SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: State of Delaware v. Jamaien Monroe
I.D. No. 0601021343

Submitted: October 27, 2008
Decided: October 31, 2008

On Defendant's Motion in Limine to Exclude Statements of Andre Ferrell.
DENIED in part; **GRANTED** in part.

Dear Counsel:

Defendant was indicted by the Grand Jury in a 14 count indictment stemming from two separate incidents. Counts I through XI of the indictment relate to events that occurred on April 2, 2007 and include Murder First Degree (non-capital), Possession of a Firearm During the Commission of a Felony (four counts), Possession of a Deadly Weapon During the Commission of a Felony, Reckless Endangering First Degree (three counts) and Endangering the Welfare of a Child (two counts). Counts XII through XIV of the indictment relate to events that occurred on January 26, 2006 and include Attempted Murder First Degree, Possession of a Firearm During the Commission of a Felony and Possession of a Deadly

Weapon During the Commission of a Felony. Andre Ferrell was the victim of both the Attempted Murder First and Murder First counts. The defense seeks to exclude the statements made by Andre Ferrell to a Wilmington Hospital nurse and to Wilmington police officers after he was shot on January 26, 2006.

For the reasons set forth below, Defendant's motion in limine to exclude statements of Andre Ferrell is denied in part and granted in part.

I. FACTS AND PROCEDURAL HISTORY[1]

On January 26, 2006 at approximately 12:30 p.m. Andre Ferrell was shot three times in the back. Ferrell drove to his father's home and was then transported to Wilmington Hospital. Upon intake, Ferrell stated to a nurse, "they shot me in the back." Officer Meese overheard Ferrell's statement to the nurse. Soon thereafter, Ferrell told Officer Selekman that he was shot by a person named "Main." Later that day, Ferrell was transported to Christiana Hospital and interviewed by Officer Chaffin. Ferrell described a robbery involving Defendant that occurred on January 25—the night before the shooting—and described the events preceding the shooting. Ferrell again stated that "Main" shot him earlier that day. Last, Ferrell identified Defendant Jamaien Monroe as "Main" by pointing to a photo of Defendant in a photo line-up.

II. THE PARTIES' CONTENTIONS

Defendant contends that none of the statements made by Ferrell are admissible. With regard to Ferrell's statements to police officers, Defendant maintains that they are testimonial and because Ferrell is unavailable to be cross-examined, *Crawford v. Washington*[2] bars admission of the statements. With regard to Ferrell's statement to a nurse at Wilmington Hospital, Defendant concedes that the statement was not testimonial. However, Defendant maintains that the statement is hearsay and does not qualify for the excited utterance exception to the hearsay rule.

In response, the State contends that all of the statements are admissible. With regard to Ferrell's statements to police officers, the State

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[1] The facts are essentially undisputed.

[2] 541 U.S. 36 (2004) (holding that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.").

maintains that they are not testimonial, and thus *Crawford* is inapplicable. The State asserts that the statements to police officers should be admitted pursuant to the excited utterance exception to the hearsay rule. Similarly, with regard to Ferrell's statement to a nurse, the State contends that the statement should also be admitted as an excited utterance.

III. THE APPLICABLE LAW

The United States Supreme Court decision in *Crawford v. Washington* sets the framework for determining if a statement made by an unavailable witness should be admitted. The first step is determining whether the statement is testimonial. If so, the inquiry ends there. A testimonial statement will not be admitted where the declarant is unavailable. A statement is testimonial if (1) a government agent was involved in the creating of the testimony or taking a formalized statement and (2) an objective person in the declarant's position would reasonably expect the statement would be later used in court.[3] A narrow exception to the inadmissiblity of statements made to police by an unavailable declarant was subsequently articulated by the Supreme Court in *Davis v. Washington.* The *Davis* court held that a statement describing events "as they were actually happening" with the purpose of enabling police to address an "ongoing emergency" is not testimonial.[4] If a determination is made that a statement is not testimonial, under the second step it may be admitted if there are adequate indicia of the statement's reliability.[5]

IV. DISCUSSION

A. Statement made to nurse

Ferrell's statement to a hospital nurse upon intake that "they shot me in my back" is admissible. The statement is not testimonial because it was not made to a government agent (although it was overhead by a police officer). Rather, the statement was made to medical personnel and identified the cause and location of Ferrell's injury. While the parties have focused on whether the statement to the nurse should qualify as an excited utterance, the

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[3] *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

[4] *Davis v. Washington*, 547 U.S. 813, 826-27 (2006).

