

AUG 23 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

THE STATE OF OKLAHOMA,)

Appellant,)

v.)

MICHAEL RAY ROLEY,)

Appellee.)

Case No. S 2005-702

SUMMARY OPINION

C. JOHNSON, JUDGE:

Michael Ray Roley was charged in Creek County District Court, Case No. CF 2004-503, with Child Abuse/Neglect, in violation of 10 O.S.Supp.2002, § 7115, on November 9, 2004. Preliminary hearing was held on March 29, 2005, and Mr. Roley was bound over for trial. Mr. Roley, through counsel, filed a Motion to Quash Pursuant to 22 O.S. § 504.1. Hearing on the Motion was held on June 20, 2005, and July 11, 2005, before the Honorable April Sellers White, Associate District Judge. Judge White sustained the Motion to Quash. Thereafter, the State of Oklahoma filed this appeal, pursuant to 22 O.S.2001, § 1053(5).

Appellant, the State of Oklahoma, raises three (3) propositions of error:

1. *Crawford v. Washington* does not apply to pretrial proceedings and Appellee's claim he has been denied his *Crawford* right to confrontation is not yet ripe;
2. Appellee should not be allowed to invoke an overbroad extension of the *Crawford* doctrine to apply to preliminary hearings;
3. The Court must consider the "compelling" interest of protecting the psychological well-being of the child victim.

After thorough consideration of the propositions raised, the transcripts, the Original Record, and the briefs of the parties, we have determined that no relief is required and the trial court's ruling granting the Motion to Quash should be, and hereby is, affirmed for the reasons set forth below.

When read together, both the Oklahoma Constitution and Oklahoma statutes guarantee the accused the right of confrontation at preliminary hearing. Okla.Const. art.2, §§ 17 and 20; 22 O.S.Supp.2003, § 258; *see also* 12 O.S.Supp.2002, §§ 2103, 2801, *et. seq.* Section 2103 specifically lists the types of proceedings to which the Code does not apply; the Legislature did not specifically exclude preliminary hearings from those proceedings which the Evidence Code covers. *See* 12 O.S.Supp.2002, §§ 2103, 2801, *et. seq.*

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1369-1374, 158 L.Ed.2d 177 (2004), the Supreme Court held the confrontation clause requires that testimonial hearsay statements may be admitted as evidence against an accused at a criminal trial only when the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. *Mitchell v. State*, 2005 OK CR 15, ¶ 16, 120 P.3d 1196, 1202. The fact that the Supreme Court in *Crawford* addressed this issue in the context of a criminal trial does not imply the right of confrontation does not apply at preliminary hearings. This Court has previously recognized the right of confrontation and cross-examination at preliminary hearing, even after the preliminary examination statutes were amended to include an automatic cut-off provision.

See LaFortune v. District Court of Tulsa County, 1998 OK CR 65, ¶ 11, 972 P.2d 868, 872.

At preliminary hearing, the State must show a crime was committed and probable cause to believe the defendant committed it. 22 O.S.Supp.2003, § 258. The finding of probable cause should be made based upon competent evidence; child hearsay statements, admitted without a showing of unavailability when the defendant has not had the opportunity to cross-examine the declarant, is not competent evidence upon which a finding of probable cause should be based. *See Probst v. State*, 1991 OK CR 30, ¶ 11, 807 P.2d 279, 283 (“competent” evidence in the record supported the magistrate’s finding of probable cause); *Kennedy v. State*, 1992 OK CR 67, ¶ 13, 839 P.2d 667, 671 (“reliability or unreliability of any evidence goes toward establishing or failing to establish probable cause.”)

We review the trial court’s decision granting or denying a Motion to Quash for an abuse of discretion. *See State v. Edmondson*, 1975 OK CR 93, ¶ 12, 536 P.2d 386, 391, *overruled on other grounds in State v. Durham*, 1976 OK CR 20, 545 P.2d 805 (“The rule of law is well established, and this Court has previously held, that a Motion to Quash the information on grounds that proof offered at a preliminary hearing is insufficient to establish a crime, is addressed to the sound discretion of the trial court.”) When determining whether the trial court abused its discretion in granting or denying a motion to quash, the grounds upon which the motion was granted or denied must be examined. *Id.*

The record discloses the trial court granted the Motion to Quash because the finding of probable cause was not based upon competent evidence. The magistrate at the preliminary hearing did not find either of the child declarants unavailable and neither child testified. The reliability or unreliability of the hearsay was proper for the trial court to consider in reviewing the finding of probable cause. The trial court properly considered the competence of the evidence and did not abuse its discretion by granting the Motion to Quash. Accordingly, Propositions One and Two are denied.

In Proposition Three, we decline to accept the State's invitation to "endorse the spirit" of 12 O.S.Supp.2003, § 2611.7 "in a new context: [to] Allow the State to protect the child victim by electing not to call the victim as a witness if not necessary to establish probable cause at a preliminary hearing."

Section 2611.7 provides, pertinent part:

A. In a criminal proceeding, the judge or presiding officer may allow a child witness to testify by an alternative method **only in the following situations:**

1. The child may testify otherwise than in an open forum in the presence and full view of the finder of fact if the judge or presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to testify in the open forum; and
2. The child may testify other than face-to-face with the defendant if the judge or presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant.

The plain language of the statute forecloses an interpretation based upon the State's "spirit of the law." If the Legislature had intended such a broad

interpretation, it would not have specifically required a judicial finding by clear and convincing evidence that the child would suffer serious emotional trauma before allowing the child to testify other than face to face with the defendant. Such a finding, in reality and arguably, would amount to a finding of unavailability, which the magistrate in this case did not make. Even if this Court were to “endorse the spirit” of § 2611.7, *in this case*, because the only evidence presented by the State to establish probable cause was inadmissible hearsay, the victim’s testimony *was necessary* to establish probable cause.

DECISION

The trial court’s ruling on the Motion to Quash in Creek County District Court, Case No. CF 2004-503, is hereby **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY
THE HONORABLE APRIL SELLERS WHITE, ASSOCIATE DISTRICT JUDGE

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LEWIS, J.: CONCURS

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