STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 5, 2005
v	No. 244023 Wayne Circuit Court
JOHN ANTONIO POOLE, Defendant-Appellant.	LC No. 02-000893-02

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for the first-degree murder conviction, 24 to 90 months in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm.

I. FACTS

Defendant's convictions arise out of the shooting death of Henry Covington on December 12, 2001, around 6:45 a.m., outside a home where Covington resided with his fiancé, Delora Lester. A few months before the shooting, Lester had purchased a house from Harold Varner, defendant's uncle and a codefendant in this case.[1] Lester indicated that she did not have enough money to close on the home and had to borrow money from Varner. Lester testified that she had problems with Varner when she attempted to take possession of the home she purchased, and ultimately she and Covington had to leave the home after someone threw a firebomb through the kitchen window.

On December 12, 2001, Varner called Amanda Coddington, who managed properties for Varner and had a child with him, at 5:00 a.m. to ask her to meet him at a gas station.[2]

[1] Varner's appeal is pending in Docket No. 244024.

[2] Testimony from Coddington about defendant and Varner was presented at trial by way of cross-examining Coddington using her testimony given at the preliminary examination. At trial, Coddington recanted much of her preliminary examination testimony that implicated defendant (continued…)

Coddington met Varner and then went to pick up defendant. Defendant got into a white Explorer with Varner first and then he got into the car with Coddington. Varner told Coddington to follow him and Coddington drove to an area near where Lester and Covington were living. Defendant exited the car and went to an alley heading toward Lester's house. Coddington indicated that defendant was gone approximately 15 minutes.

Lester was inside the home when she heard four shots fired. After hearing the shots, she ran to the door. Lester could hear Covington yelling and when she opened the door, Covington fell into the hallway. Coddington, who was still at her car, also heard four shots and after the shots, defendant returned to the car holding a .357 gun. Defendant put the gun in a shopping bag on the floor. Coddington asked defendant what happened. Defendant initially said, "don't worry about it, just go." Defendant later informed Coddington that he shot someone, but did not specify whom he shot. Defendant left the gun in Coddington's car and she later threw the gun into a dumpster.

Coddington indicated that Varner told her later that day that Covington had been shot. A day or two after the shooting, Varner said to Coddington that he paid defendant $300 to kill someone and that he was annoyed that defendant kept calling him about more money. Varner said he did not know why defendant kept phoning him, and that he was going to pay defendant more when everything died down. Coddington testified that Varner told her that having Covington shot made it easier to deal with Lester and the problems she had with the home she had purchased from him.

On December 18, 2001, Varner was arrested based on information the police obtained from Coddington. Varner asked to speak to Sergeant Kenneth Gardner, one of the investigating officers. Gardner interviewed Varner on December 20, 2001. Gardner testified that Varner offered to give information about a separate murder, in exchange for receiving a deal in this case. Gardner testified that Varner told him that a few days after the shooting, defendant told Varner that he shot Covington.

Vaudi Higginbotham, a cell mate of Varner's, testified that Varner told him that he was going to have a female named Amanda stage a fake compliant against the police and that he gave his nephew $300 and a gun to kill a guy. Higginbotham testified that Varner told him that he had Coddington take defendant to kill the guy and that "he couldn't sleep at night until he killed this guy . . . or had this guy killed."

Originally both Varner and defendant were charged with first-degree murder. Later, the charge against Varner was amended to second-degree murder. Varner and defendant were tried jointly and neither testified. Defendant and Varner were found guilty as charged.

II. CONFRONTATION CLAUSE

(…continued)

in the shooting. Coddington testified at trial, that she did not go any where with defendant on December 12, 2001 and that she was threatened by the police to give a statement implicating defendant and Varner.

Defendant first argues that his Sixth Amendment right to confront the witnesses against him was violated by the admission of out-of-court statements of Varner, by way of the testimony of Higginbotham and Gardner. We conclude that defendant has not shown error requiring a new trial.

