STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 2010
v	No. 290031 Saginaw Circuit Court
NAYKIMA TINEE HILL, Defendant-Appellant.	LC No. 07-028869-FC

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Defendant appeals as of right her convictions following a jury trial of one count each of home invasion, assault and battery, unlawful imprisonment, and extortion, and three counts of armed robbery. We reverse and remand.

On the morning of March 7, 2007, Sherry Crofoot and her 13-year-old daughter, Samantha, were at their home on Cleveland Street in Saginaw. With them was Sherry's grandmother, Florence Karien. Samantha answered a knock at the door to find a black woman wearing a brown coat with a fur-trimmed hood standing on the porch. The woman, who was swaying and appeared disoriented, asked to use the Crofoots' phone and for a ride, both of which Sherry refused. When Sherry attempted to close the door, the woman pushed her way in, knocking Sherry back into the room. Inside the house, the woman punched Karien several times in the face, and then pulled Sherry into the bedroom. Grabbing a knife, the woman threatened Sherry with it and demanded money. Samantha brought her Karien's purse, and some money of her own. Eventually, the woman left the home.

Michigan State Police Trooper Steven Escott was one who responded to the incident on Cleveland Street. With his police tracking dog, he followed a trail that first led to the porch of 407½ North Porter. Police later investigated the house, and recovered a brown coat with a knife in the pocket. Both the coat and the knife matched the victims' descriptions. The trail then led to a point near the corner of Holland and Bond Streets. Saginaw City police officers were there responding to complaints of a "loud and boisterous" woman. The woman in question turned out to be defendant, who was arrested. Before being taken to the police station, defendant was taken to the Cleveland Street address, where all three victims identified her as their assailant. Defendant claimed that it was a case of mistaken identity.

Trial was delayed several times for several reasons throughout 2007. The day trial was scheduled to begin on February 12, 2008, defendant asked the court to appoint an expert on eyewitness identification. The trial court denied the motion as untimely. Defendant sought and was granted a stay in order to seek leave to appeal to this Court. We denied the application because immediate appellate review was not deemed necessary.[1]

Defendant first argues that the trial court erred in allowing a police detective to testify to the hearsay statement of Jacqueline Sistrunk. Sistrunk lived at the home where defendant was confronted and arrested by police. The officer testified that Sistrunk indicated that a coat found at that address was similar to one that defendant had. However, the evidence was that the coat belonged to Sistrunk's boyfriend. We review a trial court's decision to admit evidence for an abuse of discretion, but when the decision involves a preliminary question of law, this Court reviews the preliminary question de novo. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). Admission of evidence that is inadmissible as a matter of law is per se an abuse of discretion. *Id.* at 159. We review the constitutional question of whether a defendant was denied her Sixth Amendment rights de novo. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. This right extends to defendants in state court prosecutions as well as federal ones. *Pointer v Texas*, 380 US 400, 406; 85 S Ct 1065; 13 L Ed 2d 923 (1965). This right is violated when testimonial statements of a witness who did not testify at trial are admitted against the defendant, unless the witness was unavailable and defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Statements that qualify as "testimonial" for *Crawford* purposes include statements taken during police interrogation. *Id.* at 52.

Here, admission of Sistrunk's out-of-court statement violated *Crawford*. The statement was made in response to police questioning and thus was testimonial. Although the prosecution did argue that Sistrunk was unavailable, it did not show that defendant had a prior opportunity to cross-examine her. Citing MRE 804(b)(7)(C), the trial court admitted the statement under the "rule of completeness," reasoning that defendant had "opened the door" to the statement by referring to other parts of the detective's report. *Crawford*, however, explicitly overturned *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980), which held that the Sixth Amendment was not violated by the admission of an out-of-court statement that was not subject to cross-examination if the statement could be admitted under a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Crawford*, 541 US at 42. *Crawford* held that such statements violate the Sixth Amendment regardless of "the vagaries of the rules of evidence." *Id.* at 61. Thus, the trial court committed constitutional error in allowing the statement into evidence.

[1] *People v Hill*, unpublished order of the Court of Appeals, entered May 29, 2008 (Docket No. 284461).

In order to demonstrate that a preserved constitutional error in a criminal case was harmless, the prosecutor bears the burden of demonstrating beyond a reasonable doubt that the error did not affect the outcome of the trial. *People v Smith*, 243 Mich App 657, 690; 625 NW2d 46 (2000). The prosecutor has not done do so. Nor are we able to conclude, after examining the record, that the error was harmless beyond a reasonable doubt. The evidence against defendant consisted of the testimony of the three victims, as well as circumstantial evidence that supported the credibility of the testimony. One piece of circumstantial evidence was Sistrunk's statement, which connected the coat worn by the assailant to defendant. Without this connection, it is possible that the jury might have still credited the victims' testimony. But it is also possible that the discrepancy would have led the jury to believe that the victims had made a mistake in identifying defendant. Because we cannot say that the error was harmless beyond a reasonable doubt, we reverse and remand for a new trial.

Defendant next argues that the trial court erred in qualifying Trooper Escott as an expert in dog handling. We need not address the merits of this argument, however, because the trooper's evidence was not expert evidence subject to the corresponding rules of evidence and case law. Trooper Escott testified only to what his tracking dog did, outlining the path taken from the Crofoots' home to Washington's home and then to the house on North Bond, and noted that he found a purse, some money, and a checkbook between the two homes. He was not asked to opine on whether anything to which he testified established the identify of the Crofoots' assailant. Indeed, he indicated that he would probably not be able to recognize the woman involved with the officers at North Bond if he saw her again. Because Escott did not draw any inferences and submit his conclusions to the jury, he was not an expert witness. See *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 148; 119 S Ct 1167; 143 L Ed 2d 238 (1999), quoting Hand, *Historical and practical considerations regarding expert testimony*, 15 Harv L Rev 40, 54 (1901). Accordingly, Escott's testimony was properly admitted.

Finally, defendant appeals the trial court's denial of her motion to appoint an expert witness in eyewitness identification. We decline to address this issue because the trial court's reason for the denial was a lack of timeliness, and in light of our resolution of this matter, the issue is moot.

The trial court's admission of the testimonial hearsay statement of a declarant who was not subject to confrontation or cross-examination violated *Crawford* and was constitutional error requiring reversal. Defendant's conviction is reversed and the case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis