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

[September 14, 2005]

ON MOTION FOR REHEARING

PER CURIAM.

We deny appellant's motion for rehearing, but write to discuss one issue raised therein. In our original opinion, we indicated that Mencos did not preserve his *Crawford*[1] objection for appellate review. *See Mencos v. State*, No. 4D03-4003, 2005 WL 1680166 (Fla. 4th DCA July 20, 2005). As Mencos points out, he could not have specifically objected based on *Crawford* because the Supreme Court issued its ruling after Mencos' trial. Nevertheless, as Justice Scalia discussed, arguments predicated on the right to confrontation have been made in cases throughout this nation's history. *See Crawford*, 541 U.S. at 49-50. Mencos asserted on appeal and in his motion for rehearing that due to *Evans v. State*, 838 So. 2d 1090 (Fla. 2002), *cert. denied*, 540 U.S. 846 (2003), this court could consider his Sixth Amendment challenge since the hearsay objection raised was closely related to the right of confrontation.

In *Evans*, the Supreme Court of Florida decided, on the merits, whether the defendant's Sixth Amendment right to confrontation was violated by the admission of hearsay statements. The court noted that "[a]lthough Evans' counsel did not specifically assert a Sixth Amendment challenge, the hearsay objection raised is closely related to the right of confrontation." *Id.* at 1097 n.5. Although the opinion does not contain

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[1] *Crawford v. Washington*, 541 U.S. 36 (2004).

the precise arguments made, according to the appellee's brief submitted in that case, defense counsel argued, "'[t]his is just plain hearsay,' and '[i]f they want to establish this sort of stuff they need to have somebody testify to it . . . .' (R 2225)." Brief of Appellee at 34-35, *Evans v. State*, 838 So. 2d 1090 (Fla. 2002), *cert. denied*, 540 U.S. 846 (2003). In contrast, Mencos' attorney argued at trial that the State could not prove the child victim's unavailability and the trial court could neither corroborate her statements nor determine their reliability. Hence, we find that Mencos' hearsay objection is distinguishable from the one made in *Evans*. Accordingly, the conviction is AFFIRMED.

STEVENSON, C.J., 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, Jeffrey N. Golant and Patrick B. Burke, Assistant Public Defenders, West Palm Beach, for appellant.

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