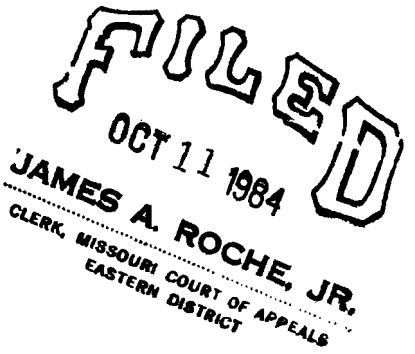
12-6
Div. II

No. 47955

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT



STATE OF MISSOURI,

Respondent,

v.

RODNEY LEE LINCOLN,

Appellant.

Appeal from the Circuit Court for the City of St. Louis
Division 23 of the 22nd Judicial Circuit
The Honorable Jack L. Koehr, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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ATTORNEYS FOR RESPONDENT

A F F I D A V I T

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

FAYE BERRY, duly sworn and deposed, states that she/he is an employee of the Office of the Attorney General of Missouri, and has mailed, FIRST CLASS POSTAGE PREPAID, the following number of copies of respondent's brief in: State vs. Rodney L. Lincoln, No. 47955, to the following persons on: October 4, 1984.

10 copies to: Missouri Court of Appeals, Eastern District, St. Louis, Missouri 63101

2 copies to: Debru Buie Arnold, 1320 Market St., Municipal Courts Building, St. Louis, Missouri 63103

1 copy to: George A. Peach, Circuit Attorney, City of St. Louis, 1320 Market St., St. Louis, MO. 63103

Faye Berry

Subscribed and sworn to before me this 4th day of October, 1984.

David W. Baker
Notary Public
State of Missouri

My commission expires on the 17 day of November, 1987.

I N D E X

JURISDICTIONAL STATEMENT

Appellant, Rodney Lee Lincoln, was charged on July 1, 1982, by way of indictment under Count I of capital murder, in violation of § 565.001, RSMo, and under Counts II and III, with assault in the first degree, § 565.050, RSMo. Appellant was convicted by a jury in the Circuit Court of the City of St. Louis, Missouri, on October 7, 1983, of the charges of assault in the first degree as set forth in Counts II and III of the indictment and of the lesser offense of manslaughter under Count I of the indictment. Appellant, a persistent offender, was sentenced by the trial court to the following terms in the Missouri Department of Corrections: Count I, fifteen (15) years; Count II, a period of life, said sentence to commence at the expiration of the sentence imposed under Count I; and Count III, a period of life, said sentence to run consecutively with the terms imposed on Counts I and II. As this appeal does not involve any issue under the exclusive jurisdiction of the Missouri Supreme Court, jurisdiction lies in the Missouri Court of Appeals pursuant to Article V, § 3, MO. CONSTITUTION (as amended 1982).

STATEMENT OF FACTS

Appellant, Rodney Lee Lincoln, also known as "Ronald Lee Lincoln", and "Bill", was charged by way of indictment under Count I of capital murder, § 565.001, RSMo and under Counts II and III of first degree assault, § 565.050, RSMo (L.F. 72-73). On trial by jury in the Circuit Court of St. Louis, Missouri, appellant was convicted as charged for Counts II (L.F. 45) and III (L.F. 46), and the lesser offense of manslaughter under Count I (L.F. 44). Appellant, a persistent offender, §§ 558.016 and 557.036.4, RSMo (L.F. 73), was sentenced by the trial court to the following term in the Missouri Department of Corrections: Count I, fifteen (15) years; Count II, a period of life, said sentence to run consecutively with the sentence imposed under Count I; and Count III, a period of life, said sentence to run consecutively with the sentences imposed for Counts I and II (L.F. 36-37). As appellant does not challenge the sufficiency of the evidence to support his conviction, appellant was reasonably convicted after submission of the following facts to the jury.

During the early morning hours of April 27, 1982, Joanne Tate and her two small children, [redacted] Davis, age 8 and [redacted] Tate, age 4, were at home on the ground floor apartment in a multi-family flat located at 1418 Farrar, St. Louis, Missouri (Tr. 308). At about 4:00 a.m. on April 27, 1982, an upstairs neighbor heard a loud noise, described as a "boom" or "bang" from Ms. Tate's apartment (Tr. 309).

