

EVIDENCE

Judge Steve R. Dozier

September 2023

Ever seen this:

- “as I have already said now, I don’t want a bunch of objections. I am going to let things run wide open. I am going only to consider those things that I think are pertinent. You can trust me. I am going to hear everything that you are wanting me to hear, but about 90% is going to go in one ear and out the other.”

Appellate court ruling:

- “This court is unaware of an exception to the hearsay rule for evidence that is ‘pertinent’ or ‘important’. This was a misguided manner in which to conduct a trial.”

Abuse of discretion

- Admissibility of evidence within sound discretion of court—not disturbed absent showing of abuse of discretion by court.
- Incorrect legal standard/decision against logic/reasoning that caused an injustice
- Plain error—“especially egregious/ strikes at fairness of proceedings.”

- 401
- 400's series of rules some believe are the most important series of rules in TRE
- “ANY”

- 401 says that relevant evidence is evidence having *any* tendency to make the existence of *any* fact that is of consequence to the action more or less probable than it would be without the evidence.

Admissibility of 911/jail calls

- TRE 401—relevant? Any evidence having any tendency to make the existence of a material fact more or less probable
- Foundation—identify voice (victim/defendant as caller—police officer), identify how obtained—911 call center or sheriff's PIN number
- Transcript

TRE 404(b)

- **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is NOT admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes.
- Intent, motive, identity, common scheme or plan, lack of mistake
- Must exclude if probative value is outweighed by danger of unfair prejudice.
- Clear and convincing standard act occurred – “eliminate any serious or substantial doubt/produce a firm conviction as to the truth”. *Nicholson v. St.* 2010 WL 1980190 (5/12/2010)

State v. David Gilley, 173 SW3d 1 (Tenn. 2005)

- No *per se* rule of admissibility of prior bad acts against same victim
- No reason to grant Rule 9 appeal on 404(b) issues
- *State v. Smith* 868 SW2d 561 (Tenn. 1994)—leading domestic violence homicide 404b evidence allowed—identity—“purposeful harm to kill victim”

PH examples

- Officer: "I know the defendant from prior arrests"—not admissible—goes to defendant's character.
- Clerk gives you list of prior record—not relevant to PC determination—should not consider; may consider after PC determination for purposes of bond (TCA 40-11-118 record, FTAs)

TRE 606 impeaching jury verdict

- May not testify as to any matter or statement occurring during the course of deliberations or as to the effect of anything on a juror's mind or emotion which influenced his/her verdict

Exceptions:

- 1) Extraneous, prejudicial information into the jury room
- 2) Improper outside pressure on a juror
- 3) Quotient verdict (gambling) (not in FRE)

- External – statements from court officials, internet or other media exposure, visiting scenes

Examples: Facebook/Twitter/definitions

- Maury Co. jury room—memorabilia

St. v. Adams 405 SW3rd 641(Tenn. 2013)

- “I think guilty of first degree murder”
- Once extraneous prejudicial or improper outside influence shown:
 - 1)nature and content of information or influence
 - 2)number of jurors exposed
 - 3)manner and timing of the exposure
 - 4)weight of evidence adduced at trial
- Holding: State rebutted presumption--no reasonable possibility that note affected verdict.

800s Hearsay definition

A statement other than one made by the declarant WHILE TESTIFYING offered in evidence to prove the truth of the matter asserted

What does that mean?????




TikTok
@ depptokk





Three simple questions:

1) Is it assertion (does the witness intend his or her statement/conduct to assert or declare)(imperative, interrogatory, exclamatory – not considered declaring anything)

2) Was it made out of court?
(easy to determine)

3) Is it offered for the truth?

- (does the relevancy of the statement depend upon its truth)

Admissions by Party Opponent

- 6 Varieties:
- Party's own statement
- Statement by another that party has adopted
- Statement authorized by party to make
- Statement by agent---lawyer/partners
- Co-conspirator—during course of/in furtherance of conspiracy.
- Person in privity of estate--probate

Excited Utterance

- 1) “startling event”
- 2) statement related to event
- 3) declarant under the stress or excitement of the event. (time interval, nature of event, appearance/demeanor/outlook of declarant seen through statement)
- “there goes my rapist, catch him”
- (prior startling event 6 months earlier)

State of mind (TRE) or Present Sense Impression (FRE)

- Present or future plan or intention
- Not memory/past act
- Not act of 3rd party
- Ramona case study: daughter in law AND future wife? (Long case)
- “If he finds out I told you where his mjh. is, he will kill me!”

