STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 4, 2004
v	No. 248038 Calhoun Circuit Court
MICHAEL BART MILESKI, Defendant-Appellant.	LC No. 02-003738-FC

Before: Griffin, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant was charged with committing three counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b, involving (1) vaginal, (2) anal, and (3) oral penetration. Defendant appeals as of right from his jury trial conviction for one count of CSC-1 involving anal penetration. He was acquitted by the jury of the other two counts. We reverse and remand for a new trial.

Defendant's primary issue on appeal is that he was denied his right to confrontation as guaranteed by the United States (US Const, Am VI and Am XIV) and Michigan Constitutions (Const 1963, art 1, § 20) by the admission into evidence of the complainant's out-of-court statements, in lieu of complainant's in-court testimony. Recently, in *Crawford v Washington*, ____ US ____; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court overruled its prior precedent, *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), and held: "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, *supra* at 158 L Ed 2d 203. Further, by operation of the Fourteenth Amendment, "This bedrock procedural guaranty applies to both federal and state prosecutions." *Id*. at 187.

In *People v Bell*, ____ Mich App ____; ____ NW2d ____ (2004) (Dockets No. 209269 and 209270, issued October 7, 2004), our Court held that *Crawford* is to be applied retrospectively to all cases pending on direct review or not yet final. *Bell*, slip op, p 3. See also *People v McPherson*, 263 Mich App 124, 135 n 10; ____ NW2d ____ (2004). Accordingly, the principles of *Crawford v Washington* are applicable to the instant case. In this regard, we review issues of constitutional law de novo. *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002).

Finally, when the trial court commits an error that denies defendant his constitutional right to confrontation, the verdict must be reversed, unless the prosecution, as the beneficiary of the error, establishes that the error is harmless beyond a reasonable doubt. *Bell, supra* at slip op, p 3; *People v Shepherd*, ____ Mich App ____; ____ NW2d ____ (2004) (Docket No. 247945, issued September 28, 2004). See also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999) and *People v Anderson (After Remand)*, 446 Mich 392; 521 NW2d 538 (1994).

In the present case, complainant was not "unavailable," but simply chose not to testify. On the first day of trial, the prosecution announced that the complainant would not be testifying,[1] despite being listed as a witness. Thereafter, defendant moved to dismiss the case on the basis that the admission of complainant's out-of-court statements, in lieu of her in-court testimony, violated the defendant's constitutional rights of confrontation. The trial court denied defendant's motion, ruling, in part, "I'm not convinced that this case cannot go forward without the presence and [in-court] testimony of the alleged victim."

On appeal, defendant challenges three hearsay statements made by the complainant.[2] The first is a classic excited utterance (MRE 803(2)) because it related to a startling event and was made while the declarant was under the stress of the excitement caused by the event. *People v Smith*, 456 Mich 543; 581 NW2d 654 (1998) and *People v Zysk*, 149 Mich App 452, 456-457; 386 NW2d 213 (1986). According to witness Starr Foreman, complainant was naked, yelling and screaming outside her door. Ms. Foreman let the complainant into her home, at which time complainant advised her that she had been raped by the defendant, had been dragged by him by her hair upstairs during the episode, and chased by him down the street while he was carrying a knife. The complainant did not advise Ms. Foreman as to the specifics of any acts of penetration or how those acts were accomplished. In his brief, and at oral argument, defendant conceded that the complainant's hearsay statement to Starr Foreman was not "testimonial" as the term is defined by *Crawford v Washington*. Regarding nontestimonial evidence, the Supreme Court has stated: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ." *Crawford, supra* at 203. Because complainant's statement to Starr Foreman was nontestimonial and qualified under our excited utterance hearsay exception, MRE 803(2), it was properly admitted into evidence. *Smith, supra; Zysk, supra*.

Second, defendant challenges the hearsay statement made by the complainant to Officer Charles Pelfrey. First, because this statement was a product of police interrogation, it was

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[1] Defense counsel also did not call complainant as a witness. Under our pre-*Crawford v Washington* jurisprudence, "the right to confrontation is not violated by the prosecution failing to call witnesses that defendant could have called to testify." *People v Cooper*, 236 Mich App 643, 659; 601 NW2d 409 (1999). See also *People v Lee*, 212 Mich App 228, 257; 537 NW2d 233 (1995), and *People v Cross*, 202 Mich App 138, 142; 508 NW2d 144 (1993). Because this prior line of authority is inconsistent with the standards of *Crawford v Washington*, it cannot be followed.

[2] At trial, defense counsel did not object to these statements on the basis that their admission violated the Michigan Rules of Evidence.

testimonial in nature. *Crawford, supra* at 193 ("Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard."). See also *Bell*, slip op, p 3 n 8. For testimonial statements to be admissible, the Sixth Amendment requires both the unavailability of the declarant *and* a prior opportunity for cross-examination. Here, neither requirement was satisfied. Therefore, the admission of this out-of-court statement violated defendant's constitutional guarantees to confrontation. As to the substance of the statement, the complainant described how she and defendant had met earlier in the day and gave graphic testimony detailing the specific acts of assault and penetration. As a result of her statement to the officer, the house where the incident occurred was later searched and evidence was retrieved.

Third, defendant challenges the hearsay statements made by the complainant to forensic nurse, Meghan Garland. Nurse Garland testified that she is a government employee working for the Calhoun County Sexual Assault Services. She is certified by the International Association of Forensic Nurses to do adult sexual assault forensic exams. In her role as a forensic nurse, it is her duty to collect a medical history and to do a forensic examination which may be used at trial. At trial, nurse Garland testified regarding a detailed verbal history given to her by the complainant. This detailed history, which included the means and methods of penetration, was later supported by a medical examination. Because nurse Garland, in her capacity as a forensic nurse, acted as an arm of the police and prosecution in questioning the complainant, the statement at issue was testimonial. *Crawford, supra* at 194 ("The involvement of government officers in the production of testimonial evidence presents the same risk, ...") Again, the requirements of *Crawford,* of unavailability of the declarant and a prior opportunity for cross-examination, were not satisfied. Accordingly, the admission of the statement to nurse Garland also violated defendant's constitutional guarantees to confrontation.

The pivotal question is whether the prosecution sustained its burden of establishing that the preserved constitutional errors were harmless beyond a reasonable doubt. We conclude that the prosecution has not sustained its burden and, therefore, reverse and remand for a new trial. Because the complainant did not testify, the prosecution's case rested primarily on the three hearsay statements made by the complainant. Without the two improperly admitted statements, there was no evidence regarding the specifics of the acts of penetration or how those acts were accomplished. In this regard, it is significant that the jury found defendant not guilty of vaginal and oral penetration (Counts I and III). Further, the improperly admitted statements also significantly bolstered the prosecutor's case, rebutted defendant's defense of consent,[3] and were not cumulative to complainant's statement to Starr Foreman. Following our review of the trial record, we hold that the prosecutor has failed to establish that the constitutional errors were harmless beyond a reasonable doubt.

[3] Defendant testified that he and the complainant met via the internet matchmaker site, "Cupid Junction." He claims to have engaged in several prior consensual sexual encounters with the complainant. In regard to the charges, he denied threatening the complainant with a knife and testified that the sexual activity was consensual.

In view of our disposition of the confrontation issue, we need not address the other issues raised by defendant.[4]

Reversed and remanded for a new trial.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

[4] Had the hearsay statements not violated defendant's rights to confrontation, the evidence presented at trial would have been sufficient to sustain defendant's conviction.