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OPINION RENDERED MAY 15, 2009, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002211-MR

AMANDA STANLEY

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 07-CR-00106

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: CAPERTON AND THOMPSON, JUDGES; GRAVES,¹ SENIOR JUDGE.

CAPERTON, JUDGE: Amanda Faye Stanley appeals as a matter of right her conviction of Complicity to Robbery in the First Degree for which she was sentenced to ten years. At her trial, the jury was presented with testimony from

¹ Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

two witnesses, Stanley, and the police detective who investigated the incident and testified to the statements made by the victim. Because the detective's statements were testimonial under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and thus, inadmissible, we find palpable error and therefore reverse and remand to the trial court for further proceedings not inconsistent with this opinion.

The Commonwealth presented only one witness during its case in chief, Detective Preston Herndon. According to the testimony provided by Detective Herndon, Zane Farmer, an informant for the detective, was robbed at knife point on February 23, 2007, at Stanley's apartment.² Based on the information Farmer provided, Detective Herndon testified that he had Stanley arrested and brought to the police station where she was advised of her *Miranda* rights. Subsequently, Stanley stated that she knew what the detective needed to question her about, and gave her confession. Detective Herndon testified that he asked if she had any weapons on her and she produced a black lock-blade knife with a stainless steel blade. The uniform citation for the arrest was admitted into evidence at trial.

Detective Herndon testified to the confession given by Stanley, which is hereinafter summarized. Stanley and a friend identified as Jessie were driving down the road when they saw Zane Farmer and Archie Turner walking. Stanley picked them up and went to an ATM machine in downtown Henderson, Kentucky.

² The detective met with Farmer the day after the robbery at the local Denny's restaurant.

Farmer withdrew money and the group went to Stanley's apartment where Farmer gave Turner \$40 to purchase crack cocaine, but Turner did not provide the drugs for the money. Instead, Stanley pulled her knife, showed it to Turner, and gestured to Farmer. Turner then took the knife from Stanley, took Farmer into the bathroom, and Stanley followed.

While Stanley was behind Turner, Turner pointed the knife at Farmer and demanded his wallet. Farmer gave up his wallet and became tearful. Turner poked the knife towards Farmer's midsection and told him to shut up or he would stab him. Turner removed \$120 and two debit cards from the wallet. Turner got the pin numbers from Farmer and said that if he told the cops he would kill him. Stanley then drove Turner to a nearby gas station. She and Turner went into the store; she went to the restroom while Turner tried to use the debit cards at the ATM. Turner and Stanley then went back to Stanley's apartment. At the apartment, Stanley gave one debit card back to Farmer and told him that Turner kept one and that Farmer should leave.

During her statement, Stanley told the detective that it was not her intention to rob Farmer or to have Turner rob Farmer, only to scare him, because she always talked about being tough and wanted to "see if she had it in her to rob someone." On cross-examination Detective Herndon testified that the confession given by Stanley was not recorded and that he had been unable to locate Turner.

Stanley moved for a directed verdict at the close of the Commonwealth's case in chief, which the trial court overruled. Stanley then

testified and was the only witness presented by the defense. Her version of events was slightly different than those testified to by Detective Herndon. Stanley acknowledged giving the knife to Turner to cut the crack cocaine but when she gave the knife to Turner she did not know he was going to rob anyone. Stanley then went into the bathroom with Farmer to ask him for money. Turner followed and robbed Farmer. Stanley did not stop the robbery because she was afraid of Turner since he had belt-whipped her a few months prior.³

The jury convicted Stanley of complicity to robbery in the first degree and sentenced her to ten years. Stanley now appeals her conviction and presents three arguments on appeal. First, Stanley argues that the court erred when it overruled Stanley's motion for a directed verdict at the close of the Commonwealth's case, when the only evidence for the Commonwealth was from the detective who recited what Stanley said and what the alleged victim said in violation of RCr 9.60 which requires corroboration of an out of court confession. Second, Stanley argues she was denied due process of law under the 5th and 14th amendments when the Commonwealth introduced hearsay and opinion testimony from the detective in order to improperly establish the corpus delicti for robbery in the first degree. Third, Stanley argues she was denied due process of law because of the constant misconduct of the Commonwealth's Attorney throughout the trial,