Later that morning, at about 10:00 a.m., Mr. Gerald Woodward, Ms. Tate's boyfriend, had been unsuccessful in his efforts to contact Ms. Tate by telephone. At that time, Mr. Woodward and Ms. Tate's brother, Nathaniel Clenney, drove to Ms. Tate's apartment (Tr. 391). Mr. Woodward and Mr. Clenney entered the open door of Ms. Tate's apartment, and saw Ms. Tate, obviously dead, on the floor, face down in a pool of blood with a broomstick protruding from her rectum (Tr. 392-

393). Mr. Clenney asked [redacted] Tate "who did this?" and she responded "Bill did it" (Tr. 393-394). Mr. Clenney called his mother, Lue Clenney (Tr. 394), the police (Tr. 402), and an ambulance (Tr. 403).

When Lue Clenney arrived, she and police officers discovered that [redacted] Davis and [redacted] were lying in bed covered with blood with multiple stab wounds (Tr. 411, 428, 472). Lue Clenney accompanied her granddaughters to Cardinal Glennon Hospital (Tr. 429-430). The police began their investigation by questioning the daughters of Ms. Tate about the incident subsequent to their recovering from extensive operations (Tr. 431).

[redacted] Davis, age 9 at time of trial, testified that she and her sister were awakened from their sleep by a loud "scream" (Tr. 317). [redacted] looked up and saw blood on the floor and saw her mother in the doorway to her bedroom laying on the floor (Tr. 317-318). [redacted] also saw a nude man standing near her mother's body (Tr. 318). [redacted] testified that this man took her into her mother's room, removed her clothes, tried to get her to kiss him, spread her legs around his hips and stabbed her approximately eight times (Tr. 318-320). [redacted]a Tate testified that she played "possum" and the man stopped stabbing her (Tr. 321). This man then left the room to go to the kitchen and wash off the knife and at this time, Melissa hid under her sister's bed (Tr. 321). According to Melissa, this man returned to the bedroom and she heard him "hurting" her sister (Tr. 322).

Police officers showed Melissa numerous pictures but she was unable to identify her assailant (Tr. 431-432, 740-741, 743). Later, a composite drawing of the suspect was prepared and released to the news media for possible identification (Tr. 746-747). Two of Ms. Tate's relatives saw the sketch on the television news and identified the man as "Rod" (Tr. 612, 747). A photograph of appellant was obtained (Tr. 751). [redacted] Davis identified the photograph of appellant as

depicting her assailant from a photo array of two pictures (Tr. 752). When this photographic array was shown to [redacted] Tate, she threw the photograph depicting appellant "down on the table and covered up her eyes with her hands and did not say anything" (Tr. 756). Subsequently, [redacted] Davis made a positive identification of appellant as her assailant out of a lineup conducted at the police station (Tr. 755). The police officers attempted to have [redacted] Tate view the lineup in which appellant participated but she turned her head away and would not look (Tr. 756).

When contacted by police, appellant readily admitted that he knew Ms. Tate and her two daughters and that they had spent the night at his house which was located across the street from a park (Tr. 750). After the positive identification of appellant in a police lineup, appellant was placed under arrest (Tr. 757).

In his opening remarks to the jury, the prosecutor stated in part, as follows:

> [Prosecutor]: The evidence will further show that [redacted] was taken in to look at the lineup, and Lue Clenney, her grandmother, Joanne's mother, was there with Detective Burgoon.

(Tr. 301). Defense counsel immediately called a bench conference where the following discussion was held:

> [Defense counsel]: Having been through this trial once before, I know and I would advise the Court that the witness [redacted]e Tate, the child, is not and has never been a competent witness to testify.
>
> In that respect, I do not wish and I would ask the Court to prohibit [the prosecutor] from alluding to, mentioning, or referring in any way to any non-verbal conduct on behalf of a child who is not competent to testify.
>
> [Prosecutor]: Judge, my response is that I have a case that I think is directly on point where a witness viewed a lineup and jumped back or collapsed or something, and that was admitted into evidence. It's State vs. Kirby Abrams, and I'd be happy to show it to the Court.
>
> What I'm going to -- and [defense counsel] knows what's coming next. What's coming is that when this girl looked at the lineup, she looked in, didn't say a word, turned her face and wouldn't look back at it. And that's all I'm going to get out of it.

[Defense counsel]: I know very well what the Abrams case says, and I think it stands for the proposition that non-verbal conduct by a witness, by a victim, is admissible. However, if the -- I do know that the witness in that case was an adult female. Under the circumstances we have here with a child who was four at the time, has not been qualified to testify, will not be qualified to testify, that any non-verbal conduct or non-verbal assertive conduct or non-verbal reactive conduct on her part should be excluded as equally unreliable.

[Prosecutor]: No, I disagree with that, and --

THE COURT: All right. The objection is overruled. You will be allowed to state what you have on the record.

[Prosecutor]: I'm not going to go beyond that.

THE COURT: That the child did observe the lineup and immediately turned away, and that's what someone will testify as to what they observed. But no further than that.

[Prosecutor]: Okay.

(The proceedings returned to open court.)

[Prosecutor]: The evidence will be that when [redacted] Tate, the little four-year-old, was taken there to look at the lineup, when she looked at the lineup, she looked in this window, and she turned her head. Didn't say a word. Turned her head and refused to look back at the lineup.

(Tr. 302-303).

On direct examination Lue Clenney responded as follows to questions by the prosecutor concerning her granddaughter's reaction to the lineup:

Q: . . .when the girls looked at the lineup, did they go one at a time?

A: Yes.

Q: Who went first?

A: We all went together to a place, and me and the little one stayed in the room there. And Mr. Burgoon took [[redacted] Davis] up in his arms and carried her --

(Tr. 433). Immediately, defense counsel called a side-bar conference and the following proceedings were had out of the hearing of the jury:

[Defense counsel]: Your Honor, if recollection serves me correctly from the last trial, I think this witness is about to relate conduct of the child [redacted] upon being displayed to the lineup and vice versa. I feel that because the child has not been qualified as a witness, cannot be qualified as a witness, was only four years old at the time, that any assertive non-verbal conduct on her part is equally unreliable and should not be admitted at all. And further, that kind of conduct deprives me of the right to cross-examine about it.

[Prosecutor]: Your Honor, my response is that as we mentioned during opening statement, the Abrams case, I believe, was right on point. There's a discussion in that case that said even though the actual witness is not present, and there is no right to cross-examine that witness, he has the right to cross-examine this witness as to what she saw. And it's my position that this is non-assertive non-verbal conduct by the four-year-old, and it's exactly what I told you in opening statement.

And I will also tell you we haven't gotten to [redacted] yet, but she was not present when [redacted] viewed the lineup.

[Defense counsel]: The problem is that I can't cross-examine this conduct. The problem is that the conduct is no more reliable than the child; and if the child's incompetent to testify, that her conduct shouldn't be admitted either.

[Prosecutor]: Well, in the Abrams case they specifically said that there is, granted, no right to cross-examine that conduct.

[Defense counsel]: That was an adult though, Joe.

THE COURT: But it still --

[Defense counsel]: Not an incompetent.

[Prosecutor]: I would --

THE COURT: It's still the question of the right of confrontation and the right of cross-examination, whether it's an adult or a child. And as I previously ruled during the opening statement, I am going to allow her to testify as to what this child did insofar as was related in the opening statement and no further, because I'm not aware of anything further. So the objection is overruled.

[Defense counsel]: Okay.

(The proceedings returned to open court.)

Q: [Prosecutor]: Okay, Mrs. Clenney.

A: Yes.

Q: Quickly, were you there when [redacted] actually looked at the lineup through the magic mirror that Burgoon described? Did you see her when she looked -- [redacted] now.

A: Not [redacted]

Q: Okay. Were you present when [redacted] looked at the lineup?

A: Yes, I was with [redacted]. Me and the policeman.

Q: And when [redacted] looked at the lineup, can you tell the jury what she did?

A: She just hid her face and wouldn't look.

Q: She hid her face and wouldn't look?

A: Uh-huh.

(Tr. 433-435).

Subsequently during the trial, the state called Officer Burgoon to testify about the identification of appellant. The testimony elicited, without objection by defense counsel, was as follows:

Q: After [redacted] identified the defendant, what did you do then?

A: I handed [redacted] to Detective Scaggs, who was also there. He then carried her to the other room. I went back, and he was standing in the doorway where he could watch what was going on. Went back and got [redacted] Tate and carried her in to have her look at the lineup.

Q: Was her grandmother with you also?

A: Her grandmother was there also, yes.

Q: And what did she do when she looked at the lineup?

A: She turned her head away and rested it on my shoulder.

Q: Did you make an attempt to get her to look back at the lineup?

A: Yes, sir.

Q: Would she?

A: She would not look.

Q: When you took the photograph of the defendant and the Polaroid over on the same day prior to the lineup, did you also show them to [redacted]?

A: Yes, sir, I did.

Q: And what, if anything, was her reaction when she saw them?

A: She threw the photograph down on the table and covered up her eyes with her hands.

Q: Which photograph?

A: The photograph of Mr. Lincoln.

Q: Did she say anything.

A: No, sir. She started crying.

(Tr. 755-57).

On October 7, 1983, defendant was convicted of one count of manslaughter and two counts of first-degree assault (Tr. 964).

Appellant raises in a section of her Statement of Facts entitled "Post Trial Matters", certain allegations pertaining to the competency of Melissa Davis to testify at appellant's trial. However, these matters are not before this court on appeal. Therefore, respondent will not attempt to address any such issues.

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THAT PORTION OF LUE CLENNEY'S TESTIMONY WHICH INDICATED THAT HER FOUR-YEAR-OLD GRANDDAUGHTER, [redacted] TATE, WHEN VIEWING A PRETRIAL LINEUP WHICH INCLUDED APPELLANT, HID HER FACE AND WOULD NOT LOOK AT THE SUSPECTS; THAT THE TRIAL COURT DID NOT COMMIT ERR, PLAIN OR OTHERWISE, IN ALLOWING THE TESTIMONY OF POLICE OFFICER JOHN BURGOON, WITHOUT OBJECTION BY APPELLANT, THAT FOUR-YEAR-OLD [redacted] TATE, UPON VIEWING A PHOTOGRAPH OF DEFENDANT, THREW SAID PHOTOGRAPH ON THE TABLE, COVERED HER EYES AND CRIED; BECAUSE THE TESTIMONY OF LUE CLENNEY DID NOT CONSTITUTE HEARSAY IN THAT [redacted] TATE'S REACTION WHEN VIEWING A PRETRIAL LINEUP WAS SPONTANEOUS AND WAS NOT INTENDED TO COMMUNICATE AN ASSERTION AND BECAUSE THE TESTIMONY OF OFFICER BURGOON, AS WELL AS THE TESTIMONY OF LUE CLENNEY, WERE MERELY CUMULATIVE OF OTHER EVIDENCE IDENTIFYING APPELLANT AS THE PERPETRATOR OF THE CRIMES.

State vs. Abram, 632 S.W.2d 60 (Mo.App., E.D. 1982);

State vs. Shields, 619 S.W.2d 937 (Mo.App., E.D. 1981);

State vs. Repp, 603 S.W.2d 569 (Mo. banc 1980);

State vs. Smith, 603 S.W.2d 78 (Mo.App., E.D. 1980).

ARGUMENT

THE TRAIL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THAT PORTION OF LUE CLENNEY'S TESTIMONY WHICH INDICATED THAT HER FOUR-YEAR-OLD GRANDDAUGHTER, [redacted] TATE, WHEN VIEWING A PRETRIAL LINEUP WHICH INCLUDED APPELLANT, HID HER FACE AND WOULD NOT LOOK AT THE SUSPECTS; THAT THE TRIAL COURT DID NOT COMMIT ERROR, PLAIN OR OTHERWISE, IN ALLOWING THE TESTIMONY OF POLICE OFFICER JOHN BURGOON, WITHOUT OBJECTION BY APPELLANT, THAT FOUR YEAR OLD [redacted]E TATE, UPON VIEWING A PHOTOGRAPH OF DEFENDANT, THREW SAID PHOTOGRAPH ON THE TABLE, COVERED HER EYES AND CRIED; BECAUSE THE TESTIMONY OF LUE CLENNEY DID NOT CONSTITUTE HEARSAY IN THAT [redacted]E TATE'S REACTION WHEN VIEWING A PRETRIAL LINEUP WAS SPONTANEOUS AND WAS NOT INTENDED TO COMMUNICATE AN ASSERTION AND BECAUSE THE TESTIMONY OF OFFICER BURGOON, AS WELL AS THE TESTIMONY OF LUE CLENNEY, WERE MERELY CUMULATIVE OF OTHER EVIDENCE IDENTIFYING APPELLANT AS THE PERPETRATOR OF THE CRIMES.

Appellant's point on appeal pertains to two separate portions of testimony which were admitted in the course of his trial. The first portion of testimony to which appellant raises as being improperly admitted at trial, is that of Lue Clenney pertaining to the reaction of her four year old granddaughter, [redacted]e Tate, upon viewing a pretrial lineup which included appellant. Appellant contends that this testimony was inadmissible on the basis that the child's conduct was assertive and constituted hearsay not falling within a recognized exception to the hearsay rule. Appellant also contends that the testimony of Officer John Burgoon pertaining to the actions of [redacted] Tate upon viewing a photograph of appellant was also inadmissible for the same reasons stated above regarding Lue Clenney's testimony. Respondent contends that appellant's point is without merit and should be dismissed.

