DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2005

JOSE MARIA MENCOS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D03-4003

[July 20, 2005]

STEVENSON, C.J.

The appellant, Jose Maria Mencos, was tried by a jury and convicted of committing lewd or lascivious molestation on a victim under the age of twelve, battery on a law enforcement officer, resisting an officer with violence, and resisting an officer without violence. We affirm.

During the trial, the State introduced several statements by the child victim, J.A., which were objected to by the defense on hearsay grounds. Officer Hurley testified that she responded to a 911 call regarding lewd and lascivious conduct at the Mencos household. Upon arrival, Hurley spoke to J.A.'s mother and sister. J.A.'s mother stated that she heard J.A. yell "stop" and then was told by J.A. that her step-father touched her in her private area. Officer Hurley spoke to J.A. During their four or five minute conversation, J.A. told Hurley that Mencos touched her private area over her clothing. Detective Hall, another officer to arrive at the scene, testified that, while outside the house, he heard J.A. tell her mother that Mencos reached under her shorts and touched her vagina.

On appeal, Mencos argues, on the basis of *Crawford v. Washington*, 541 U.S. 36 (2004), that the trial court erred in allowing Officer Hurley and Detective Hall to testify to J.A.'s statements because Mencos did not have the opportunity to cross-examine J.A. as she did not testify at trial.[1] In *Crawford*, the United States Supreme Court held that the

[1] The child victim was in Colombia, South America, and the trial court properly found that she was "unavailable."

confrontation clause of the Sixth Amendment excludes from evidence any out of court, testimonial statements unless the witness is found to be unavailable and the defense is provided a prior opportunity for cross-examination. *See* 541 U.S. at 68.

We find that Mencos' *Crawford* objection was not properly preserved for appellate review. At trial, counsel for Mencos did not assert a Sixth Amendment challenge, but, instead, raised a hearsay objection. Mencos never argued that use of this hearsay evidence would violate his constitutional right to confront the witness against him. On appeal, Mencos asserts that this court, nevertheless, is able to consider the Sixth Amendment challenge because the "hearsay objection is closely related to the right of confrontation." Closely related is not the standard followed by the court. *See Castro v. State*, 791 So. 2d 1114 (Fla. 4th DCA 2000) (stating that the defendant's claim was not preserved because the argument on appeal was different than the argument at trial). The right of confrontation guaranteed by the Sixth Amendment "differs from the kind of protection that is afforded by state evidence rules governing the admission of hearsay." *Lopez v. State*, 888 So. 2d 693, 697 (Fla. 1st DCA 2004). An objection specifically based on *Crawford* serves to focus the trial court's attention on the salient inquiry required by that decision, i.e., whether the evidence is "testimonial," whether the witness is "unavailable," and whether there was a "prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. Furthermore, even if the issue was preserved, we find "testimonial" only those statements J.A. made to Officer Hurley in response to questions at the scene, *see Lopez*, 888 So. 2d at 700. In the context of this case, the admission of that evidence was harmless. *See State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986) (stating the focus of a harmless error analysis is whether the error affected the verdict). J.A.'s statements to her mother regarding the sexual abuse, as overheard by Detective Hall, were non-testimonial and therefore could be relayed in court without violating the confrontation clause. *See Herrera-Vega v. State*, 888 So. 2d 66 (Fla. 5th DCA 2004) (refusing to apply *Crawford* exclusion to statements made by a child victim to her mother and father about sexual contact with the defendant, concluding that such statements did not qualify as being testimonial), *review denied*, 902 So. 2d 790 (Fla. 2005).

We have considered the other issues on appeal and find no error. Accordingly, the convictions and sentences on review are affirmed.

Affirmed.

SHAHOOD and GROSS, JJ., concur.

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Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Dwight L. Geiger, Judge; L.T. Case No. 02-1450 CF.

Carey Haughwout, Public Defender, and Patrick B. Burke, Assistant Public Defender, West Palm Beach, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Claudine M. LaFrance, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.