STATE OF MINNESOTA

IN SUPREME COURT

A19-1045

Court of Appeals McKeig, J.

State of Minnesota,

Respondent,

vs.

Filed: May 26, 2021
Office of Appellate Courts

Dylan Roger Sutter,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Senior Assistant County Attorney, Rochester, Minnesota, for respondent.

Cathryn Middelbrook, Chief Appellate Public Defender, John Donovan, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. A testimonial statement made before a defendant's trial by a co-conspirator who does not testify at the trial is subject to a Confrontation Clause analysis.

2. The erroneous admission of testimonial statements of the nontestifying co-conspirator was harmless.

Affirmed.

OPINION

MCKEIG, Justice.

This case presents the legal question of whether a testimonial statement of a nontestifying co-conspirator is subject to a Confrontation Clause analysis. The district court determined that appellant Dylan Roger Sutter's co-conspirator made testimonial statements during police questioning. However, it concluded that the statements were admissible as co-conspirator statements and thus *Crawford* did not apply. The court of appeals affirmed Sutter's conviction, concluding that our decision in *State v. Brist*, 812 N.W.2d 51 (Minn. 2012), exempted all co-conspirator statements from a Confrontation Clause analysis. We conclude that a testimonial statement of a nontestifying co-conspirator is subject to a Confrontation Clause analysis. Because the statements of Sutter's co-conspirator were testimonial, the district court erred when it failed to conduct that analysis. Nevertheless, because the error was harmless, we affirm.

FACTS

On the morning of July 14, 2018, an employee at a restaurant in Rochester brought his gun to work and stored it in his backpack in the back hallway of the restaurant. The only people working at the restaurant that day were the employee, the manager, and appellant Sutter. After the employee left the restaurant to make a delivery, Sutter asked the manager if he could leave early from his morning shift. The manager allowed him to leave, and Sutter's friend Ron Burks picked him up. When the employee returned from his delivery, he realized his gun was missing and called the police to report the theft.

When Sutter returned to the restaurant that evening to work his second shift, the employee called the police and notified them that Sutter was there. Several hours later, four officers arrived at the restaurant. After the officers detained Sutter, Burks came to the restaurant.

An officer questioned Sutter in the back of his squad car while Sergeant Kenyon questioned Burks in the parking lot. First, Sutter told the officer that after Burks picked him up from his morning shift, they went to Burks's house. Immediately after, Sutter changed his statement and said they did not go to Burks's house, but instead went to a car wash, then to the Rochester airport to pick up Burks's mother. Like Sutter, Burks made inconsistent statements about where he was that afternoon.

After interviewing Burks and Sutter, the officer and Sergeant Kenyon compared the statements and found they did not match. The officer and Sergeant Kenyon then confronted Burks and Sutter about the discrepancies. At this point, both Burks and Sutter stated that they had gone to a carwash and then picked up Burks's mother at the Rochester airport. The police then arrested Sutter.

Sutter made multiple monitored phone calls after he was booked at the jail. Sutter tried calling Burks several times, but Burks did not answer his phone. Sutter also called his mother. He asked her if she had spoken to Burks, and told her to tell Burks that Burks left his "wallet" at her house. Believing that Sutter was speaking in code—that the "wallet" likely referred to the employee's missing gun—officers went to Sutter's house. When the

officers arrived, they learned that Burks had already been to the house. The police did not execute their search warrant because they believed that Burks had already taken the gun.[1]

The State charged Sutter with theft in violation of Minn. Stat. § 609.52, subd. 2(a)(1) (2020). The complaint alleged both principal and accomplice liability. *See* Minn. Stat. § 609.05, subd. 1 (2020) ("A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime."); *State v. DeVerney*, 592 N.W.2d 837, 846 (Minn. 1999) (explaining that "aiding and abetting is not a separate substantive offense," and accomplices are criminally liable as principals). The State also charged Sutter with being an ineligible person in possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2) (2020).

On the day of the trial, the State informed the district court that it planned to offer the bodycam video of Burks's police interview into evidence, but that it would not call Burks to testify. The State indicated that it planned to use the bodycam video to show guilt and "an attempt to cover up exactly what [Burks and Sutter] did after they left [the restaurant]." Characterizing the statements that Burks made to police as statements made in the course of and in the furtherance of a conspiracy to take "the firearm and attempt to cover up the theft," the State argued that the statements fell outside the definition of hearsay. *See* Minn. R. Evid. 801(d)(2)(E) (explaining that a co-conspirator's statement is

[1] In August of 2018, the missing gun along with Burks's ID and cell phone surfaced during the investigation of a drive-by shooting.

not hearsay if "there was a conspiracy involving both the declarant and the party against whom the statement is offered," and "the statement was made in the course of and in the furtherance of the conspiracy"). Sutter objected. Citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004), he argued that Burks's interview in the bodycam video was plainly testimonial and that its admission would violate Sutter's constitutional right "to be confronted with the witnesses against him." *See* U.S. Const. amend. VI.

The district court overruled Sutter's objection. The court concluded that Burks's statements to police were testimonial because they were provided as part of their investigation into the theft of the gun. The court went on to say, "If it is a statement of a co-conspirator, it is not hearsay, so *Crawford* doesn't apply, regardless of whether it is testimonial."

Sutter's jury trial lasted five days, during which 15 witnesses testified and 28 exhibits were entered into evidence. Burks did not testify at trial. Instead, the State played the bodycam video of Sergeant Kenyon questioning Burks. The jury found Sutter guilty of being an ineligible person in possession of a firearm and theft under a principal theory of criminal liability.

Sutter appealed his convictions, arguing that the district court violated his right to confrontation by admitting Burks's co-conspirator statements to the police when he had no opportunity to cross-examine Burks. *State v. Sutter*, No. A19-1045, 2020 WL 3172654, at *3 (Minn. App. June 15, 2020). The court of appeals affirmed Sutter's convictions.

We granted Sutter's petition for review.[2]

ANALYSIS

I.

In general, evidentiary rulings are within the district court's discretion. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006). However, we apply de novo review when determining whether the admission of evidence violates a defendant's rights under the Confrontation Clause. *Id.* The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also Pointer v. Texas*, 380 U.S. 400, 400–08 (1965) (making the protections of the Confrontation Clause applicable to the States under the Due Process Clause of the Fourteenth Amendment).

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court clarified the requirements for a Confrontation Clause claim. Based on the Court's analysis in *Crawford,* we have held that there are three prerequisites to a successful Confrontation Clause claim: "the statement in question was testimonial, the statement was admitted for the truth of the matter asserted, and the defendant was unable to cross-examine the

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[2] Before the court of appeals Sutter also argued: the district court erred by admitting the jail phone calls; the cumulative effect of the district court's errors deprived him of a fair trial; and the evidence of unlawful possession of a firearm was insufficient because the juvenile adjudication to which he stipulated is not a "crime of violence." Sutter did not petition for review of these issues; therefore, they are not before us.

declarant." *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013).[3] "The threshold question for a *Crawford* analysis is whether the statements at issue are testimonial." *State v. Vang*, 774 N.W.2d 566, 577 (Minn. 2009).

In its analysis of Burks's statements, the court of appeals concluded that it was required to apply our decision in *State v. Brist*, 812 N.W.2d 51 (Minn. 2012), which it read as exempting all co-conspirator statements from a *Crawford* analysis. *Sutter,* 2020 WL 3172654, at *4–5. Because Burks's statements satisfied the requirements of Minn. R. Evid. 801(d)(2)(E), which governs co-conspirator statements, the court of appeals held that a *Crawford* analysis was not required. *Id.* at *5. The court of appeals also found that, "even if *Crawford* did apply to Burks's statement to police, the majority of his statement that was admitted at trial was not testimonial because he also made his statement during the course of an ongoing emergency—the search for a stolen firearm from a public restaurant." *Id*.

We turn first to the question of whether *Brist* applies in this case. Sutter argues that *Brist* is not applicable because the statements in *Brist* were non-testimonial, and Burks's statements to police were testimonial. The State argues that the court of appeals'

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[3] From the record, it is unclear what the State's purpose was in admitting Burks's statements. In its brief to our court, the State said that the statements were not offered to prove the truth of the matter asserted. But at oral argument, the State indicated that its argument on appeal did not rely on the second requirement of the *Andersen* test when it said, "[W]hether or not [Burks's statement] was used for the truth of the matter is really irrelevant." Because the State effectively waived any argument regarding the second requirement in a Confrontation Clause analysis, we do not address it in our analysis. *See Weitzel v. State*, 883 N.W.2d 553, 554 n.1 (Minn. 2016) (explaining that waiver is the intentional abandonment of a known right).

application of *Brist* is correct. We agree with Sutter that *Brist* does not exempt a co-conspirator's *testimonial* statements from a Confrontation Clause analysis.

Prior to *Crawford,* the admissibility of an out-of-court statement under the Confrontation Clause turned primarily on evidentiary rules and "indicia of reliability." *Ohio v. Roberts,* 448 U.S. 56, 66 (1980). In *Crawford*, the Supreme Court rejected the rule in *Roberts*. *Crawford,* 541 U.S. at 60–65. The Supreme Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id*. at 68–69.

Brist involved the admission at trial of a recorded statement of a nontestifying co-conspirator made unwittingly to a confidential government informant. 812 N.W.2d at 55–56. We held that the admission of a nontestifying co-conspirator's unwitting statement to a government informant does not violate the Confrontation Clause. *Id*. at 56–57; *see also Bourjaily v. United States*, 483 U.S. 171 (1987) (holding that admission of a nontestifying coconspirator's statement to a government informant does not violate the Confrontation Clause).

We noted that, even though *Bourjaily* was decided prior to *Crawford*, it still applied to the facts in *Brist* because (1) only the Supreme Court can overrule its own decisions and (2) the holding of *Bourjaily* was directly on point. *Brist*, 812 N.W.2d at 56-57. We also observed that the United States Supreme Court has said that "statements made unwittingly to a Government informant" do not pose a Confrontation Clause problem because they are "clearly nontestimonial." *Id.* at 57 (quoting *Davis v. Washington*, 547 U.S. 813, 825

(2006)). We therefore held that the admission of the nontestimonial statement of Brist's nontestifying co-conspirator "did not violate Brist's rights under the Confrontation Clause of the Sixth Amendment." *Id*. at 58. But we have never extended the *Brist* exemption to a *testimonial* statement of a nontestifying co-conspirator and we decline to do so now.[4] Accordingly, we turn to the question of whether Burks's statements are testimonial.

This case is not like *Brist* because Burks did not make unwitting statements to an undercover informant in furtherance of a conspiracy. Instead, he made his statements in response to direct questioning by a police officer. The Supreme Court has stated that the phrase testimonial "applies at a minimum . . . to police interrogations." *Crawford*, 541 U.S. at 68.

But the fact that a statement is made to a police officer does not end the inquiry. To determine whether the Confrontation Clause bars admission of a statement, a court "should determine the 'primary purpose of the interrogation' by objectively evaluating the

[4] We acknowledge that in *United States v. Stewart*, the Second Circuit Court of Appeals held that "when the object of a conspiracy is to obstruct justice, mislead law enforcement officers, or commit similar offenses by making false statements to investigating officers, *truthful statements made to such officers designed to lend credence to the false statements* and hence advance the conspiracy *are not rendered inadmissible by the Confrontation Clause*." 433 F.3d 273, 293 (2d Cir. 2006) (emphasis added) (footnote omitted). In reaching this conclusion, the court said that a different reading "would result in obvious and unacceptable impediments to prosecuting cases like this one, in which the very object of the charged conspiracy is for the defendants to mislead investigators by responding falsely to the investigators' questions in a structured setting, fully aware that their responses might be used in future judicial proceedings." *Id.* Under these unique facts, the Second Circuit Court of Appeals held "there was no error here in admitting the testimonial statements of one Defendant against the other." *Id.* Because the facts of Sutter's case are materially distinguishable from the facts of *Stewart*, we do not need to decide whether the reasoning in *Stewart* is sound.

statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." *Michigan v. Bryant*, 562 U.S. 344, 370 (2011).

In *Davis v. Washington*, the United States Supreme Court analyzed the distinction between testimonial and nontestimonial statements. 547 U.S. at 821–22. The Court determined that statements made to a 911 operator during the course of an emergency were nontestimonial and that statements made to the police during an initial, on-scene investigation where the danger had passed were testimonial. *Id*. at 817–23. The Supreme Court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

The Supreme Court has further stated that "whether an ongoing emergency exists is simply one factor . . . that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Ohio v. Clark*, 576 U.S. 237, 245 (2015) (alteration in original) (quoting *Bryant*, 562 U.S. at 366). "Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." *Id*. at 246.

In *State v. Warsame*, we articulated the factors used to determine when a testimonial statement is admissible because it was made during an ongoing emergency:

> (1) the [person] described events as they actually happened and not past events; (2) any "reasonable listener" would conclude that the victim was facing an ongoing emergency; (3) the questions asked and answers given were necessary to resolve a present emergency, rather than only to learn what had happened in the past; and (4) there was a low level of formality in the interview because the [person's] answers were frantic and [their] environment was not tranquil or safe.

735 N.W.2d 684, 690 (Minn. 2007). For the reasons that follow, we conclude that Burks's statements were testimonial and not made in the course of an ongoing emergency.

First, as Sutter points out, Burks did not describe events as they actually happened. Instead, in his statements to Sergeant Kenyon, Burks described what he and Sutter did hours earlier that day.

Second, no "reasonable listener" would conclude that Burks was the victim of an ongoing emergency. *See Warsame*, 735 N.W.2d at 690. Police questioned Burks not because he was a victim, but because they were trying to determine his possible involvement in the theft.

Third, Sergeant Kenyon did not ask Burks questions to resolve an ongoing emergency. Instead, as Sergeant Kenyon testified at trial, he asked the questions to establish where Burks and Sutter went earlier in the day. Sergeant Kenyon told Burks "we're just trying to figure out what happened, when it happened, how it happened, all that good stuff." Police did not frisk or detain Burks when they questioned him. And it was not until after asking Burks multiple questions about where he went that day that Sergeant Kenyon even brought up the gun. Sergeant Kenyon did not express concern for anyone's safety regarding the missing gun. Instead, she told Burks that it would inconvenience his mother if they had to issue a search warrant for her house. Therefore, the primary purpose

of the interview was to establish or prove past events potentially relevant to later criminal prosecution

Fourth, to fall under the ongoing emergency exception, not only must the interview be informal, but the informality must be "because the [person's] answers were frantic and [their] environment was not tranquil or safe." *Id*. The State focuses on the low level of formality in the interview, observing that the police conducted the interview in public; Sergeant Kenyon did not give Burks *Miranda* warnings; the officers did not take Burks into custody; and the officers did not search Burks or his car. This description is accurate, and nothing in the record supports the conclusion that Burks was frantic or indicates that his environment was not tranquil or safe.

Because Burks's statements to police were made in response to questioning for the purpose of establishing or proving past events for a later criminal prosecution, and not to enable police assistance to meet an ongoing emergency, they were testimonial under *Crawford*, *Davis*, *and Warsame.* Therefore, we conclude that the district court violated Sutter's right to confrontation when it admitted the statements into evidence at trial.

II.

Our conclusion that the district court violated Sutter's right to confrontation does not end our analysis. A new trial is not warranted if the violation of the Confrontation Clause is harmless beyond a reasonable doubt. *State v. Wright*, 726 N.W.2d 464, 476 (Minn. 2007.) For an error to be harmless, the jury's verdict must be "surely unattributable" to the error. *State v. Courtney*, 696 N.W.2d 73, 80 (Minn. 2005). "[W]e consider the manner in which the evidence was presented, whether the evidence was highly

persuasive, whether it was used in closing argument, and whether it was effectively countered by the defense." *Id*. Additionally, although it is not the only factor, "[e]vidence of the defendant's guilt is also a relevant consideration." *Id*. Evidence presented as only one item "among a plethora of other evidence" weighs in favor of finding that the verdict was surely unattributable to its admission. *See State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006).

The court of appeals did not conduct a harmless error analysis. The State argues that the admission of Burks's statements was harmless because this was "one item among a plethora of other evidence including the testimony of fourteen witnesses and the admission of twenty-seven other exhibits." The State also argues that the testimony surrounding the admission of the statements "constituted approximately nine transcribed pages of a trial with over five hundred transcribed pages of testimony." Additionally, the State notes that Sutter used the evidence in his own closing statements.

Sutter argues that the admission of Burks's testimonial statements to police was not harmless because "Burks was a key character in the [State's] story." Additionally, he notes that the State asked the jury to pay attention to Burks's statements to police during its opening statement.

We conclude that Burks's statements to police was just one piece of evidence that the State used to try to establish a conspiracy between Burks and Sutter. The additional evidence included: recorded jail phone calls between Sutter and Burks as well as another individual and Burks; the testimony of two officers regarding the events of a drive-by shooting a month later that linked Burks to the handgun; and a BCA scientist who testified

regarding DNA evidence found on the hand gun. The State also entered into evidence the phone call in which Sutter told his mother that Burks had left his "wallet" at her house, and testimony that Burks stopped by Sutter's house, grabbed something, and left. The trial included 15 witnesses, 28 exhibits, and took place over 5 days. Based on this record, we conclude that the jury's verdicts were surely unattributable to the erroneous admission of Burks's relatively innocuous statements to police.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.