**Affirmed and Memorandum Opinion filed March 16, 2010**


**In The**

# Fourteenth Court of Appeals

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**NO. 14-08-01178-CR**

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**LATOYA NICOLE COLVIN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 228th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1123634**

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## MEMORANDUM OPINION

Latoya Nicole Colvin was convicted of the felony offense of aggravated robbery and sentenced to fifteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Colvin's sole issue on appeal is the trial court erred by allowing a witness to testify to what her assailants told her, which Colvin contends violates Rule 802 of the Texas Rules of Evidence, the Texas Constitution, and the U.S. Constitution. We affirm.

I

On May 21, 2007, a group of men forcibly entered the home of Y.M. and C.R. The men bound, gagged, and sexually assaulted both Y.M. and C.R. During the home invasion, the men stole jewelry, a television, stereo speakers, Y.M.'s vehicle, and other property from the home.

After the robbery, C.R. testified that she began to suspect Latoya Nicole Colvin, Y.M.'s half-sister, was involved in the robbery. While C.R. was driving with Colvin, she recognized Y.M.'s ring, which was stolen during the robbery, sitting in the center console of Colvin's vehicle. When C.R. confronted Colvin about the ring, Colvin replied that it was her ring. But C.R. stated that she also found Colvin in possession of her stolen CDs, so she and Y.M. informed the investigating officers about Colvin's potential involvement in the robbery. After Colvin confessed to planning the break-in, officers arrested and charged her with aggravated robbery.

During the trial, the jury heard evidence that Colvin wanted to scare her sister because Colvin was angry with her. In Colvin's confession, she explained, "I told [a friend] to go to the house and mess with [Y.M.] and maybe kick the door in or something like that." Crime scene investigator Gail Mills testified that she discovered Colvin's fingerprint on the tape that was used to bind and gag Y.M. and C.R. Additionally, Officer Robert Minchew stated that when he arrested Colvin, he discovered more of Y.M. and C.R.'s stolen property in Colvin's home. After hearing all the evidence, the jury found Colvin guilty of aggravated robbery and sentenced her to a term of fifteen years in the Institutional Division of the Texas Department of Criminal Justice. This appeal followed.

II

Colvin argues that the trial judge improperly allowed C.R. to testify about what the robbers told her before the assault. Specifically, Colvin complains that C.R.'s statements violated Rule 802 of the Texas Rules of Evidence, Article 1, Section 10 of the

Texas Constitution, and the Confrontation Clause of the Sixth Amendment of the U.S. Constitution. The State contends first that Colvin has failed to properly brief and preserve her issue. Second, even if the issue is adequately briefed and properly preserved, the State argues that the statements are not hearsay and do not violate the Confrontation Clause.

Briefing waiver occurs when a party fails to make proper citations to authority or to the record. Tex. R. App. P. 38.1(h), (i); *Sterling v. Alexander*, 99 S.W.3d 793, 798–99 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Colvin properly cited to the record to demonstrate where the alleged errors occurred. Additionally, Colvin cited to general constitutional provisions and case law to support her contentions, and she at least made cursory arguments. We conclude Colvin did not waive her issue because of briefing waiver.

The State also argues that even if Colvin properly briefed her issue, she did not preserve the error for review because essentially the same testimony came in elsewhere during the trial without objection. Colvin objected to the following testimony at trial:

Prosecutor: Why did you do that?

C.R.: I seen the guy - - the first guy with the gun.

Prosecutor: All right.

C.R.: Because at first I had my back to the door. I thought just in case he shot through the door or whatever. And I could hear all the guys cussing at me.

Colvin: Objection, Your Honor, calls for hearsay.

Court: That's overruled.

Prosecutor: Present sense impression.

Prosecutor: What could you hear the guys saying?

C.R.: Move, using profanity.

Colvin: Objection, Your Honor. I'm - - also object to hearsay, Your Honor. And I'll also object to third party that is not present, No. 1, under Crawford because they are not here, No. 1, Judge, for us to cross-examine those particular people.

Court: Okay. That's overruled.

Prosecutor: You can tell us exactly what they said.

C.R.: Move, Bitch. Get off the door. And they was repeating that.

