IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 66022-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
WILLIAM FRANKLIN BROWN II,	)	
	)	
Appellant.	)	FILED: April 16, 2012
	)	

Leach, C.J. — William Brown appeals his conviction for possession of stolen property in the third degree. He contends that the trial court admitted his codefendant's out-of-court inculpatory statement in violation of Brown's constitutional right to confront witnesses and admitted evidence of Brown's prior bad acts in violation of ER 404(b). But because his codefendant's statement was not testimonial, its admission did not implicate Brown's constitutional rights. Brown failed to preserve for review his claim about evidence of his alleged prior bad acts. We affirm.

FACTS

In June 2009, Frank Harris had just moved into an apartment in Shoreline. Several others were staying at Harris's apartment, including Barbara Brittain, who was in a romantic relationship with Harris, William Brown, who had been Harris's friend for almost twenty years, and Christina Lux.

In the early morning hours on June 20, Brittain was moving some of her belongings into the apartment. She stacked some bags, including her handbag, by the elevator. She left the items unattended while she returned to the car. The contents of Brittain's purse included her identification card, a Money Tree ATM (automated teller machine) card, and her dentures.[1]

While Brittain was transporting her belongings to the apartment, some noise in the kitchen awakened Harris. He got up and found Lux making a sandwich. Lux told Harris that she found a purse by the elevator and took it but then discovered it belonged to Brittain. Lux asked Harris what she should do with it. Harris told Lux she should put the purse back where she found it.

Brown entered the room during this conversation. Brown took the purse and rummaged through it. He commented on some of the items and said, "[O]oh teeth," while he was doing this. Brown told Harris he would return the bag to Brittain but wanted her to "sweat" a bit first.

When Brittain discovered her purse was missing, she became hysterical, especially at the loss of her dentures, which her father had recently purchased for her. Brittain returned to the grocery store where she had been a few hours earlier to make sure she had not left the purse there. Over the next few days, Brittain put posters up around the apartment complex and, at Lux's suggestion, checked the dumpsters several times but did not find the purse. Harris did not

[1] Brittain testified that there were no funds in the Money Tree account at the time.

tell Brittain that Lux took her purse and Brown had it because he believed that Brown would return Brittain's property to her as he said he would. But later, when Harris asked Brown whether he had given Brittain her purse back, Brown said he "threw it away."

A few nights after the incident, Harris, Lux, and Brittain were at the apartment. Lux appeared to be intoxicated. She told Brittain she had a "confession to make" and admitted that she took the purse, gave it to Brown, and he "threw it." Immediately afterward, Lux said she had taken 150 pills, then stumbled to the stove, turned on the burners, and began vomiting over the stove. When she became incoherent, Harris called 911. An ambulance arrived, and paramedics transported Lux to the hospital. Brittain filed a police report about her purse.

The State charged Brown with first degree possession of stolen property for possessing Brittain's dentures and second degree possession of stolen property for possessing her ATM card. The State also charged Lux with two counts of theft. Brown and Lux were tried together before a jury.

The jury acquitted Brown of the charge based on possession of the ATM card but found him guilty of the lesser included charge of third degree possession of stolen property on the count based on possession of Brittain's dentures.[2] Brown appeals.

[2] Lux was found not guilty of one count of theft, and the jury could not agree on a verdict as to the other count.

Admission of Codefendant's Statement

Relying on Bruton v. United States,[3] Brown contends that his constitutional right to confront witnesses against him was violated by the admission of Harris's testimony that during the drug overdose episode, Lux admitted that she took the purse and gave it to Brown.[4]

The confrontation clause guarantees a criminal defendant the right "to be confronted with the witnesses against him."[5] In Bruton, the Court held the admission at a joint trial of an out-of-court confession of a nontestifying codefendant that implicates the defendant violates that defendant's rights under the confrontation clause.[6]

The State argues that the admission of Lux's out-of-court statement did not violate Brown's confrontation rights because it was not "testimonial."[7] Brown does not dispute the State's characterization of the statement as nontestimonial. Instead, he contends his confrontation rights are not determined by whether Lux's statement was testimonial; his rights are violated if the statement implicated Brown and it was made by a nontestifying codefendant.

In recent years, the Supreme Court has clarified the contours of the

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[3] 391 U.S. 123, 135-36, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

[4] Brittain testified about the same incident but did not say that Lux mentioned Brown's involvement.

[5] U.S. Const. amend. VI.

[6] Bruton, 391 U.S. at 137.

[7] See Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

confrontation clause in Crawford v. Washington[8] and Davis v. Washington.[9] It is now evident that the confrontation clause does not apply to nontestimonial statements made by an out-of-court declarant.[10] As recognized by several federal and state courts, because Bruton and its progeny are based on the protections afforded by the confrontation clause, after Crawford, Bruton's restriction on the admission of inculpatory statements by a jointly tried codefendant is limited to testimonial hearsay.[11] As aptly explained by the First Circuit:

> The Bruton / Richardson framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place. If none of the co-defendants has a constitutional right to confront the declarant, none can complain that his right has been denied. It is thus necessary to view Bruton through the lens of Crawford and Davis. The threshold question in every case is whether the challenged statement is testimonial. If it

[8] 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[9] 547 U.S. 813, 821-22, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

[10] Davis, 547 U.S. at 823-26; Whorton v. Bockting, 549 U.S. 406, 420, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) ("[T]he Confrontation Clause has no application to [nontestimonial out-of-court] statements.").