Police records/reports

- TRE 803(8)—Public Records— introduction of police reports specifically prohibited— cites TCA 55-10-114.
- Officer can provide testimony (relevant/expert?) as to TRE 602 personal knowledge type information —subject to cross.

TRE 803(26) Prior Inconsistent statement (7/1/09)

- (26) Prior Inconsistent Statements of a Testifying Witness.-A statement otherwise admissible under Rule 613(b) if all of the following conditions are satisfied:
- (A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.
- (B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.
- (C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.
- PH more important---longer!! St. v. Davis 466 SW3d 49 (Tenn. 2015)—inability to remember (“I don’t recall”) is inconsistent under 803(26)

6th amendment US constitution

- “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...”
- TN constitution—”face to face”

TRE 804 ---- 6 = 5

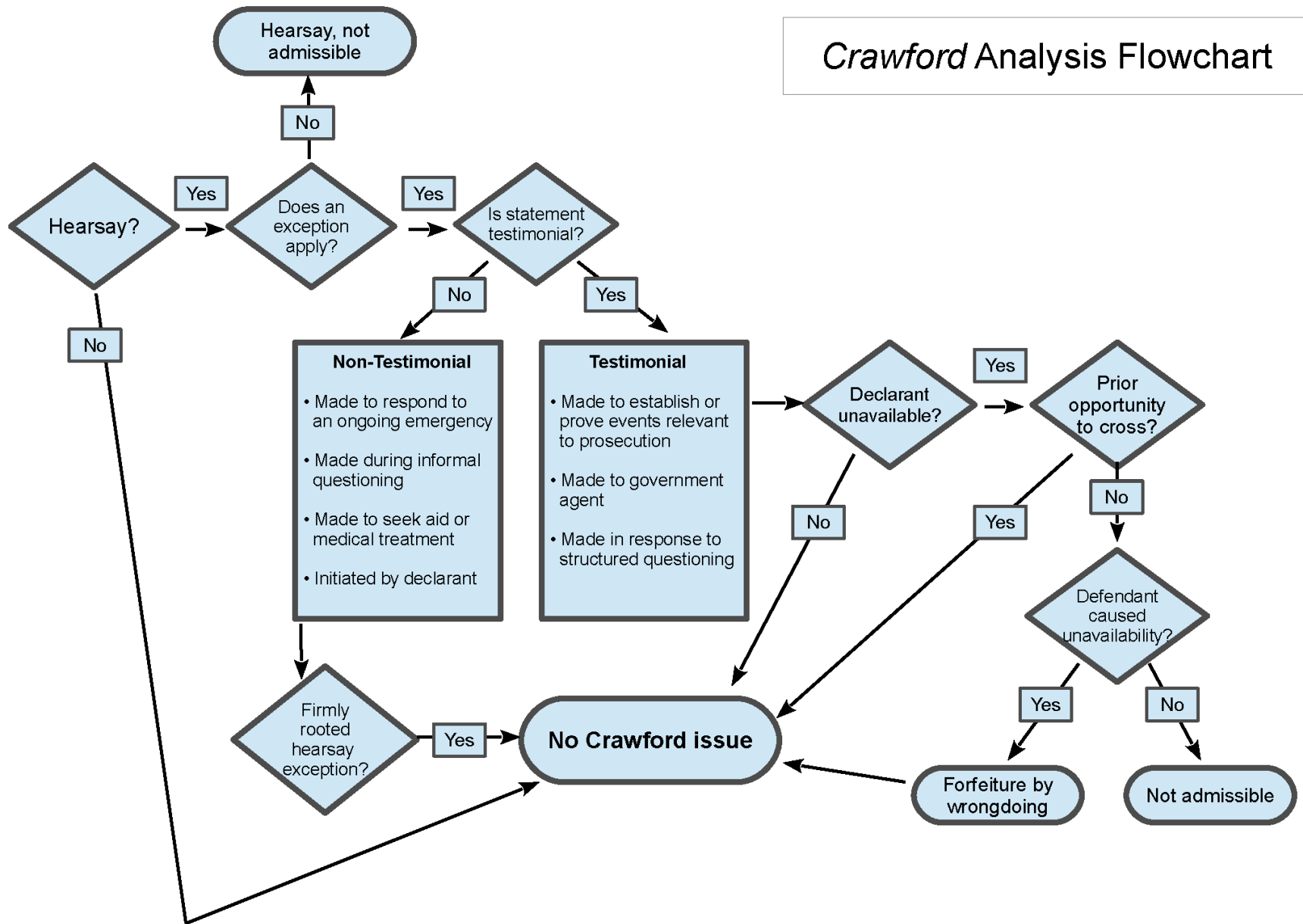
- Unavailability of witness— 6 reasons under (a) (hearing held under TRE 104)
- IF SO, 5 exceptions to introduce hearsay (b)
- Taken in steps---must prove (a) before you move to (b)
- Against penal interest/ dying declaration/
forfeiture by wrongdoing

