IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO.: 48-2008-CF-15606-O

Plaintiff,

DIVISION: 99

vs.

CASEY MARIE ANTHONY,

Defendant.
___________________/

ORDER DENYING MOTION TO EXCLUDE HEARSAY EVIDENCE, GOSSIP, AND INNUENDO

THIS MATTER came before the Court for hearing July 15, 2010, on the Defendant's Motion to Exclude Hearsay Evidence, Gossip, and Innuendo, filed March 8, 2010. After carefully considering the Motions, evidence presented, arguments of counsel, and the law, the Court finds and determines as follows:

Counsel for the defense petitions the Court to enter an Order excluding certain evidence offered by the State against the Defendant, Casey Marie Anthony ("Casey") from her trial for the murder of her three-year-old daughter, Caylee Marie Anthony ("Caylee"). Specifically, counsel moves the Court to find that the recordings of three "911" calls placed on July 15, 2008, by the Defendant's mother, Cynthia Anthony ("Cindy"), constitute inadmissible hearsay.

Counsel for the State has filed a Response setting forth its theory on the admissibility of the "911" calls and the basis for which the evidence is being proffered. The gist of the argument is that as the contents in the first two recordings are not being offered for the truth of the matter asserted, the "911" calls do not constitute inadmissible hearsay. Additionally, the State argues that should the third call be considered hearsay, it would nevertheless be admissible based upon the "excited utterance" exception.

The issue thus presented is whether or not the "911" recordings constitute inadmissible hearsay in the trial on the cause. For the reasons discussed *infra*, the Court finds that they do not. Moreover, even assuming, *arguendo*, that the third "911" call constitutes hearsay, the Court finds that the statements made in the recordings qualify for admission under the "excited utterance" exception pursuant to Section 90.803(2), Florida Statutes. In addition, the Court finds the probative value of the proffered evidence to outweigh any prejudicial effect to the Defendant.

FACTS

Cindy places the first call to "911" on July 15, 2008 at 8:08 pm, while seated in her car with Casey. She reports to the dispatcher that Casey had stolen money and a car from her and that she was attempting to bring her daughter in to the Orlando Police Department. The dispatcher then informs Cindy that since the alleged crimes took place outside of the city limits, Orange County had jurisdiction and the call would have to be transferred.

While waiting on hold for the call transfer, Cindy threatens to remove Caylee from Casey's custody. (*See transcript of first 911 call, lines 6-8*). Casey then asks her mother for more time to produce Caylee. (*Id. at line 11*). Cindy states in her deposition that her purpose in making this call was to force Casey to take the police to Caylee. (*See deposition of Cindy Anthony, July 29, 2009, page 371, lines 23-25; and page 372, lines 9-13*).

Cindy places a second call to "911" from outside her home at 8:44 pm that same day. This time, Casey and her brother Lee Anthony ("Lee") are inside the family home and Lee is attempting to get Casey to disclose Caylee's whereabouts to him. In the recording of the second "911" call, Cindy calmly reports again that her daughter needs to be arrested for stealing the car and money; she also mentions for the first time that Caylee is possibly missing. (*See audio recording and transcript of second 911 call*).

While Cindy is outside on the phone, Lee engages Casey in a role playing scenario of how her interaction with police may unfold. It is during this role-play that Casey discloses for the first time that she has not seen Caylee in 31 days. (*See deposition of Lee Anthony, July 30, 2009, page 108, line 11 through page 110, line 17*). Cindy, who had returned to the inside of the home after placing the second call to the police, overhears this declaration from her daughter and runs into the room. Cindy testifies that she was extremely upset at learning that Casey has not seen the child in over a month. It is at this point that Cindy makes the third call to "911."

ANALYSIS

The defense raises several theories that it argues should render the aforementioned evidence inadmissible in the trial on the cause. The first, is that the calls are hearsay and that they violate the dictates of the Sixth Amendment's Confrontation Clause as interpreted by the United States Supreme Court in the case of *Crawford v. Washington*, 541 U.S. 36 (2004).

The Court disagrees. The Confrontation Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford* at 59. (Adding that the Confrontation Clause "also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted," citing *Tennessee v. Street,* 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)). As the State is offering the first two calls to show "consciousness of guilt" of the Defendant by her alleged fabrication of the kidnapping story, *Crawford* is not implicated here.

Furthermore, even assuming that the statements are testimonial, Cindy will be testifying at trial, and thus will be made available for cross-examination by the Defendant. Therefore, the admission of the recordings is in full compliance with the requirements of the Sixth

Amendment's Confrontation Clause. *See McWatters v. State*, 2010 WL 958069 (Fla.); *State v. Pinault*, 933 So. 2d 1287 (Fla. 4th DCA 2006).

In addition, the third "911" call falls squarely within the definition of an "excited utterance." § 90.803(2). A statement qualifies for admission as an excited utterance when: (1) there is an event startling enough to cause nervous excitement; (2) the statement was made before there was time for reflection; and (3) the statement was made while the person was under the stress of the excitement from the startling event.

The Court finds this test to be clearly met by the testimony of Cindy at the hearing and from the audio of the third "911" call itself. The defense argues that the "startling event" was Cindy's discovery earlier that day that the car smelled like a decomposing body. The Court disagrees. The startling event which distressed Cindy and prompted the call was Casey's admission that she hadn't seen Caylee in approximately 31 days. Prior to that, Cindy had no knowledge that any criminal activity occurred. It was Casey's disclosure of this upsetting news that served as the impetus of Cindy's call to "911." Upon hearing the disturbing statement from Casey that Caylee had been allegedly kidnapped by the babysitter, Cindy called "911."

It is also evident, based upon the testimony at the hearing, that Cindy's statement was made before there was time to reflect or misrepresent. Indeed, both she and her son Lee stated that Cindy placed the call within moments of hearing this startling information.

The audio of the third "911" call clearly demonstrates that Cindy made the statements in the third call while under the stress of the excitement from the startling event. In the recordings, Cindy is extremely distraught. She can clearly be heard crying on the phone and at times her speech is unintelligible from sobbing so heavily. Accordingly, the third "911" call qualifies as an

excited utterance and is admissible at trial. The Court further finds that its probative value is not outweighed by any prejudicial effect.

The Court now turns to the admissibility of the two earlier calls. The evidence presented at the hearing establishes that they constitute the frantic efforts of a grandmother to find the location of her missing grandchild. Cindy testified that she attempted to elicit this information from Casey by using the ploy of calling the police.

The statements made by Casey in response to Cindy's attempts to locate Caylee are not being offered for the truth of the matter asserted. Therefore, the Court finds that the first two calls do not constitute inadmissible hearsay. *See Smith v. State*, 7 So. 3d 473 (Fla. 2009) (if an out-of-court statement is not offered to prove the facts contained in the statement, it is not hearsay). Upon request, the Court will give a cautionary instruction prior to this evidence being offered as to the purpose for which it is to be considered.

The defense also objects to the admission of the statement made in the third call by Cindy that the car "smells like a dead body." Specifically, the defense claims that it is improper lay testimony. The Court disagrees. Identification by lay witness opinion testimony has long been recognized in Florida. *See, e.g., Roberson v. State*, 40 Fla. 509, 24 So. 474 (1898). Furthermore, opinion testimony by lay witnesses is expressly admissible under our current evidence code. § 90.701, Fla. Stat. This statute has been interpreted to allow testimony in the form of opinion by a qualified nonexpert witness as to touch, sight, smell, and sound. *See Duncan v. State*, 583 So. 2d 439 (Fla. 4th DCA 1991); *Bolin v. State*, 2010 WL 2612348 (Fla.). Moreover, Cindy testified that she had previously smelled decomposing human flesh while working as a nurse in a hospital. As such, the proper predicate for introduction of this testimony has been established. *See Oregon v. Lerch*, 677 P. 2d 678 (Or. 1984).

Accordingly, the Defendant's Motion is DENIED.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 19th day of July 2010.

BELVIN PERRY, JR.
Chief Judge

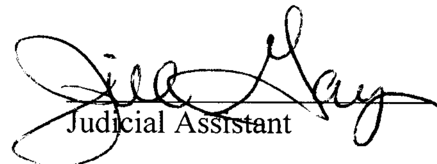
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished by U.S. Mail or hand delivery this 20th day of July, 2010 to:

• Linda Drane Burdick, Jeffrey L. Ashton, and Frank George, Assistant State Attorneys, Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801;

• Jose Baez, Esquire, The Baez Law Firm, 522 Simpson Road, Kissimmee, Florida 34744;

• J. Cheney Mason, Esquire, J. Cheney Mason, P.A., 390 North Orange Avenue, Suite 2100, Orlando, Florida 32801;



Judicial Assistant