

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Case No. 2023-287

Plaintiff-Appellee,

vs.

On appeal from the Montgomery
County Court of Appeals,
Second Appellate District
Court of Appeals Case No. 28821

BRANDON WILLIAM LEIGH

Defendant-Appellant.

**MEMORANDUM IN RESPONSE TO JURISDICTION
OF APPELLEE, THE STATE OF OHIO**

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WHY LEAVE TO APPEAL SHOULD BE DENIED

The United States Supreme Court held in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2005), that a testimonial statement made by a witness who does not testify at trial violates the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross examine the witness. *Id.* at 53-54. The exception to the Confrontation Clause carved out by *Crawford* for testimonial hearsay statements made by declarants who are unavailable and for whom the defendant had been afforded a prior opportunity to cross examine is well-established and has been repeatedly followed by this Court and other Ohio courts. *See, e.g., State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 173; *State v. Trench*, 156 Ohio St.3d 85, 2018-Ohio-5205, 123 N.E.3d 955, ¶ 210; *State v. Watts*, 1st Dist. Hamilton No. C-180545, 2019-Ohio-4856, ¶ 10; *State v. Nevins*, 171 Ohio App.3d 97, 2007-Ohio-1511, 869 N.E.2d 719, ¶ 35 (2d Dist.); *State v. Jordan*, 9th Dist. Summit No. 27005, 2014-Ohio-2857, ¶ 5; *State v. Lawson*, 10th Dist. Franklin No. 19AP-68, 2020-Ohio-3004, ¶ 10; *State v. Heard*, 12th Dist. Warren No. CA2016-11-095, 2017-Ohio-8796, ¶ 8.

Beyond satisfying the admissibility requirements under the Confrontation Clause, before a declarant's former testimony can be admitted at a subsequent trial, the testimony must also satisfy the requirements of Evid.R. 804(B)(1). *Neyland* at ¶ 182. Evid.R. 804(B)(1) provides that hearsay statements by an unavailable declarant are admissible if the statements qualify as "[t]estimony given by a witness at another hearing of the same or a different proceeding," and "if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." If the declarant's former testimony was given at a preliminary hearing, Evid.R. 804(B)(1) provides further that the testimony must satisfy the right to confrontation and exhibit indicia of reliability before it will be deemed admissible. Requiring that a declarant's former testimony satisfy both the Confrontation Clause and the Ohio

Rules of Evidence before it will be admissible is also well-established and has repeatedly been followed by this Court and other Ohio courts. *See, e.g., Neyland* at ¶ 182; *State v. Walker*, 1st Dist. Hamilton No. C-170321, 2018-Ohio-3918, ¶ 21; *State v. Young*, 2d Dist. Montgomery No. 23438, 2010-Ohio-5157, ¶ 205; *State v. Moore*, 7th Dist. Mahoning No. 12 MA 8, 2013-Ohio-1435, ¶ 106; *State v. Ford*, 10th Dist. Franklin No. 07AP-803, 2008-Ohio-4373, ¶ 89.

The issue that Appellant seeks to challenge here is the trial court's decision to admit former testimony given by a witness for the State who was not available to testify at trial, but who had testified in juvenile court at a probable cause hearing that led to Appellant's transfer to the general division for trial as an adult. Before admitting the witness's testimony, the trial court took testimony to confirm that the witness satisfied the unavailability requirements under Evid.R. 804(A). The trial court further considered the admissibility requirements set out in *Crawford* and Evid.R. 804(B)(1) and determined that Appellant's counsel had not only been afforded a prior opportunity to cross-examine the witness at the probable cause hearing, but had taken advantage of that opportunity by engaging the witness in a lengthy and probing cross-examination.

In affirming the trial court's decision to admit the witness's probable cause hearing testimony, the Second District Court of Appeals correctly applied *Crawford* and Evid.R. 804(B)(1) in finding that the admissibility requirements under the Confrontation Clause and the Ohio Rules of Evidence were fully satisfied. *State v. Leigh*, 2d Dist. Montgomery No. 28821, 2023-Ohio-91, ¶ 73-91. The Second District's analysis of Leigh's Confrontation Clause arguments was legally and factually sound and was fully aligned with well-established precedent. In holding that Leigh's rights were not violated, the Second District did not misapply or misinterpret the law, it did not create new law, nor did it change existing law. Consequently, there is nothing of substance for this Court to review or decide.

Moreover, given the soundness of the Second District's Opinion, this case does not involve matters of public or great general interest, nor is there a substantial constitutional question involved that has any reasonable merit. For these reasons, jurisdiction over Leigh's propositions of law should be declined, and this appeal should be dismissed.

STATEMENT OF THE CASE AND FACTS

On the evening of February 16, 2018, Jacqueline Mooty and her family were in their Dayton home when a barrage of bullets came through the walls and windows of the home. One of the bullets struck Jacqueline's twenty-two-year-old daughter, Keyona, in the head as Keyona sat on a bed eating dinner. Keyona, and the ten-week-old fetus she was carrying, died at the hospital later than night.

Appellant Brandon Leigh became the prime suspect in the shooting based on information provided to police by Keyona's brother, Marrico Murray. Marrico knew Leigh by his Facebook profile name, "Brando So Humble." Marrico and Leigh had a "falling out" over a gun Leigh accused Marrico of stealing, and throughout the two days leading up to the shooting Leigh called Marrico and sent him a series of Facebook messages demanding that Marrico give him his gun back. In the written messages sent the day before the shooting, Leigh told Marrico, "This is the last time I'm going to tell you this. You going to give me my shit or are you going to really go through with this?" In another message, Leigh warned, "This I'm telling you now. You don't want to go through with it." A short time later Leigh wrote, "But just to tell you this really the last time * * * you don't tell me nothing in an hour, it's over." Just over two hours later, Leigh messaged Marrico, "bet," meaning the fight is on.

At the same time he was messaging Marrico, Leigh was also messaging several other people, telling them that Marrico had robbed him and asking if they knew where he could find

Marrico. One person Leigh messaged was his sister, Brittany Leigh. These messages involved, among other things, Leigh needing to buy a “pole” or handgun, and his sister asking Leigh whether he wants the house “sprayed with Ks,” meaning bullets from a rifle like an AK-47. Other message threads leading up to the shooting involved Leigh explaining how he was robbed of his gun, Leigh attempting to find Marrico, or Leigh attempting to obtain a firearm.

Police were able to track Leigh down at the home of Alea Lee. Leigh considered Lee a second mother and spent a considerable amount of time with her and the other people who lived with Lee. One of the people Leigh met through Lee was Angela Williams, who Leigh called auntie.

On the morning of the first day of Leigh’s jury trial when Angela Williams failed to appear, the prosecutor asked for a material witness warrant, which the trial court granted. When Williams was not located by the second day of trial, the prosecutor asked the trial court to declare Williams unavailable and to admit prior testimony that Williams gave during Leigh’s August 3, 2018 probable cause hearing in Juvenile Court. The trial court heard testimony regarding law enforcement’s failed efforts to locate and arrest Williams on her material witness warrant. The trial court found that Williams was unavailable to testify at trial, that her testimony from the probable cause hearing had been challenged by Leigh’s counsel through extensive cross-examination, and, therefore, that her former testimony was admissible under the Confrontation Clause and Evid.R. 804(B)(1).

An audio recording of Williams’s probable cause hearing testimony was played for the jury. Williams testified that a few days after the shooting, Leigh asked her if she had heard about Keyona Murray getting shot. When Williams asked him if he had anything to do with it, Leigh responded, “What do you mean have something to do with it? I did it.”

Leigh was arrested a week after the shooting when police found him hiding in Lee's home. Lee testified at trial regarding the events leading up to Leigh's arrest. She explained that she and Leigh had just arrived home when they noticed a truck going down the street that they both believed was being driven by a detective. Upon seeing the detective drive by Leigh proclaimed, "I'm about to go to jail." Later that day, Leigh was arrested and taken to jail.

Lee also testified about the day Keyona was killed. Leigh called her and asked if she would drive him to a rec center that was determined to be six blocks east of Keyona's house. Lee dropped Leigh off sometime between 7:30 and 8:00 p.m. on the night of the murder. Between 8:30 and 8:45 p.m., Leigh called Lee again and asked her to come pick him up, but told her he was now at a different location that was four blocks northwest of Keyona's house. Keyona's family called 911 at 8:23 p.m. to report that she had been shot.

From this evidence the jury found Leigh guilty of murder, involuntary manslaughter, improper discharge of a firearm at or into a habitation, and attendant firearm specifications. The trial court separately found Leigh guilty of having a weapon while under disability. He was sentenced on April 23, 2020, to an aggregate term of thirty years to life in prison.

Leigh appealed his conviction to the Second District Court of Appeals, raising five assignments of error. *State v. Leigh*, 2d Dist. Montgomery No. 28821, 2023-Ohio-91. Relevant here was Leigh's first assignment of error, in which he claimed that his rights under the Confrontation Clause were violated by the admission of Angela Williams's probable cause hearing testimony. *Id.* at ¶ 62. The Second District found no merit to Leigh's argument, holding specifically that the requirements under the Confrontation Clause and the Ohio Rules of Evidence for admissibility of prior testimony by an unavailable witness were fully met. *Id.* at ¶ 72-91.

Leigh now seeks leave of this Court to appeal further.

ARGUMENT

Response to Appellant's Propositions of Law:

Former testimony given by a witness at a probable cause hearing in juvenile court satisfies the admissibility requirements of the Confrontation Clause and Evid.R. 804(B)(1), and is therefore admissible at trial against a criminal defendant, when the witness is unavailable and the defendant had a prior opportunity and a similar motive to develop the witness's testimony on cross-examination.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." The Confrontation Clause has been interpreted to mean that " 'admission of an out-of-court statement of a witness who does not appear at trial is prohibited * * * if the statement is testimonial unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness.' " *State v. Tench*, 156 Ohio St.3d 85, 2018-Ohio-5205, 123 N.E.3d 955, ¶ 210, quoting *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 34, and citing *Crawford*, 541 U.S. at 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177.

Evid.R. 804(B)(1) likewise provides that "former testimony of a declarant who is not currently available to testify is not excluded as hearsay when the following separate, conjunctive requirements are met: (1) the party against whom the testimony is offered * * * had an opportunity to examine the declarant in the prior proceeding, and (2) that party had a motive that is similar to the motive that the party would have in the present proceeding to develop the former testimony by direct, cross, or redirect examination." *Burkhart v. H.J. Heinz Co.*, 140 Ohio St.3d 429, 2014-Ohio-3766, 19 N.E.3d 877, ¶ 3. Accordingly, a witness's former testimony, in order to be admissible at a subsequent trial, must satisfy the requirements of both the Confrontation Clause and Evid.R. 804(B)(1). *Neyland*, 139 Ohio St.3d 353, 2104-Ohio-1914, 12 N.E.3d 1112, at ¶ 182.

That is precisely what the Second District found when it affirmed the trial court's decision admitting Angela Williams's probable cause hearing testimony at Leigh's jury trial. *Leigh*, 2d Dist. Montgomery No. 28821, 2023-Ohio-91, at ¶ 73, 86-91. Leigh nevertheless contends in his Memorandum in Support of Jurisdiction that the Second District erred by collapsing the separate levels of protections—first under the rules of evidence and second under the Confrontation Clause—into “a single rule-based admissibility analysis.” (See Leigh's Second Proposition of Law) But the Second District did no such thing.

Comparing the requirements for the admissibility of prior testimony under the Confrontation Clause (as set out in *Crawford*) to the admissibility requirements under the Ohio Rules of Evidence (as set out in Evid.R. 804(B)(1)), reveals significant similarities: both require that the declarant be unavailable and that the defendant had a prior opportunity to cross-examine the declarant regarding the statements. Here, the Second District reviewed and considered the evidence presented in the trial court and determined that the evidence satisfied the admissibility requirements of both the Confrontation Clause and Evid.R. 804(B)(1). Simply because the court of appeals conducted its admissibility analysis of the Confrontation Clause and Evid.R. 804(B)(1) together does not mean that the court failed to recognize that a separate analysis of each was required. It simply means that the court recognized that the same evidence satisfied both admissibility requirements. And despite Leigh's apparent argument to the contrary, there is no requirement that a court consider the admissibility of former testimony under the Rules of Evidence before considering its admissibility under the Confrontation Clause—so long as both admissibility requirements are met, it makes no difference in what order the reviewing court performs its analysis.

