

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL E. BELL,

Defendant-Appellant.

FOR PUBLICATION

October 7, 2004

9:00 a.m.

No. 209269

Recorder's Court

LC No. 95-004885

ON SECOND REMAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL E. BELL,

Defendant-Appellant.

No. 209270

Recorder's Court

LC No. 97-001258

Before: Cavanagh, P.J., and Saad and Meter, JJ.

SAAD, J.

Once again, this case is before us on remand from our Supreme Court,¹ which has instructed us to reconsider this case in light of the United States Supreme Court's significant decision in *Crawford v Washington*, ___ US ___; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We hold that *Crawford* applies retrospectively, requires reversal here, and thus we reverse and remand for a new trial.

I. FACTS AND PROCEDURAL HISTORY

¹ In *People v Bell*, 470 Mich 875; 683 NW2d 141 (2004), in lieu of granting defendant leave to appeal, the Court vacated this Court's previous opinion in this case, *People v Bell (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued February 5, 2002 (Docket Nos. 209269, 209270), and remanded to this Court for reconsideration.

This case stems from defendant's jury trial convictions in two separate cases of three counts of first-degree felony murder ("felony murder")² and one count of solicitation to commit arson of a dwelling house.³ The police arrested defendant after Matthew Roberts told them that defendant hired Roberts to firebomb the victims' house. At trial, Roberts asserted his Fifth Amendment right against self-incrimination⁴ and did not testify. Accordingly, the trial court admitted Roberts' statement to police that inculpated defendant.⁵

Defendant appealed his convictions and sentences to this Court, and argued that the trial court erred when it admitted a statement of a nontestifying codefendant that implicated defendant. Defendant argued that this violated his Confrontation Clause right to cross-examine witnesses against him. US Const, Am VI. We rejected defendant's argument because of our Supreme Court's opinion in *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), in which the Court held that the hearsay statements of nontestifying codefendants are admissible if they meet certain reliability requirements. *People v Bell*, unpublished opinion per curiam of the Court of Appeals, issued October 6, 2000 (Docket Nos. 209269, 209270). Defendant sought leave to appeal with our Supreme Court, which remanded this case to us for further explanation of our analysis under *Poole*.⁶ On remand, we complied with the Court's remand order, explained our decision, and reaffirmed our previous opinion. *People v Bell (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued February 5, 2002 (Docket Nos. 209269, 209270).

II. APPLICATION OF *CRAWFORD* v *WASHINGTON*

A. The *Crawford* Decision Generally

In *Crawford*, the United States Supreme Court held that to admit testimonial evidence against a defendant, the declarant must be unavailable and the defendant must have had "a prior opportunity for cross examination" of the declarant. *Crawford, supra*, ___ US at ___; 124 S Ct at 1374. The Court in *Crawford* overruled its previous opinion in *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1986), which held that such evidence could be admitted if it could be shown to be reliable. Our Supreme Court's opinion in *Poole*, upon which we previously relied in this case, in turn relied upon *Roberts*. *Poole, supra*, 444 Mich at 162-163.⁷ In *Crawford*, the Supreme Court reasoned that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford, supra*, ___ US at ___; 124 S Ct at 1371.

² MCL 750.316.

³ MCL 750.157b; MCL 750.72.

⁴ US Const, Am V.

⁵ The trial court originally ruled, at defendant's preliminary examination, that it would not admit Roberts' statement, but it later reversed itself at trial and admitted this evidence.

⁶ However, the Court otherwise denied leave. *People v Bell*, 465 Mich 923; 639 NW2d 254 (2001).

⁷ Clearly, this explains our Supreme Court's decision to order us to reconsider this case.

Though the Supreme Court in *Crawford* “[left] for another day any effort to spell out a comprehensive definition of ‘testimonial,’” *Crawford, supra*, ___ US ___ at ___; 124 S Ct at 1374, it also stated that “[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard,”⁸ *Id.* at ___; 124 S Ct at 1364.

B. Retrospective Application

This Court has previously noted that *Crawford* should be applied retrospectively. *People v McPherson*, ___ Mich App ___, ___ n 10; ___ NW2d ___ (Docket No. 242767, issued July 20, 2004), slip op, p 10 n 10, citing *Powell v Nevada*, 511 US 79, 84; 114 S Ct 1280; 128 L Ed 2d 1 (1994). In *Powell*, the United States Supreme Court held that “‘a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.’” *Powell, supra*, 511 US at 84, quoting *Griffith v Kentucky*, 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987). Accordingly, we hold that *Crawford* applies retrospectively here because this case was pending on appeal when the Supreme Court decided the case.

C. Application to the Facts of this Case

Here, Roberts was arrested and interrogated by the police in connection with this crime. During the course of this interrogation, Roberts gave a statement that implicated defendant. Therefore, this statement was clearly testimonial. Moreover, defendant did not have an opportunity to cross-examine Roberts, because Roberts chose to exercise his Fifth Amendment right not to testify at trial. Accordingly, the Supreme Court’s decision in *Crawford* compels us to hold that the trial court’s decision to admit Roberts’ statement violated defendant’s Confrontation Clause right to cross-examine witnesses against him.

D. Harmless Error

However, “when a trial court commits an error that denies [a defendant’s] constitutional rights under the Confrontation Clause . . . we need not reverse if the error is harmless beyond a reasonable doubt.” *McPherson, supra* at ___, slip op, p 7, citing *People v Smith*, 243 Mich App 657, 690; 625 NW2d 46 (2000), citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Here, the primary evidence supporting the solicitation and felony-murder convictions is Roberts’s inadmissible statement. Therefore, we cannot say that this constitutional error is harmless beyond a reasonable doubt. See *McPherson, supra* at ___, slip op, p 7.

⁸ We respectfully disagree with our concurring colleague that a police interrogation is not testimonial. We instead agree with the rationale articulated by Justice Scalia in *Crawford* where he said: “That interrogators are police officers rather than magistrates does not change the picture either. . . . The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.” *Crawford, supra* at ___; 124 S Ct at 1365.

Accordingly, we reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Mark J. Cavanagh