All exceptions are subject to analysis under *Crawford v. Washington*, 124 S.Ct. 1354 (2004) where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy demands of confrontation clause is confrontation (cross-examination)

Those pre-trial statements the
declarant “would reasonably
expect to be used
prosecutorially”

Or stated another way, “would an objective witness reasonably believe the statement would be used at a later time in court proceedings”

Crawford Analysis Flowchart



Chronology of US Supreme court cases

- Davis v. WA and Hammon v. IN (2006)
- Giles v. CA (2008)
- Melendez-Diaz V. MA (2009)—drug lab report
- MI v. Bryant ((2011)—dying declaration
- Bullcoming v. NM (2011)—DUI results
- Williams v. IL (2012)—report re: match of DNA

- If NOT testimonial, evaluate evidence under traditional hearsay rules
- Davis v. WA and Hammon v. IN (2006)—excited utterances in DV cases-emergency ongoing??
- MI v. Bryant (2011)—dying declaration/”primary purpose” test—not testimonial.

Davis/Hammon

- Domestic violence—911 call for assistance
- Davis—on going emergency with assailant at large—non-testimonial
- Hammon—parties separated, victim questioned but assailant in custody—testimonial—expectation of prosecution.
- What was the “primary purpose” of the statement/police involvement?

Giles

- Defendant shot victim 6xs some in head. Def. claimed self-defense/victim(ex-girlfriend) had shot a man in the past and pulled knife on people and threatened to kill his new girlfriend.
- State sought to introduce V's statement to police 3 weeks earlier about DV(threat to kill/held knife and choked her)
- Admissible?
- Vacated conviction and remanded—intent to prevent V from testifying? Testimonial?
- Under 804(if intent shown) and Crawford —still testimonial?

Giles

- “where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution rendering her prior statements admissible under the forfeiture doctrine.”

Okay post-Crawford:

- 1) 911-excited utterances
- 2) Business records
(medical records—St.v. Cannon 254 SW3d 287
(Tenn. 2008) Crawford analysis)
- 3) Co-conspiracy statements to others
- 4) State of mind exceptions – no crime yet committed

Questionable post-*Crawford*

- 1) On scene interrogation by law enforcement that might have previously been considered excited utterance
- 2) Statements against penal interest implicating others
- 3) Statements from medical diagnosis and treatment

St. v. Hutchison 482 SW 3rd 893(TN 2016)

- M.E. who performed autopsy was not called as a witness. Current M.E. introduced report. Relied on autopsy report to give opinion about cause of death—blunt force trauma.
- Defendant arrested and in custody at time of autopsy. Testimonial??
- Report prepared in normal course of business of M.E. is not rendered testimonial merely because M.E. is aware that a suspect is in police custody. Report does not link defendant to crime. Purpose not to accuse targeted person or to provide evidence against specific person at trial—just determine cause of death.



Forfeiture by Wrongdoing— TRE 804

- State v. Brooks 249 S.W.3d 323 (Tenn. 2008)
- Leading Case- Defendant's actions must show in part that defendant intended to prevent witness from testifying
- Long history of Dom. Abuse but no showing murder was committed to make victim unavailable. Prior statements about beatings and fear inadmissible. REVERSED

Forfeiture by Wrongdoing

- State v. Minor, 2012 WL 3055776 (Tenn. Crim. Ct. App. July 26, 2012)
- Victim's statements to others in domestic violence murder case- Admissible
- 804(b)(6)- Out of court statements about abuse do not have to relate to formal charges or court proceedings/preponderance standard.