Although the State points this court to other places in the record that allegedly contain the same testimony, that particular testimony does not state what the robbers said to C.R. The State's examples discuss only how the robbers forcibly entered the bedroom, and then yelled at C.R. and Y.M. to get on the floor. Because Colvin objected at trial to C.R.'s testimony as hearsay and on *Crawford* grounds and the trial court overruled these objections, Colvin properly preserved error for appeal as to these complaints. *See Geuder v. State*, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003).[1]

Generally, we review the trial court's decision to admit statements using an abuse-of-discretion standard. *Wall v. State*, 184 S.W.3d 730, 743 (Tex. Crim. App. 2006); *Angleton v. State*, 971 S.W.2d 65, 67 (Tex. Crim. App. 1998). Even though a trial court has substantial discretion, it can abuse its discretion if its rulings are outside "'the zone of

[1] We do conclude, however, that Colvin's objections did not challenge the admission of the statements as violating her confrontation rights under the Texas Constitution. *See, e.g., Grant v. State*, 218 S.W.3d 225, 229 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (discussing how the appellant did not challenge the admission of evidence under the Texas Constitution, but only raised an objection to the U.S. Constitution because he stated, "'I think you got *Crawford* questions there'"). As in *Grant*, Colvin only invoked a challenge to the U.S. Constitution, so because Colvin failed to preserve error on her state constitutional issue, we will not address a confrontation question regarding the Texas Constitution.

reasonable disagreement.'" *Salazar v. State*, 38 S.W.3d 141, 153–54 (Tex. Crim. App. 2001) (quoting *Montgomery v. State*, 801 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g)). A trial court's ruling on the admissibility of evidence will be upheld if the record reasonably supports the ruling. *Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). In reviewing the Confrontation Clause objection, however, we review the constitutional ruling de novo. *Wall*, 184 S.W.3d at 742–43.

> In part, the distinctive standards of review for hearsay objections and Confrontation Clause objections . . . arise because the hearsay objection depends largely upon the subjective state of mind of the declarant at the time of the statement, whereas [whether the statement] is "testimonial" under *Crawford* depends upon the perceptions of an objectively reasonable declarant.

*Id*. at 743. When determining whether a statement is objectively reasonable, a trial judge is no better equipped than an appellate judge in making the decision of admissibility. *See id*.

A statement is hearsay if it was offered to prove the truth of the matter asserted, and the declarant did not make the statement while testifying at trial or at a hearing. Tex. R. Evid. 801(d). Hence, a statement not offered to prove the truth of the matter asserted, but offered for some other reason, is not hearsay. *Guidry v. State*, 9 S.W.3d 133, 152 (Tex. Crim. App. 1999). For example, if a statement is offered to show the effect on the listener rather than for the truth of the matter asserted, then the statement is not hearsay. *In re Bexar County Criminal Dist. Attorney's Office*, 224 S.W.3d 182, 189 (Tex. Crim. App. 2007). Here, C.R. testified that she was afraid because she saw the robbers outside her bedroom door with a gun. She closed her bedroom door, crouched down by the door frame, and pushed her back against the door to prevent the men from entering the bedroom. She stated she could feel the men pushing against the door. C.R. also testified that she continued to hold the door closed even after the men instructed her to "move." The robbers' statements were not offered to prove the truth of the matter asserted, but

their effect on C.R. As the State noted in its brief, these statements were introduced to show the resultant impact on the victim—C.R.

Furthermore, Colvin neither gives an explanation of what these statements prove, nor explains how the statements were "harmful and fundamental." Even though the prosecutor at trial argued that the statement met the present-sense-impression exception to the hearsay rule, we will uphold a trial court's ruling if it is reasonably supported by the record and correct under any theory of applicable law. *Willover*, 70 S.W.3d at 845. Thus, we conclude that these statements are not hearsay, and we uphold the trial court's ruling.

III

The Confrontation Clause of the Sixth Amendment of the U.S. Constitution does not allow testimonial, out-of-court statements to be introduced at trial. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004). But these statements are admissible if (1) the witness is unavailable, and (2) the person whom the statement is being used against had a previous opportunity to cross examine the witness. *See id.* The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Del Carmen Hernandez v. State*, 273 S.W.3d 685, 687–88 (Tex. Crim. App. 2008) (citing *Crawford*, 541 U.S. at 59 n.9). Having decided that C.R.'s statements were not offered to prove the truth of the matter asserted, we also conclude the Confrontation Clause did not bar her statements. Accordingly, we hold that that trial court did not abuse its discretion by overruling Colvin's objections. We overrule Colvin's sole issue on appeal.

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For the foregoing reasons, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Yates, Frost, and Brown.

Do Not Publish — TEX. R. APP. P. 47.2(b).