The questions presented to this court pertain to the admissibility of

hearsay evidence. Hearsay evidence is generally defined as testimony in court of an assertion made out-of-court, the assertion being offered to prove the truth of the matter asserted. State vs. Abram, 632 S.W.2d 60, 62 (Mo.App., E.D. 1982). Failure to object to hearsay testimony as such results in a failure to preserve such issue for review by the appellate court. State vs. Shields, 619 S.W.2d 937, 940 (Mo.App., E.D. 1981). Any unpreserved alleged error may only be reviewed as a plain error under Rule 29.12(b), justifying reversal only if such error reaches the point of causing a manifest injustice or miscarriage of justice. Id. Under this standard of review, the allegedly wrongful admission of hearsay testimony does not constitute plain error if such testimony is merely cumulative to other evidence properly admitted. State vs. Smith, 603 S.W.2d 78, 79 (Mo.App., E.D. 1980); State vs. Repp, 603 S.W.2d 569, 571 (Mo. banc 1980).

The first portion of testimony which appellant challenges is the testimony of Lue Clenney which indicated that her four year old granddaughter, [redacted] Tate, on viewing a pretrial lineup which included appellant, hid her face and would not look at the suspects. Appellant's objection to this testimony at trial was overruled and appellant's claim of error was preserved in appellant's motion for new trial. However, respondent contends that this testimony was not hearsay testimony and therefore was properly admitted.

Respondent contends that State vs. Abram, supra, is dispositive of this claim of error in this case. The relevant facts of State vs. Abram, supra, were that the victim was to view a lineup of several men, including the defendant. The police officer present at that lineup, testified, over the defendant's hearsay objection, that when the victim first viewed the lineup through the viewing windows, the victim was startled and fell back against him. Id. at 61. The court in Abram concluded that the actions of the victim were not intended to communicate an assertion to the police officer. Id. at 63.

In support of the court's ruling in Abram, the court cited the Advisory Committee Note to the Federal Rules of Evidence, as follows:

> Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the advisory committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with non-verbal than with assertive verbal conduct. The situations giving rise to the non-verbal conduct are such as virtually to eliminate questions of sincerity.

Id. at 63. The court in Abram, held that the officer's testimony as to the victim's reaction upon looking at the pretrial lineup was not hearsay and therefore the trial court did not err in admitting that testimony. Id.

Respondent contends that the actions of four year old [redacted]e Tate were spontaneous and not assertive in nature. [redacted] Tate did not intend to communicate an assertion to the police officers at the time she viewed the pretrial lineup; she did not point her finger at anyone in the lineup or say anything identifying anyone in the lineup. Accordingly, the unassertive conduct of young [redacted] Tate was not hearsay. Therefore, respondent contends that this portion of appellant's argument is without merit.

Appellant next contends that the testimony of Police Officer John Burgoon that [redacted] Tate, upon viewing the photograph of appellant, threw appellant's picture on the table, covered her eyes and cried, was inadmissible hearsay. However, the record reflects that appellant failed to object in any manner to this testimony (Tr. 756-757). While this may appear to be assertive conduct on the part of [redacted] Tate, respondent contends that appellant's failure to object resulted in a failure to preserve for appellate review any hearsay objection to this testimony. State vs. Shields, supra at 940. Also, the admission of this evidence does not rise to the level of plain error because

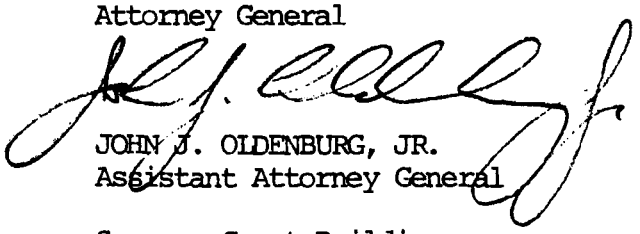
it was cumulative in nature. State vs. Repp, supra; State vs. Smith, supra. Appellant had been identified as the perpetrator of the crimes by the testimony of [redacted] Davis (Tr. 752, 755). Thus, the admission of the testimony of Officer Burgoon pertaining to [redacted] Tate's actions upon viewing a photograph of appellant, at most can only be deemed harmless error and clearly does not rise to the level of plain error. Accordingly, respondent contends that this portion of appellant's argument is without merit and should be dismissed.

CONCLUSION

Appellant has failed to present to this Court any reasons sufficient to justify reversal and remand of this case. Therefore, respondent respectfully requests that this Court affirm appellant's conviction and sentence handed down below.

Respectfully submitted,

JOHN ASHCROFT
Attorney General



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