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Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-001149-MR

TORREY CROSS APPELLANT

ON REMAND FROM THE UNITED STATES SUPREME COURT
(No. 05-SC-10347)

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 01-CR-001262

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: BARBER AND JOHNSON, JUDGES;[1] MILLER,[2] SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: This matter is before us upon remand by the United States Supreme Court for reconsideration in light of its decision in Davis v. Washington, 547 U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). In our previous decision we

[1] Judges David Barber and Rick A. Johnson concurred in this opinion prior to the expiration of their respective terms of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

determined that statements made by the victim in an emergency 911 call were nontestimonial and therefore not subject to the confrontation clause concerns contained in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Davis addressed Crawford in the context of a 911 call and concluded that such calls are normally nontestimonial and not subject to the rule as stated in Crawford. Upon reviewing this case in light of Davis, we again conclude that the statements made in the 911 call made by the victim in this case were nontestimonial and, accordingly, not subject to exclusion from the trial under the confrontation clause concerns addressed in Crawford. We accordingly affirm.

We begin by restating the factual background of the case. Natia Clarkson had known Torrey Cross for eighteen years. He was a cousin to her roommate, Kim Stovall, and went by the nickname “88.” On April 8, 2001, Cross was at Clarkson's apartment on Brockton Lane. He was dressed in a Hawaiian shirt. He left and returned at 2:00 a.m. the next morning, April 9, 2001.

Later the day of April 9, 2001, Cross called for a cab from Clarkson's apartment. Yellow Cab # 786, with driver Mike Eilers, was dispatched to the address to pick up a fare going to 13th and Hill Streets. Eilers arrived between 4:45 p.m. and 5:00 p.m. The fare was Cross, who signaled from the apartment

building porch for Eilers to wait. In describing Cross, Eilers indicated that he was an African-American; 6 foot, 1 inch tall; stocky; 225-230 pounds; and wearing a loudly colored Hawaiian style shirt. Eilers waited for five to seven minutes, got impatient, and left, only to be told by dispatch to return five minutes later.

At 6:12 p.m. on April 9, 2001, a woman who identified herself as 40-year old Shelly Miles (a neighbor of Natia Clarkson) called 911 from her apartment on Brockton Lane and reported that a large black man whom she did not know had broken down her back door, come in, choked her until she lost consciousness, taken her prescription medications and money, and left in yellow cab # 786. She further advised 911 that she had called the cab company to report this and they advised her to call the police. She reported to 911 that the next door neighbors knew she had narcotics due to her having cancer; and that she had been unable to control her bladder and had urinated on herself, but said she did not need EMS.

Upon being sent back to Brockton Lane, Eilers picked up Cross who asked to be taken to 13th and Hill Streets. Once in the cab, Cross began rustling through a black fanny pack bag. As he pulled several pill bottles out of the bag, Cross asked Eilers if he had heard of any of the drug names, and Eilers replied that he had not. Apparently in response to a request by

police dispatchers, while in route to 13th and Hill Streets, cab dispatch made one call asking Eilers for his destination, then uncharacteristically made two calls asking for the cab's exact location. Cross asked Eilers why dispatch wanted to know the cab's location. He got nervous and excited and told Eilers to pull over at Brook and Magnolia, well short of his destination. He paid his fare and got out. Eilers found a cell phone in the cab after Cross left and turned it over to the police.

Meanwhile, Officer Jeffrey Schmidt responded to the 911 call. He interviewed the victim, who was very distraught: screaming, yelling, crying, and generally hysterical. The redness around her neck area was, in the officer's opinion, in the imprint of a thumb. She told him that she had heard her door being kicked in and was confronted and choked by a man she recognized but did not know by name.

No others in the apartment building answered the officer's knock. He did interview Clarkson, Stovall, and Stovall's sister, Angela Nelson.

The officer received the cell phone recovered from the cab. It rang constantly. One of the saved numbers matched the number of Natia Clarkson's apartment.

The officer provided a description of the intruder to Clarkson, Stovall and Nelson. The victim, who was a friend of

Clarkson, also described the intruder to Clarkson. Clarkson knew from the description that it was Cross.

Photos were taken of marks on the victim's neck and of the apartment, including the broken door. Unidentifiable fingerprints were taken from the door and a pill bottle.

The next day, Detective Horn was assigned as the lead detective on the case. He began with two suspects, a Jesse Wheeler, Jr. and an “88.” Wheeler was eliminated after Eilers did not identify him as the person in the cab; further, he was in prison at the time of the crime. The detective recovered ten bottles of the victim's medications when a resident of Patton Court in the Parkhill Housing Project, near the original cab destination of 13th and Hill Streets, reported to the police that she found the bag and drugs on her porch. The detective then interviewed the victim at her apartment. She was still physically upset and crying. After taking photographs of the bag and medications, he returned what was left of her medication to her. The victim gave the detective an additional description of the intruder.

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detective went next door and spoke to Clarkson and Stovall in hope that they could give a name to his suspect, “88.” Clarkson and Stovall did know that “88” was also Torrey Cross and provided a physical description of him which matched the description given by the victim. The detective showed the victim and Eilers a photopak and then made up a wanted poster for Cross.

Cross was arrested on April 12, 2001. At the time, he had $70.00 in cash. He waived his rights, told the detective that he did know the victim, and placed his location before, during, and after the crime at Clarkson's apartment, which Clarkson could not corroborate. He further admitted that on April 9, 2001, he was wearing a brightly colored Hawaiian shirt; he called for the cab, told it to wait, and then had to call again; he paid $20 for a bag of medicines from Stovall's 14-15 year old son (who according to the detective was tall, slender and of medium build); he asked the cab driver about the use of some of the medications; he decided to get out of the cab when the dispatcher kept asking about the cab's location; he exited the cab and went to the Parkhill Housing Project; and when told of the description of the intruder, he admitted that it was probably him.

Sometime after he was arrested, Cross called Angela Nelson asking for Clarkson's phone number. Cross told Nelson

that he had heard from others about some statements he had made to Clarkson, and told Nelson that Clarkson needed to come to court and indicate that she had lied about anything he said to her. Clarkson stated that Cross never asked her to testify for him or to say anything in particular, beyond asking her if she thought that the victim would "shut up" if he gave her something.

Five months after the crime, and several months before the trial, the victim died. Her cause of death was unrelated to the crime.

Cross was indicted by the grand jury on two counts of first-degree robbery,[3] two counts of first-degree burglary,[4] intimidating a witness,[5] and PFO I. On motion of the Commonwealth, one of the robbery counts, one of the burglary counts, and the charge of intimidating a witness were dismissed. After a jury trial, Cross was convicted on lesser charges of second-degree robbery and second-degree burglary, enhanced by PFO I.

In an opinion rendered on July 22, 2005, this Court affirmed the judgment of the trial court. The Kentucky Supreme Court denied the appellant's petition for discretionary review

[3] Kentucky Revised Statutes 515.020, a class B felony.

[4] Kentucky Revised Statutes 511.020, a class B felony.

[5] Kentucky Revised Statutes 524.040, a class D felony.

on January 11, 2006. On October 22, 2006, the United States Supreme Court granted certiorari and remanded the cause to us for consideration of the 911 call issue in light of its decision in Davis v. Washington, 547 U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). See Cross v. Kentucky, ___ S.Ct. ___, 2006 WL 993564, 75 USLW 3162 (U.S.Ky. Oct 02, 2006) (NO. 05-10347).

On the 911 tape, the victim stated that a large black man whom she did not know had broken down her back door, come in, choked her until she lost consciousness, taken her prescription medications and money, and left in yellow cab # 786. The 911 call was made in the immediate wake of the appellant's intrusion into the victim's home. In Davis, the Supreme Court addressed the matter at hand, in relevant part, as follows:

> In Crawford, it sufficed for resolution of the case before us to determine that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." Id., at 53, 124 S.Ct. 1354. Moreover, as we have just described, the facts of that case spared us the need to define what we meant by "interrogations." The Davis case today does not permit us this luxury of indecision. The inquiries of a police operator in the course of a 911 call are an interrogation in one sense, but not in a sense that "qualifies under any conceivable definition." We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if

so, whether the recording of a 911 call qualifies.

The answer to the first question was suggested in Crawford, even if not explicitly held:

> "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused-in other words, those who 'bear testimony.' 1 N. Webster, An American Dictionary of the English Language (1828). 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' Ibid. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U.S., at 51, 124 S.Ct. 1354.

A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its "core," but its perimeter.

We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined. Well into the 20th century, our own Confrontation Clause jurisprudence was carefully applied only in the testimonial context. See, e.g., Reynolds v. United States, 98 U.S. 145, 158, 25 L.Ed. 244 (1879) (testimony at prior trial was subject to the Confrontation Clause, but petitioner had forfeited that right by procuring witness's absence); Mattox v. United States, 156 U.S. 237, 240-244, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (prior trial testimony of deceased witnesses admitted because subject to cross-examination); Kirby v. United States, 174 U.S. 47, 55-56, 19 S.Ct. 574, 43

L.Ed. 890 (1899) (guilty pleas and jury conviction of others could not be admitted to show that property defendant received from them was stolen); Motes v. United States, 178 U.S. 458, 467, 470-471, 20 S.Ct. 993, 44 L.Ed. 1150 (1900) (written deposition subject to cross-examination was not admissible because witness was available); Dowdell v. United States, 221 U.S. 325, 330-331, 31 S.Ct. 590, 55 L.Ed. 753 (1911) (facts regarding conduct of prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to defendants' guilt or innocence and hence were not statements of "witnesses" under the Confrontation Clause).

Even our later cases, conforming to the reasoning of Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay, see Crawford, 541 U.S., at 57-59, 124 S.Ct. 1354 (citing cases), with one arguable exception, see id., at 58, n. 8, 124 S.Ct. 1354 (discussing White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992)). Where our cases did dispense with those requirements-even under the Roberts approach-the statements at issue were clearly nontestimonial. See, e.g., Bourjaily v. United States, 483 U.S. 171, 181-184, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) (statements made unwittingly to a Government informant); Dutton v. Evans, 400 U.S. 74, 87-89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (plurality opinion) (statements from one prisoner to another).

Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort-sworn testimony in prior judicial proceedings or formal depositions

under oath-which invites the argument that the scope of the Clause is limited to that very formal category. But the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions, see Crawford, supra, at 52, and n. 3, 124 S.Ct. 1354. In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case-English or early American, state or federal-can be cited, that is it.

The question before us in Davis, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in Crawford, supra, at 53, 124 S.Ct. 1354, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in Crawford, "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " 541 U.S., at 51, 124 S.Ct. 1354. (The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood. See, e.g., United States v. Stewart, 433 F.3d 273, 288 (C.A.2 2006) (false statements made

to federal investigators violate 18 U.S.C. § 1001); State v. Reed, 2005 WI 53, ¶ 30, 280 Wis.2d 68, 695 N.W.2d 315, 323 (state criminal offense to "knowingly giv[e] false information to [an] officer with [the] intent to mislead the officer in the performance of his or her duty").) A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.

The difference between the interrogation in Davis and the one in Crawford is apparent on the face of things. In Davis, McCottry was speaking about events *as they were actually happening*, rather than "describ[ing] past events," Lilly v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (plurality opinion). Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in Davis, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in Crawford) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. See, e.g., Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 U.S. 177, 186, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). And finally, the difference in the level of

formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*. What she said was not "a weaker substitute for live testimony" at trial, United States v. Inadi, 475 U.S. 387, 394, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), like Lord Cobham's statements in Raleigh's Case, 2 How. St. Tr. 1 (1603), or Jane Dingler's ex parte statements against her husband in King v. Dingler, 2 Leach 561, 168 Eng. Rep. 383 (1791), or Sylvia Crawford's statement in Crawford. In each of those cases, the *ex parte* actors and the evidentiary products of the ex parte communication aligned perfectly with their courtroom analogues. McCottry's emergency statement does not. No "witness" goes into court to proclaim an emergency and seek help.

Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779), for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. Id., at 200, 168 Eng. Rep., at 202. The case would be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim

> got home, her story was an account of past events.

Davis at 547 U.S. ____, ____, 126 S.Ct. 2266, 2274-2277 (footnotes omitted).

In summary, Davis concludes that in the normal case - i.e., when the 911 call is made to seek emergency assistance – it is nontestimonal and the confrontation clause is not implicated. In the case at hand, the victim made the 911 call in the immediate wake of the home intrusion, assault, and robbery perpetrated by the appellant. The call was without any aforethought of giving a statement for later use against Cross in a court proceeding. Hence, the statements are not excludable pursuant to the confrontation clause under Crawford and Davis.

As noted in our previous decision the statements are otherwise admissible as an excited utterance pursuant to KRE[6] 803(2). We accordingly affirm the trial court's admission of the 911 tape at trial.

The remaining issues raised by Cross in his original appeal we construe as not being implicated by the mandate contained in the Supreme Court's remand. While those issues include hearsay issues which implicate the confrontation clause, in our previous decision we concluded that the statements at

[6] Kentucky Rules of Evidence.

issue were cumulative with other evidence admitted at trial and, accordingly, harmless error.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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