STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2008
v	No. 281620 Oakland Circuit Court
LAMAR RASON ISHAWN CLARKE, Defendant-Appellant.	LC No. 2007-216001-FH

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order denying his motion to quash the information. Defendant is charged with four counts of second-degree criminal sexual conduct (CSC), MCL 750.520c. Defendant was bound over for trial after a preliminary examination and thereafter filed his motion to quash with the trial court, which was denied. We affirm.

This case arises out of an accusation by defendant's daughter that defendant engaged in sexual contact with her on numerous occasions between 1997 and 2003. The victim was between the ages of 7 and 12 during this time. She was 16 at the time she testified at defendant's preliminary examination. In her testimony she refused to give any details about defendant's alleged conduct. The prosecutor then sought to admit a statement the victim had written for the police at the time she reported the conduct. The statement was admitted and defendant was bound over for trial.

Defendant first argues on appeal that the statement violated his constitutional right to confrontation. Accordingly, defendant argues that the district court should not have considered it at the preliminary examination and, further, that the trial court erred in denying his motion to quash the information. We disagree. We review a circuit court's ruling on a motion to quash de novo to determine if the district court abused its discretion in binding the defendant over for trial. *People v Jenkins*, 244 Mich App 1, 14; 624 NW2d 457 (2000).

"The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker* (*On Rem*), 273 Mich App 56, 60-61; 728 NW2d 902 (2006). With regard to whether a statement is testimonial, this Court has distinguished between statements made to describe a current event requiring police assistance and statements made for the purpose of establishing a past crime. *Id.*

at 63. The prosecutor never challenges the conclusion that the victim's written statement was testimonial. The statement was made about a past crime and not for any immediate safety or criminal apprehension purposes. We conclude that it was testimonial. *Id.* at 63.

Defendant's primary argument is that his right to confront the victim was violated because he was denied the opportunity to cross-examine her regarding the statement. He argues that, while she testified at the preliminary examination, her refusal to testify regarding the content of the statement rendered her unavailable for cross-examination. It is uncontested that the victim was not subject to prior cross-examination regarding her statement. Therefore, if she were unavailable for cross-examination at the time of the preliminary examination, admission of the statement would violate the Confrontation Clause. *Walker, supra* at 60. The inquiry regarding whether a witness is unavailable for cross-examination to satisfy the defendant's right to confrontation differs from the inquiry dictated by rules of evidence pertaining to hearsay exceptions. *People v Chavies*, 234 Mich App 274, 284; 593 NW2d 655 (1999), overruled in part on other grounds *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006); MRE 804(a). The purpose of cross-examination, to satisfy the Confrontation Clause, is to allow the defendant an opportunity to uncover bias or defects in memory or observation. *Chavies, supra* at 283. The protection of the right to confront a witness guarantees only an opportunity for effective cross-examination, not whatever cross-examination defendant desires. *Id.*

The victim was present at the preliminary examination and did testify. She responded to many of the prosecutor's questions. She testified that she wrote the statement and that its contents were true. She did not wish to testify regarding the "unusual things" that occurred between her and her father. She simply refused to answer questions regarding this subject. She clearly denied, however, that defendant put his penis inside her vagina or his mouth on her vagina. Defendant made no attempt to question the victim. Defendant had an opportunity to probe the reasons for the victim's refusal, to test her memory, or to uncover prejudices or biases. He did not take this opportunity. There is no basis for concluding that defendant's opportunity to cross-examine the victim was deficient when no attempt to even define the contours of her refusal to cooperate was made. The victim was sufficiently available for cross-examination to satisfy the Confrontation Clause.

Defendant next argues that the Supreme Court's decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), abrogates the hearsay rules by requiring cross-examination to be the only test for reliability and trustworthiness of an out-of-court statement. We disagree.

Defendant's argument is predicated on the notion that the rule dictated in *Crawford* pertains to any analysis of the reliability of out-of-court statements, whether couched as a hearsay question or a confrontation question. *Crawford* does indeed teach that the purpose of the Confrontation Clause is to establish the reliability of *ex parte* statements and that the best way to establish that reliability is by cross-examination. *Crawford, supra* at 61. The Court, however, draws a clear distinction between admission of a statement under the rules of evidence and satisfaction of the constitutional right to confrontation. *Id.* at 56 n 7; see also *Davis v Washington*, 547 US 813, 823; 126 S Ct 2266; 165 L Ed 2d 224 (2006) (distinguishing hearsay inquiry from constitutional inquiry). "[The Confrontation Clause's] ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee." *Crawford* at 61. Admission of hearsay under the evidentiary rules permits a "judicial determination of

reliability," whereas the Confrontation Clause requires, under *Crawford*, the procedural protection provided by cross-examination. *Id*. at 61-62. All hearsay is subject to the rules of evidence; testimonial hearsay must also satisfy the requirements of the Confrontation Clause. *Id.* at 61. Defendant's argument that the catch-all hearsay exception is modified and informed by *Crawford* must, therefore, fail.

Defendant's final argument is that the prosecutor failed to satisfy two of the requirements of MRE 803(24),[1] the catch-all hearsay exception. We disagree.

Defendant failed to preserve this issue because he did not raise these specific grounds for objection with the lower court. *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). Thus, we review only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

MRE 803(24) provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Defendant argues on appeal that the victim's statement is not more probative than her in-court testimony and that he was not given adequate notice that the prosecutor intended to offer the statement.

The victim's written statement detailed the alleged sexual conduct by defendant. The victim would only state in her testimony that "unusual things" occurred some nights between herself and defendant. When questioned at the preliminary examination, she refused to give details about these "unusual things." The prosecutor then received permission from the court to lead the victim as a hostile witness and questioned the victim about the incidents detailed within the statement to no avail. Defendant offers no argument that the prosecutor could have made any

[1] Defendant's brief on appeal cites MRE 803(b)(7), possibly because the lower court erroneously cited this rule. MRE 803(24) and MRE 803(b)(7) are identical catch-all hearsay exceptions, but under MRE 803(24), availability of the witness is immaterial. Because they are identical, there is never any need to determine whether a witness is unavailable, as required by MRE 803(b)(7), in order to apply a catch-all hearsay exception. See *People v Welch*, 226 Mich App 461, 464 n 2; 574 NW2d 682 (1997).

other reasonable effort to procure additional testimony from the victim. See MRE 803(24)(B). Defendant's contention that a written statement is not more probative than in-court testimony by the same witness is only true in the hypothetical. In the instant case, because the victim's testimony lacked any detail about the alleged actions, it differs from the written statement not only in quality, but also in substance. The written statement was, in fact, the only evidence of the alleged acts reasonably procured by the prosecutor.

Defendant also argues that he was not provided adequate notice to prepare his defense in regard to admission of the written statement. There is, indeed, no evidence on the record establishing that the prosecutor gave defendant notice of intent to offer the statement. The victim was on the witness list and she testified at the preliminary examination. The prosecutor asked her about the statement after she refused to provide detailed allegations, and offered the statement into evidence at the close of her testimony. Defense counsel did not express any surprise at the time the statement was discussed or offered into evidence. No objection relating to notice was raised at the time it was introduced. In the absence of any indication that defendant was surprised or unprepared to meet the proposed evidence, the court did not plainly err in failing to investigate, sua sponte, whether adequate notice was given. Cf. *People v Elston*, 462 Mich 751, 764; 614 NW2d 595 (2000) (trial court has no duty to order continuance in face of surprise evidence if none is sought).

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Mark J. Cavanagh