DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2011

NORMAN BROWN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D09-4667

[August 17, 2011]

DAMOORGIAN, J.

Appellant, Norman Brown, appeals his judgments and sentences for first-degree murder, attempted armed robbery, aggravated fleeing or eluding a law enforcement officer and resisting an officer without violence.[1] Appellant argues that the trial court abused its discretion in admitting testimony from a third party who testified to statements made by a co-defendant describing Appellant's participation in the murders and attempted robbery. Appellant also contends that his trial counsel was ineffective for failing to make the proper objections to this testimony. Finding no reversible error, we affirm Appellant's convictions and sentences.

The evidence adduced at trial established that Appellant and two other individuals[2] attempted to rob three victims. During the course of the robbery, two of the victims were shot and killed. Appellant's DNA evidence was found at the murder scene. Outside the presence of the jury, and in anticipation of Appellant's objection, the State proffered the testimony of Miller's friend. Miller's friend was party to a conversation in which Miller implicated himself as well as Appellant and Chestnut in the crimes. During the State's proffer, Miller's friend testified that the

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[1] The incident leading to charges of first-degree murder and attempted armed robbery occurred on May 19, 2006. The other charges arose from the police's attempt to execute an arrest warrant for the Appellant on June 23, 2006.

[2] The two other individuals were co-defendants Kevin D. Miller and Donny Chestnut. Their cases were severed.

conversation with Miller took place in the neighborhood in which they lived. He went on to state that during the conversation, Miller pointed out a photograph appearing in the newspaper discussing Appellant's arrest, and explained that he, along with Appellant and Chestnut, went to rob "some Mexicans" on a Friday because it was "payday." During the robbery, Miller and Appellant shot and killed two of the victims because they did not do as they were told.

Citing to *Machado v. State*, 787 So. 2d 112 (Fla. 4th DCA 2001), the State argued that Miller's statements were admissible as an exception to the hearsay rule because Miller made the statements against his penal interest under corroborating circumstances indicating their trustworthiness. To establish the trustworthiness of the statements, the State cited to the fact that Miller's statements to the witness were made in a social setting, not in a police environment, and implicated Miller as well as Appellant and Chestnut. Finally, the State argued that allowing the testimony would not violate Appellant's Sixth Amendment right of confrontation[3] under *Crawford*,[4] because Miller's statements were not "testimonial" hearsay as that term has been defined.

In response, Appellant argued that the statements were not trustworthy or reliable because certain evidence was inconsistent with Miller's statements. The inconsistencies included that Miller stated he killed one person and Appellant killed another, but the evidence showed that one gun killed both individuals;[5] furthermore, the statements of Miller's friend did not indicate that Appellant had suffered injuries during the incident, which was contrary to Appellant's testimony that he suffered a cut and contrary to the evidence of his blood gathered from the scene of the crime. Over Appellant's objection, the trial court ruled that the statements met the guidelines set forth in *Machado*, concluding that there were "particularized guarantees of trustworthiness" based on the language used by Miller and the setting in which the statements were made. The trial court also found the statements admissible under section 90.803(18)(e), Florida Statutes (2009), which allows hearsay statements by co-conspirators in furtherance of the conspiracy. After its ruling, the witness was allowed to testify before the jury about what Miller told him.

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[3] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

[4] *Crawford v. Washington*, 541 U.S. 36 (2004).

[5] This argument does not correspond with the evidence at trial. The firearms examiner in this case testified that based on her investigation she could not exclude another firearm.

On appeal, Appellant argues that Miller's statements to his friend were testimonial in nature and fell within the *Crawford* purview because they 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.'" *Crawford v. Washington*, 541 U.S. 36, 52 (2004). Appellant points out that an objective witness, in Miller's position, would reasonably believe a double murder confession to a non-privileged listener, without a confidentiality agreement, would later be used in trial. Therefore, Appellant contends that the trial court erred in concluding *Crawford* was inapplicable, and asserts that Appellant's confrontation right was violated by the admission of the third party's testimony relating Miller's statements.

In *Crawford*, the Supreme Court held that the admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment if (1) the statement is testimonial, (2) the declarant is unavailable, and (3) the defendant lacked a prior opportunity for cross-examination of the declarant. *Id.* at 53-54. The Court emphasized that if "testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. "Only [testimonial statements] cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006). "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id.*

The Supreme Court identified "[v]arious formulations" of the core class of "'testimonial'" statements; among these are:

> *ex parte* in-court testimony or its functional equivalent-that is, materials such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions, 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, . . . [and] [s]tatements taken by police officers in the course of interrogations.

Crawford, 541 U.S. at 51-52 (internal citations and quotations omitted). At a minimum, statements are testimonial if the declarant made them "at a preliminary hearing, before a grand jury, or at a former trial; and [during] police interrogations." *Id.* at 68.

When a statement is not testimonial it "is not subject to the Confrontation Clause." *State v. Contreras*, 979 So. 2d 896, 903 (Fla. 2008). Most courts agree that a spontaneous statement to a friend or family member is not likely to be testimonial under *Crawford*. *See Franklin v. State*, 965 So. 2d 79, 91 (Fla. 2007) (collecting cases and holding that a victim's statements to a friend and co-worker immediately after being shot were nontestimonial). That is precisely what occurred in this case. Accordingly, we hold that Miller's statements to his friend were not testimonial in nature, and, therefore, no violation of the Confrontation Clause occurred by their admission through Miller's friend.

With respect to the alleged *Crawford* violation, Appellant argues that this case is consistent with *Looney v. State*, 803 So. 2d 656, 671 (Fla. 2001), wherein the trial court allowed an inmate to testify about the hearsay statement of a non-testifying co-defendant, which incriminated Looney at their joint trial. The Florida Supreme Court determined that although a violation had occurred, the error was harmless based on the direct testimony and corroborating evidence presented at trial as to Looney's involvement in the murder. *Id.* at 672. Looney relied on *Bruton v. United States*, 391 U.S. 123 (1968), which held that a defendant's Confrontation Clause rights are violated where the out-of-court inculpatory statements of a co-defendant are admitted at a **joint** trial. *Id.* at 137 (emphasis added). We reject this argument because *Looney* was decided on other grounds prior to *Crawford*, and, thus, did not address the dispositive issue here regarding whether the statements were testimonial in nature subjecting them to the Confrontation Clause.

Appellant next argues that Miller's statements were not admissible under section 90.804(2)(c), Florida Statutes (2009) as statements against interest, and contends that this case is distinguishable from *Machado*. We disagree.[6]

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[6] Because we conclude that the trial court did not err in admitting Miller's statements under the statement against interest hearsay exception and *Machado*, we decline to address the propriety of the trial court's *sua sponte* ruling that the statements were also admissible under section 90.803(18)(e).

In *Machado*, we held that "[a] non-testifying accomplice's statement against penal interest is admissible as a hearsay exception if corroborating circumstances show the statement has 'particularized guarantees of trustworthiness.'" 787 So. 2d at 114 (quoting *Lilly v. Virginia*, 527 U.S. 116, 136-37 (1999)). When determining whether the statement contains "particularized guarantees of trustworthiness," courts should look to the surrounding circumstances, including the language used by the accomplice and the setting in which the statements were made. *See Lilly*, 527 U.S. at 139. Miller's statements were voluntarily made, without intending to shift blame, in a personal setting, to a friend. Moreover, Miller implicated himself as well as Appellant, and provided details of the crime which were consistent with the other evidence in the case. These facts included the number of victims and their ethnicity, Appellant's nickname, the day of the week the crime took place, the manner of death, and the particular conduct resulting in the deaths. As such, we hold that the trial court properly admitted Miller's statements.

Defendant's reliance on *Brooks v. State*, 787 So. 2d 765, 775 (Fla. 2001) is misplaced. In *Brooks*, the trial court allowed the admission of a co-defendant's statements to an investigator prior to his arrest under the hearsay exception "statement against interest" pursuant to section 90.804(2)(c). *Id.* at 774. The supreme court reversed, on this and other grounds, holding that while co-defendant's statements were self-inculpatory when considered on their own, when viewed as a whole and under the investigatory circumstances in which they were made, were predominantly self-serving in attempting to shift blame, thus lacking the necessary "'guarantees of trustworthiness.'" *Id.* at 777. We hold that *Brooks* is factually distinguishable from the instant case. More to the point, like *Machado*, the corroborating circumstances surrounding Miller's statements show his statements had "'particularized guarantees of trustworthiness.'" 787 So. 2d at 113 (quoting *Lilly*, 527 U.S. at 136-37).

Lastly, Appellant argues that to the extent his attorney failed to make the proper objections to the admission of the statements under *Crawford* or sections 90.804(2)(c) and 90.803(18)(e), his attorney's performance was deficient, and this deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984) (explaining that ineffective assistance of counsel is found when counsel's performance falls below an objective standard of reasonableness and when there is a reasonable probability that the results of the proceeding would have been different but for the inadequate performance). Because we find that no *Crawford* violation occurred and that trial counsel's objections properly preserved Appellant's section 90.804(2)(c) argument for appellate purposes, trial

counsel's performance was not deficient on those grounds. Furthermore, because we conclude that the trial court properly admitted the statements under section 90.804(2)(c), and properly found the statements trustworthy and reliable pursuant to *Machado*, Appellant cannot show prejudice under *Strickland* in regards to counsel's failure to object based upon the trial court's *sua sponte* ruling that the statements were also admissible under section 90.803(18)(e).

Affirmed.

CIKLIN and LEVINE, JJ., concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John Murphy, III, Judge; L.T. Case No. 06-10823 CF10A.

Carey Haughwout, Public Defender, and James W. McIntire, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Mitchell A. Egber, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.