[5] *State v. Johnson*, 2005 WL 1952939, *2 (Del. Super. Ct.) (citing *Ohio v. Roberts*, 448 U.S. 56 (1980)).

Court concludes that it qualifies as a statement for the purpose of medical diagnosis or treatment under D.R.E. 803(4);[6] such a statement is admissible regardless of the availability of the declarant because it has "adequate indicia of reliability."[7] The hearsay exception for statements for the purpose of medical diagnosis or treatment "is premised on the theory that the patient's statements to a physician are likely to be reliable because the patient has a selfish motive to be truthful: the effectiveness of medical treatment depends upon the accuracy of the information provided."[8] For example, in *State v. Johnson*, this Court found that a victim's statements made to a triage nurse were admissible pursuant to D.R.E. 803(4).[9] The victim was sexually assaulted at 1:00 a.m. The police took her to the hospital at 11:15 a.m. The Court found that the victim's statement that she had been sexually assaulted by a black male was admissible under D.R.E. 803(4).[10]

B. Verbal statements made to police officers

Ferrell's statements made to police officers first at Wilmington Hospital and later at Christiana Hospital are inadmissible. Application of the *Crawford* framework yields a finding that these statements are testimonial. In both instances, Ferrell made the statements to police officers.[11] The essential holding of *Crawford* prohibits admission of statements made to police officers by an unavailable declarant when the defendant did not have an opportunity to cross examine the declarant. In

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6 D.R.E. 803(4). "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external course thereof insofar as reasonably pertinent to diagnosis or treatment."

7 "Adequate indicia of reliability" has been determined to mean falling within a "firmly rooted hearsay exception" or "bearing particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

8 3 *Weinstein's Federal Evidence* § 803.06[1] (2d ed.).

9 *State v. Johnson*, 2005 WL 1952939, *3-4 (Del. Super.).

10 Because Ferrell's statement to the nurse qualifies as a statement made for the purpose of medical treatment or diagnosis, the Court need not determine if the excited utterance exception applies.

11 Nothing in the facts indicates that Ferrell was unaware that he was speaking to police officers.

addition, the instant case is distinguishable from *Davis v. Washington*, upon which the State relies. In *Davis*, the United States Supreme Court found that a statement was not testimonial because the declarant "was speaking about events as they were actually happening." Similarly, in *Nalley v. State*, a case relied upon by both parties, the Delaware Supreme Court found that a bystander's unsolicited statements to police were not testimonial because the primary purpose was to assist the police with an "ongoing emergency."[12] In the instant case, Ferrell's statements to the police were made well after the shooting and there was no "ongoing emergency." Therefore, all of Ferrell's statements to police officers on January 26, 2006 are inadmissible because they are testimonial.

C. Identification of Defendant from a photo lineup

Ferrell's nonverbal identification of Defendant from a photo lineup is inadmissible. A nonverbal act is considered a statement for hearsay purposes under D.R.E. 801(a)(2)[13] and it is barred by *Crawford* because it is testimonial. In the context of a photo line-up, Ferrell's act of pointing to Defendant's photograph was the nonverbal equivalent of stating "that is the person who shot me." The photo line-up was conducted by police officers and an objective person in the declarant's position would reasonably expect that the statement would later be used in court. Therefore, Ferrell's identification of Defendant on January 26, 2006 is inadmissible.

V. CONCLUSION

For the preceding reasons, Defendant's Motion in Limine to Exclude Statements of Andre Ferrell is **DENIED** as to his statement to the Wilmington Hospital nurse, and **GRANTED** as to the identification and statements made to police officers**.**

Very truly yours,

oc: Prothonotary

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12 *Nalley v. State*, 935 A.2d 256, *3 (Del. 2007).

13 D.R.E. 801(a). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."