A. Probable Cause Hearings

It likewise makes no difference here that the prior testimony that the trial court admitted was given during a probable cause hearing in juvenile court. In *Crawford* itself the Court recognized the long line of cases that have held that prior preliminary hearing testimony satisfies the admissibility requirements under the Confrontation Clause if the defendant had an adequate opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 57, 124 S.Ct. 1354, 158 L.Ed.2d 177 (citing cases). Multiple Ohio courts have held the same, including when the former testimony is given during a juvenile court bindover hearing. *See, e.g., State v. Garnett*, 1st Dist. Hamilton No. C-090471, 2010-Ohio-3303, ¶ 9 (unavailable witness's testimony from juvenile bindover hearing admissible under Evid.R. 804(B)(1)); *State v. Strickland*, 10th Dist. Franklin No. 06AP-1269, 2008-Ohio-1104, ¶ 60-63 (witness's juvenile court bindover testimony admissible under Confrontation Clause and Evid.R. 804(B)(1)). *See also State v. Kempton*, 4th Dist. Ross No. 15CA3489, 2018-Ohio-928, ¶ 25 (victim's preliminary hearing testimony was properly admitted under Evid.R. 804(B)(1)); *State v. Tabor*, 12th Dist. Warren No. CA2011-07-076, 2012-Ohio-4642, ¶ 16 (trial court did not err in admitting preliminary hearing testimony where the defendant had a prior opportunity to cross-examine the witness and a similar motive to testing the witness's reliability and credibility).

Leigh nevertheless challenges the admissibility of prior bindover testimony by asserting that some courts believe defendants do not have a right of confrontation at probable cause or juvenile bindover hearings. (See Leigh's Memorandum in Support of Jurisdiction at pp. 13-15) But regardless of the errors other courts may have committed under other circumstances, such errors were not committed by either the trial court or appellate court here. At Leigh's bindover hearing, the juvenile court did not limit the scope of Leigh's counsel's cross-examine of Angela

Williams in any way. Williams was thoroughly cross-examined on all aspects of her testimony, particularly as it related to Leigh's admission to her that he shot and killed Keyona Murray.

Additionally, while it might be true in other cases that a defendant's motive to develop a witness's testimony at a probable cause hearing might be dissimilar to that at trial, that is not true here: at both the probable cause hearing and at trial, Leigh's motive was to attack Williams's credibility regarding her claim that Leigh admitted shooting and killing Keyona Murray, and to challenge her reliability on other aspects of her testimony. This is particularly true given that the identity of the shooter was the only contested issue at both the probable cause hearing and trial.

B. Standard of Review

Finally, Leigh contends that the Second District applied the wrong standard of review to his constitutional claim that admitting Angela Williams's probable cause hearing testimony violated the Confrontation Clause. Specifically, he contends that the Second District incorrectly reviewed the trial court's decision for abuse of discretion, rather than reviewing the decision *de novo*. But Leigh misreads the court of appeals's Opinion.

Although appellate courts review *de novo* evidentiary rulings that implicate the Confrontation Clause, a trial court's hearsay rulings are generally reviewed for an abuse of discretion. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 97. *See also State v. Patton*, 2d Dist. Montgomery No. 29384, 2022-Ohio-3350, ¶ 16, citing *McKelton* at ¶ 97 (recognizing that appellate courts ordinarily review a trial court's hearsay rulings for an abuse of discretion, but that evidentiary rulings that implicate the Confrontation Clause are reviewed *de novo*). Here, as the Second District was required to do, it analyzed the admissibility of Angela Williams's probable cause testimony under both the Confrontation Clause and the Ohio Rules of Evidence. And in relation *only to its review of the admissibility of the probable cause testimony under Evid.R. 804(B)(1)*, the Second District noted that it reviewed the trial court's ruling for an

abuse of discretion. *See Leigh*, 2d Dist. Montgomery No. 28821, 2023-Ohio-91, at ¶ 74. This was not error, and Leigh's arguments to the contrary are not well-taken.

CONCLUSION

The Second District did not err, in law or fact, in assessing the admissibility of Angela Williams's prior probable cause testimony and in concluding that the testimony satisfied the admissibility requirements of both the Confrontation Clause and the Ohio Rules of Evidence. The court of appeals did not misapply or misinterpret the law, it did not create new law, nor did it change existing law in reaching its decision. As a result, there is nothing further for this Court to decide or review. For these reasons, the State of Ohio respectfully requests that this Court decline jurisdiction over each of Brandon Leigh's propositions of law and this appeal be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2023, a copy of the foregoing *Memorandum in Response to Jurisdiction* was sent by first class mail, postage pre-paid, to counsel for Appellant: Timothy B. Hackett and Peter Galyardt, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215.

/s/ Andrew T. French
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