[11] See, e.g., United States v. Smalls, 605 F.3d 765, 768 n.2 (10th Cir. 2010) ("[T]he Bruton rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements."); United States v. Figueroa–Cartagena, 612 F.3d 69, 85 (1st Cir. 2010); United States v. Johnson, 581 F.3d 320, 325-26 (6th Cir. 2009), cert. denied, 130 S. Ct. 3409 (2010); United States v. Avila Vargas, 570 F.3d 1004, 1009 (8th Cir. 2009); People v. Arceo, 195 Cal. App. 4th 556, 574-75, 125 Cal. Rptr. 3d 436, cert. denied, 132 S. Ct. 851 (2011). Brown does not acknowledge or address this authority. He relies on cases decided before Crawford and upon one post-Crawford district court decision, in which the court concluded, contrary to the weight of authority, that "Crawford did not limit the Confrontation Clause to testimonial statements." See United States v. Williams, No. 1:09CR414 JCC, 2010 WL 3909480, at 4. (E. D. Va. Sept. 23, 2010).

is not, the Confrontation Clause "has no application."[12]

Therefore, the threshold question is whether Lux's statement to Brittain that she took the purse and gave it to Brown is testimonial or nontestimonial hearsay. The Crawford Court included "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'" as an example of a "core class of 'testimonial' statements."[13] The Court further explained that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[14] In Davis, the Court described statements from one prisoner to another as "clearly nontestimonial."[15] We conclude, and Brown does not assert otherwise, that Lux's remarks to Brittain were not made under circumstances that would lead an objective witness to understand that the statements would later be used in criminal proceedings. Because Lux's out-of-court statements were not testimonial, their admission did not violate the protections of the confrontation clause.

In addition, the admission of Lux's statement would not be grounds for reversal even if the admission violated Brown's constitutional rights. Lux's statement implicating Brown was insignificant in light of the evidence that Harris

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[12] Figueroa-Cartagena, 612 F.3d at 85 (quoting Whorton, 549 U.S. at 420).

[13] Crawford, 541 U.S. at 51-52.

[14] Crawford, 541 U.S. at 51.

[15] Davis, 547 U.S. at 825.

saw Brown holding the purse and going through its contents and the evidence of Brown's admissions to Harris that he had control over the stolen item and finally disposed of it. We are assured beyond a reasonable doubt that Brown's conviction is not attributable to the admission of Lux's statement insofar as it implicated him.

Admission of Prior Bad Acts

On cross-examination, Brittain testified that her relationship with Brown had been difficult and strained in the weeks before her purse was taken. Apparently surprised by this disclosure, defense counsel elicited the fact that before trial, Brittain told the investigator there were "no problems at all" between her and Brown. On redirect, the prosecutor allowed Brittain to explain that she was not getting along with Brown because she had purchased some crack cocaine from him, but he "shorted" her on the amount of drugs and refused to refund her. Brittain went on to explain that she did not press Brown too far on the issue because she was intimidated by him and had heard him make comments indicating that he would not hesitate to harm someone who owed him money.

Brown claims this was evidence of prior bad acts governed by ER 404(b) and that the trial court erroneously admitted the evidence without properly balancing the relative probative value of the evidence against its prejudicial effect as required by the rule.

But the court did not admit the testimony under ER 404(b). Brittain's testimony about her relationship with Brown and the source of conflict between the two was elicited by the questioning of both counsel and was unanticipated by either counsel. The defense did not object to the testimony, and the court did not rule on its admissibility under ER 404(b).

Brown objected only after Brittain testified that she feared Brown because of "things that he would say, what he would do to other people if he didn't get his money." Brown continued to object when Brittain testified that she "personally" heard Brown mention kicking a specific woman "in the crotch" and beating her up when she didn't pay him. This testimony was about Brown's prior statements, not his acts. And Brown did not state any basis for his objections.[16] While the court overruled all of Brown's objections but one, it also called a sidebar and curtailed the prosecutor's inquiry at that point. Although Brown's counsel made a motion to strike, which the court denied, counsel expressly declined to seek a mistrial and did not accept the court's invitation to craft a limiting instruction.

Because the testimony about the drug sale and resulting animosity between Brittain and Brown was not objected to, any claim of error with respect to this testimony was waived. Brown's nonspecific objections to Brittain's testimony about his statements and the basis for her intimidation were insufficient to preserve the error.[17] And even if the trial court should have

[16] At a later sidebar, counsel indicated that the evidence was inadmissible under ER 404(b), irrelevant, and prejudicial.

sustained Brown's objections to the arguably irrelevant testimony and granted a motion to strike that testimony, evidentiary error is harmless if there is no reasonable probability that the error affected the trial's outcome.[18] Considering counsel's decision not to move for a mistrial, it is apparent that the evidence did not appear to be critically prejudicial at the time.[19] And given the jury's acquittal on one charge and its conviction on only the lesser included misdemeanor charge on the other count, the challenged evidence did not, within reasonable probabilities, affect the verdict.

Affirmed.

Leach, C.J.

WE CONCUR:

Becker, J.

Grosse, J.

[17] State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

[18] State v. Templeton, 148 Wn.2d 193, 220, 59 P.3d 632 (2002).

[19] See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) ("The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.").