of young children were able to show sophisticated reasoning skills concerning illness and immorality when they are asked to recognize rather than generate reasons for illness and treatment. . . . [Our findings] do not support the current theory that claims that very young children have a primitive understanding of the concepts of illness and treatment.” p. 75.

Melody Herbst, Margaret S.
Stweard, John E.B. Myers & Robin
L. Hansen

- Young Children's Understanding of the Physician's Role and the Medical Hearsay Exception. In Michael Seigal & Candida C. Peterson (Eds.), *Children's Understanding of Biology and Health* pp. 235-256 (1999).
- Study of the medical knowledge of 3- to 6-year-old children.

Herbst, et al.

- “Our data indicate that young children are more likely to report painful than benign touch and that they understand the necessity to provide an accurate narrative to persons in authority. This suggests that, compared to [three- and four-year-old children, children who are five and six years old] were better able to distinguish what kinds of events merit possible concern and need an adult’s attention or acknowledgement.” pp. 247-248.

Herbst asked about lying to a doctor

- The 3- and 4-year-olds thought the doctor would be angry.
- About half of the 5- and 6-year-olds understood that the doctor needed accurate information to help them.

Factors influencing admissibility under 803(4)

The child got it

- The professional informed the child of the clinical purpose.
- The professional emphasized the need for accuracy.
- The child has experience with medics.
- Clinical setting, uniforms.

Cops in white coats

- People v. Spicer, 884 N.E.2d 675 (Ill. Ct. App. 2007).
- “Almost all emergency room visits by sexual assault victims will have both evidence collection and medical aspects. If we were to hold that an evidence collection purpose made statements from a sexual assault evaluation inadmissible, we would in effect obliterate the statute, which applies only in sexual assault cases.” p. 451.

Cops in white coats

- State v. Butcher, 866 N.E.2d 13 (Ohio Ct. App. 2007).
- “It is readily apparent that Dr. Dewar’s primary function was to collect evidence to support a conviction.” p. 26.

Cops in white coats

- People v. Uribe, 162 Cal. App. 4th 1457 (2008).
- Not medical diagnosis or treatment case.
- SART nurse examiner was part of “investigative team” for purposes of *Brady*.

Testimonial competence and 803(4)

- State v. Muttart, 875 N.E.2d 944 (Ohio 2007) (“We hold that regardless of whether a child less than ten years old has been determined to be competent to testify pursuant to Evid. R. 601, the child’s statements may be admitted at trial as an exception to the hearsay rule pursuant to Evid. R. 803(4) if they were made for purposes of medical diagnosis or treatment.” p. 953.

Muttart, cont'd

- “In cases in which a hearsay statement is for purposes of medical diagnosis or treatment, the question is not whether the statement is reliable; the presumption is that it is. The salient inquiry here is not A.M.’s competency but whether her statements were made for purposes of diagnosis and treatment rather than for some other purpose.” p. 953.

Residual and child hearsay exceptions

Testimonial competence when statement uttered

Testimonial competence at trial

- B.B. v. Commonwealth, 226 S.W.3d 47 (Ky. 2007)(“testimonial incompetence of a declarant should be an obstacle to the admission of the declarant’s out-of-court statements if the reason for the incompetence is one which would affect the reliability of the hearsay.”)
- State v. Borboa, 135 P.3d 469, 474 (Wash. 2006)(“a child’s competence is not relevant to the issue of whether her hearsay statements are admissible.”).

Spontaneity

- *Bockting v. Bayer*, 505 F.3d 973 (9th Cir. 2007).
- *People v. Rojas*, 181 P.3d 1216 (Colo. Ct. App. 2008) (“E.B.’s statements were not spontaneous, but they were made in response to nonleading, open-questions questions.”)
- *Bishop v. State*, 982 So.2d 371 (Miss. 2008) (“her initial statement to her mother was completely spontaneous.”).

Questioning

- State v. Hyhammer, 963 A.2d 316 (N.J. 2009).
- Nine-year-old was asked suggestive questions during videotaped interview. “Cooper questioned the child, many times pointedly, with leading questions. . . . [T]he trial court did not abuse its discretion in finding that her statements met the trustworthiness requirements of N.J.R.E. 803(c)(27). . . . Amanda exhibited sexual knowledge beyond the experience of a typical child of similar age.”

Taped interview

Mental health counseling before statement

Consistent statements

- State v. Robinson, 7188 N.W.2d 400 (Minn. 2006).
- State v. Sevigny, 722 N.W.2d 515 (N.D. 2006).

State of mind and emotion when statement made

- Bockting v. Bayer, 505 F.3d 973 (9th Cir. 2007)(child was upset and crying).

Play and gestures corroborating statement

Developmentally unusual sexual knowledge

- *Bockting v. Bayer*, 505 F.3d 973 (9th Cir. 2007) (“The vivid descriptions that A gave to both Laura and Detective Zinovitch also reflect an unusual knowledge of sex for a child her age, even given the fact that A had on occasion walked in on intercourse between Bockting and Laura.”)
- *Foley v. State*, 914 So.2d 677 (Miss. 2005).

Little kids aren't supposed to know

- Bishop v. State, 982 So.2d 371 (Miss. 2008).
- “C.C.’s statements indicate that she possessed extensive sexual knowledge well beyond her age, four years old. C.C. was able to describe the shape and size of Bishop’s penis. She also described a sexual device that was used to Bishop and stated, ‘He put a toy that makes noise in his booty.’ C.C. further described in child-like terms that she understood the concept of male ejaculation”
- “his ‘too-too’ spit on her”

Idiosyncratic detail

- Bockting v. Bayer, 505 F.3d 973 (9th Cir. 2007)(child stated that “white buddly stuff” came out of defendant’s penis).

Developmentally appropriate terminology

- Bockting v. Bayer, 505 F.3d 973 (9th Cir. 2007).
- People v. Rojas, 181 P.3d 1216 (Colo. Ct. App. 2008)(“E.B. described the incident in age-appropriate language”).

Statement against interest

Motive to fabricate

- Bockting v. Bayer, 505 F.3d 973 (9th Cir. 2007)(child's "affection for Bockting evidenced a lack of motive to fabricate.").
- People v. Rojas, 181 P.3d 1216 (Colo. Ct. App. 2008)(child had no bias against defendant).

Corroboration

- In re B.D., 156 Cal. App. 4th 975 (2007)(useful discussion of corroboration).