³ Stanley testified that she had questionable recollection of the events of the robbery and her subsequent confession to Detective Herndon. She explained her memory lapse was due to her cocaine binge that had kept her awake for four or five days. Evidence presented during the penalty phase expanded on Stanley's memory lapse. Stanley's mother testified that Stanley had a severe car crash in 2002 and had suffered a brain injury from which she would never recover. A forensic doctor's report indicted that Stanley's IQ was 77.

most emphatically by his intentional misuse of the out of court hearsay statements of Zane Farmer to get around RCr 9.60, followed by his improper objections to Stanley's legitimate questioning of witnesses which led to the exclusion of admissible evidence for Stanley.

In response, the Commonwealth argues first that the trial court properly denied Stanley's motion for a directed verdict as the evidence was sufficient to submit the matter to the jury; and secondly, that the trial court properly excluded Stanley's hearsay testimony.

Only Stanley's first argument concerning RCr 9.60⁴ and the motion for directed verdict was properly preserved for our appellate review. She requests this Court to consider the second and third arguments, concerning hearsay and prosecutorial misconduct, under RCr 10.26, the palpable error rule. Stanley's arguments directed this Court to *Crawford v. Washington, supra* on the issue of improper admission of hearsay. As the error in admitting the detective's hearsay testimony at trial is dispositive of this appeal, we shall only address the remaining arguments of the parties briefly.⁵

At trial the only witness presented by the Commonwealth was Detective Herndon, who testified to the statements of the victim and the defendant.

⁴ See *State v. Smith*, 669 S.E.2d 299 (N.C. 2008), for a learned dissertation on the history and application of the corpus delicti rule from *Hammurabi's Code* to modern jurisprudence in America. See also *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407 n.14 (1963).

⁵ We decline to address whether the Commonwealth's actions amounted to prosecutorial misconduct in the case sub judice as the aforementioned *Crawford v. Washington* issue is dispositive on appeal.

No other witness testified for the Commonwealth.⁶ At the end of the detective's testimony Stanley moved for a directed verdict on the grounds that since all of the evidence in the case was based on Stanley's statement to the police officer, this was insufficient as a matter of law. The trial court overruled Stanley's motion.

While Stanley primarily argues that the detective's testimony violated RCr 9.60,⁷ the corroboration of confession rule, we find Stanley's argument that the evidence presented by the detective was testimonial and thus should have been excluded, in conjunction with her RCr 9.60 argument, dispositive of this appeal. As the objection to the hearsay testimony of Detective Herndon was insufficiently preserved we turn to RCr 10.26 as argued by Stanley.

RCr 10.26 states:

A palpable error which affects the substantial rights of a party may be considered by the court *on motion for a new trial or by an appellate court on appeal*, even though

⁶ The only other evidence admitted to establish the purported crime was the uniform citation. Our examination of the record reveals that the uniform citation for Stanley's arrest does not list the name of the victim and is only signed by the arresting officer, which does very little to corroborate the crime. Moreover, the knife produced by the search of Stanley is equivocal at best. If retried on remand, the trial court will once again be faced with the determination as to whether the Commonwealth sustained their burden of proof given RCr 9.60.

⁷ RCr 9.60 states "[a] confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed." The rule requires corroboration that the crime has been committed, known as the corpus delicti. *Lofthouse v. Commonwealth*, 13 S.W.3d 236, 241 (Ky. 2000), held "the corroborative evidence need not be such that, independent of the confession, would prove the corpus delicti beyond a reasonable doubt; and proof of the corpus delicti may be established by considering the confession as well as the corroborating evidence." The longstanding rule requiring corroboration of a confession prevents "errors in convictions based upon untrue confessions alone." *United States v. Marshall*, 863 F.2d 1285, 1287 (6th Cir.1988) (quoting *Smith v. United States*, 348 U.S. 147, 153, 75 S.Ct. 194, 99 L.Ed. 192 (1954)). "Additionally, where there is no tangible proof of injury to person or property, the corroborative evidence must tend to connect the accused with the crime." *U.S. v. Sterling*, 555 F.3d 452, 456 (5th Cir. 2009) (quoting *Wong Sun v. United States*, 371 U.S. 471, 491 n.15, 83 S.Ct. 407, 419 n.15, 9 L.Ed.2d 441 (1963)).

insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error. (Emphasis supplied).

‘Manifest injustice’ requires that substantial rights of the defendant be prejudiced by the error, *i.e.*, there is a substantial possibility that the result of the trial would have been different. *Schaefer v. Commonwealth*, 622 S.W.2d 218 (Ky. 1981), and *Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky.App. 1986).

Recently our Kentucky Supreme Court addressed the impact of the United States Supreme Court decisions in *Crawford v. Washington*, *supra*, and *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006). Both *Heard v. Commonwealth*, 217 S.W.3d 240 (Ky. 2007), and *Rankins v. Commonwealth*, 237 S.W.3d 128 (Ky. 2007), necessarily reached the same conclusion, that our courts must vigilantly protect a defendant’s Sixth Amendment right to confrontation by applying *Crawford*. As held in *Heard*, *supra*:

We begin with a discussion of the Confrontation Clause and relevant jurisprudence and focus upon two recent decisions of the Supreme Court of the United States. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” In a landmark decision overruling settled precedent, the United States Supreme Court held in *Crawford v. Washington* that where testimonial evidence is at issue, the Sixth Amendment demands unavailability and a prior opportunity for cross-examination, and that the admission of testimonial statements against an accused without an opportunity to cross-examine the declarant is alone sufficient to establish a violation of the Sixth Amendment. . . . While *Crawford* declared statements made during a police interrogation to be testimonial in

nature, it did not elaborate on the definition of “interrogation,” nor upon when or under what circumstances such out-of-court statements may be admitted. *Davis* provided the elaboration as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Heard at 243-244 (internal citations omitted).

Our Kentucky Supreme Court went on to further hold in *Rankins*,

supra:

Crawford held that the Sixth Amendment prohibits the admission of the testimonial statement of a declarant who does not appear at trial, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford* referred to “testimonial” statements, because it is statements of a testimonial character, as opposed to other hearsay, which cause the declarant to be a witness against the accused for purposes of the Confrontation Clause. . . . [t]he Court clarified, however, that, “it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.” Where statements recount potentially criminal past events, the declarant is, for Confrontation Clause purposes, acting as a witness against the accused. More simply, statements that tell “what is happening” are nontestimonial, while statements that tell “what happened” are testimonial.

Rankins at 131(internal citations omitted).

In applying *Heard, supra*, and *Rankins, supra*, to the case *sub judice*, we must conclude that the testimony of Detective Herndon was testimonial in nature. By the detective testifying to the statements of the victim that he was robbed, that the robbery occurred at Stanley's apartment and that based on what the victim told the detective the day after the robbery,⁸ he had Stanley arrested and she subsequently confessed, the jury was given the statements of the victim as to "what happened" with the primary purpose to establish criminal liability without Stanley having the opportunity to cross-examine the witness accusing her.⁹ We agree that the substantial rights of Stanley were prejudiced, which resulted in manifest injustice under RCr 10.26. As such, we must reverse the trial court's decision to admit the hearsay testimony of Detective Herndon as related to the statements made by the victim, as such evidence was testimonial and violated Stanley's right to confrontation.

For the aforementioned reasons, we reverse and remand for a new trial not inconsistent with this opinion.

ALL CONCUR.

⁸ These statements are clearly testimonial in nature as they establish what happened with the primary purpose of a subsequent criminal prosecution. The delay between the robbery and the statement of the victim to the police further demonstrates the testimonial nature of the statements as the statements were made outside of the emergency situation.

⁹ We note that there is no indication that Stanley had an opportunity to cross-examine the victim prior to trial.

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