A. Standard of Review

Admissibility issues involving questions of law are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court also reviews claims of constitutional error de novo. *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004). However, defendant failed to preserve this issue at the trial court and we therefore review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. In *Crawford v Washington*, 541 US 36, 42, 58; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the Court held that the Confrontation Clause prohibits the admission of testimonial hearsay against a criminal defendant unless the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. See also *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). The Court determined that when nontestimonial hearsay is at issue, "an approach that exempted such statements from Confrontation Clause scrutiny altogether" was permissible. *Crawford*, *supra* at 68. However, when testimonial evidence is at issue, "the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Id.* The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

The out-of-court statements by Varner to Higginbotham were not testimonial and therefore, do not implicate the Confrontation Clause. In *People v Shepherd*, 263 Mich App 665, 673; 689 NW2d 721 (2004), rev'd on other grounds 472 Mich 343; 697 NW2d 144 (2005), this Court considered whether the admission of statements a defendant made to relatives that were overheard by jail guards implicated *Crawford*. The Court stated that because the defendant "was speaking to relatives, not to the guards, and made spontaneous, unprompted comments," the statements were not testimonial in nature. *Id.* at 675. The Court further noted that "[e]ven under the broadest definition of testimonial, it is unlikely that [the defendant] would have reasonably believed that the statements would be available for use at a later trial." *Id.* at 675-676.

Varner's statements to Higginbotham also do not fit under the definition of testimonial evidence. The statements were made to a cell mate and not a government employee. The statements also were not "statement[s] in the nature of '*ex parte* in-court testimony or its functional equivalent.'" *People v Geno*, 261 Mich App 624, 631; 683 NW2d 687 (2004)(citation omitted). It is also unlikely that Varner believed that his statements would later be used at a trial. Therefore, Varner's statements to Higginbotham were not testimonial and, even though defendant did not have the opportunity to cross-examine Varner at trial, the statements were admissible.

However, Varner's out-of-court statements to Sergeant Gardner were testimonial in nature. *Crawford* noted that "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'" were testimonial in nature. *Crawford*, *supra* at 52. The Court also determined that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id*. The Court noted that it was using the term "'interrogation' in its colloquial, rather than any technical legal, sense" and noted that one could imagine various definitions for the term interrogation. *Id*. at 53 n 4.

Varner was under arrest and incarcerated when he gave his statement to police. Although Varner requested to speak with Gardner, Gardner approached the situation as an interview, reading Varner his constitutional rights and obtaining a waiver of those rights from Varner. Varner then proceeded to give Gardner information about another case in hope of getting some type of deal in the current case. Varner also gave Gardner information about the current case. Varner informed Gardner that he would not write down the information he gave the police about either case until he was assured of getting a deal in the current case. After the interview, Gardner immediately typed out his recollection of the interview.

Based on the above facts, we conclude that Varner's statements to Gardner were testimonial in nature. The fact that Varner was read his rights and that Gardner immediately typed his recollection of the conversation suggest that one would believe that the statements "would be available for use at a later trial." *Crawford*, *supra* at 52. Additionally, Varner was under arrest and incarcerated at the time of the statements. Although he may not have been subject to a technical interrogation by the police, the circumstances surrounding Varner's statements suggest that they were testimonial in nature. Therefore, the trial court erred in admitting these statements.

However, "when the trial court commits an error that denies a defendant his constitutional rights under the Confrontation Clause . . . we need not reverse if the error is harmless beyond a reasonable doubt." *McPherson*, *supra* at 131-132. In this case, there was other evidence besides Gardner's testimony concerning Varner's statements to support defendant's conviction. As discussed previously, Higginbotham's testimony about Varner's statements was not testimonial in nature and was properly admitted. These statements specifically implicated defendant in the crime. Additionally, Coddington was impeached by her preliminary examination testimony, which also implicated defendant in the murder. As such, the error in admitting Gardner's testimony about Varner's statement was harmless beyond a reasonable doubt. *Id*.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel because his trial counsel failed to object to the admission of the hearsay statements of Varner, by way of the testimony of Higginbotham and Sergeant Gardner. We disagree.

A. Standard of Review

The issue of ineffective assistance of counsel must be raised in a motion for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

People v Thomas, 260 Mich App 450, 456; 678 NW2d 631 (2004). Defendant failed to move in the trial court for a new trial or an evidentiary hearing with regard to the ineffective assistance claim. Therefore, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court are reviewed for clear error, and questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Here, trial counsel could not have validly objected to the admission of the out-of-court statements of Varner on the basis of *Crawford* and the Sixth Amendment right to confront witnesses. The trial occurred in 2002, and *Crawford* was not decided until 2004. *Crawford, supra*. In addition, no valid *Crawford* objection could have been made to Higginbotham's testimony because, as shown above, *Crawford* only precludes testimonial hearsay, and Varner's out-of-court statements to Higginbotham were nontestimonial. Additionally, we have determined that the admission of Gardner's testimony was harmless beyond a reasonable doubt. Therefore, defendant cannot show that the result of the proceedings would have been different if objections had been made. *Garza*, *supra* at 255.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette