# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>August 31, 2004 |
| v | No. 241565<br>Oakland Circuit Court |
| ROBERT JAMES STEPHENS,<br><br>Defendant-Appellant. | LC No. 2001-176314-FH<br><br>ON REMAND |

Before: Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court for consideration of the admission of the statement given by defendant's wife in light of *Crawford v Washington*, 541 US ___; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We continue to affirm defendant's conviction and sentence.

In *Crawford*, the United States Supreme Court concluded that the admission of testimonial statements by a witness is precluded where the witness did not testify at trial. However, admission may occur where the witness was unavailable to testify at trial, and the defendant had had a prior opportunity for cross-examination. *Id*. at 1365. In the present case, the statement by defendant's wife was testimonial because it occurred during a police interrogation. She was unavailable to testify at trial based on her assertion of spousal privilege, and there was no prior opportunity for cross-examination by the defense. Consequently, under the rule established in *Crawford*, the statement by defendant's wife was erroneously admitted in violation of the Confrontation Clause.[1]

However, violations of the Confrontation Clause are reviewed in light of plain, outcome-determinative error or harmless beyond a reasonable doubt standard. See *People v McPherson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 242767, issued July 20, 2004), slip op p 6 n 10; *People v Geno*, 261 Mich App 624, 630; ___ NW2d ___ (2004); *People v Spinks*, 206 Mich App 488, 493; 522 NW2d 875 (1994).[2] The defendant's own statement or confession may be

[1] US Const Am VI; Const 1963, Art 1, § 20.

[2] The *Crawford* Court did not reach the issue of whether any error was harmless because the state did not raise the issue. *Id*. at 1359 n 1.

examined on appeal when determining whether a Confrontation Clause violation was harmless. See *People v Etheridge*, 196 Mich App 43, 47; 492 NW2d 490 (1992).

In the present case, we conclude that the admission of any confession by defendant's wife, albeit error, was harmless beyond a reasonable doubt. A resident in the subdivision observed, during daylight hours, the theft of the equipment from the garage. Although he could not identify the faces of the thieves, he testified that he was "absolutely positive" that both a man and a woman were observed leaving the garage holding lawn equipment. This observation compelled the resident to follow the vehicle as it sped away from the garage, record the license plate number of the vehicle, and contact authorities and the homeowner. Defendant, a repeat offender, acknowledged his presence in the vehicle with his wife. He testified that the couple was heroin users trying to raise money to support their habits. Defendant testified that the neighborhood was "rich," and they were combing the area for "aluminum scrap" to sell. However, defendant acknowledged that there was little "trash" available to scour for aluminum scrap because it was not the date established for trash collection. Defendant acknowledged the theft of equipment from a garage, but testified that his wife alone made the decision to steal, and she took the keys from the car when he threatened to leave. Defendant also presented a letter from his wife in which she admitted sole responsibility for the crime. In light of defendant's acknowledged presence at the location of the theft, *Etheridge, supra*, and the impartial witness' absolute certainty regarding defendant's participation in the crime, we conclude that any erroneous admission was harmless beyond a reasonable doubt. *McPherson, supra*; *Geno, supra*; *Spinks, supra*.

/s/ Karen M. Fort Hood
/s/ Janet T. Neff