IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK DANIEL RUBIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45621

FILED

NOV 14 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of felony battery constituting domestic violence. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On June 23, 2005, the district court, pursuant to a jury verdict, convicted appellant Mark Daniel Rubin of battery constituting domestic violence. The district court sentenced Rubin to serve a term of 24 to 60 months in prison. This appeal followed.

First, Rubin argues the district court erred in allowing a Las Vegas Metropolitan Police officer to testify about statements made to him by the victim, Pamela Tarte, accusing Rubin of assaulting her. Tarte did not testify at trial. Rubin argues the officer's testimony violated the United States Supreme Court's holding in Crawford v. Washington.[1] We agree.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

[1]541 U.S. 36 (2004).

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against him."[2] This guarantee applies to both federal and state prosecutions.[3] In Crawford, the Supreme Court held that the confrontation clause bars admission of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.[4] The Court indicated that "testimonial" statements include prior testimony at a preliminary hearing, before a grand jury, or at a former trial, as well as statements made during police interrogations.[5] The Court noted that "interrogation" was used in its colloquial rather than technical legal sense.[6]

Recently, the Court further honed the definition of "testimonial" statements that implicate Crawford. In Davis v. Washington, the Court held that

> [s]tatements 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

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

[3]See Pointer v. Texas, 380 U.S. 400, 406 (1965).

[4]Crawford, 541 U.S. at 68.

[5]Id.

[6]Id. at 53 n.4.

> establish or prove past events potentially relevant to later criminal prosecution.[7]

Applying that holding, the Court found that Crawford did not bar admission of a 911 caller's statements describing events while the events were actually happening and the elicited statements were necessary to resolve the present emergency.[8] The Court specifically concluded that it was proper to admit a statement identifying the perpetrator.[9] However, the Court indicated that the caller's statements made to the 911 operator after the perpetrator had left the scene would not have been properly admitted because the emergency was no longer ongoing.[10]

Similarly, the Court held that it was improper to admit statements made by a victim to an officer after he arrived on the scene of a reported domestic disturbance, the disturbance had apparently ended, and the victim and assailant had been isolated from each other by responding officers.[11] In that case, the officer who elicited the victim's statements was "not seeking to determine . . . 'what is happening,' but rather 'what happened.' Objectively viewed, the primary, if not indeed the sole, purpose of the investigation was to investigate a possible crime."[12]

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[7]126 S. Ct. 2266, 2273-74 (2006).

[8]Id. at 2276-77.

[9]Id. at 2276.

[10]Id. at 2277-78.

[11]Id. at 2278.

[12]Id.

Statements that "deliberately recount[], in response to police questioning, how potentially criminal past events began and progressed" and that take place "some time after the events described were over" are "an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial."[13] In such circumstances, "where [the victim's] statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial."[14]

Here, the testimony of Officer Perry, the investigating officer, gave little information useful to assessing whether, viewed objectively, his primary purpose was to ascertain the existence of and resolve an ongoing emergency or whether it was to establish or prove past events potentially relevant to a criminal prosecution. However, the record shows that Tarte had safely isolated herself from Rubin by going to a neighbor's apartment, some time had elapsed since the incident, and Tarte had summoned the officer via her neighbor. Objectively viewed, the record does not indicate there was an ongoing emergency, and Tarte would "reasonably expect" her statements to be used prosecutorially.[15] Thus, under Crawford and Davis, Tarte's response to Officer Perry's questions--that Rubin had gotten upset with her and pushed her head into the wall of their apartment--was

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[13]Id.

[14]Id. at 2279.

[15]See Flores v. State, 121 Nev. ___, ___, 120 P.3d 1170, 1178 (2005) (quoting Crawford, 541 U.S. at 51).

testimonial and could not be admitted unless Tarte herself testified or was unavailable to testify and Rubin had a previous opportunity to cross-examine her. Because Tarte did not testify and Rubin had not had a previous opportunity to cross-examine her, Officer Perry's testimony about Tarte's statements to him was improper.

Further, the error in allowing the testimony was not harmless beyond a reasonable doubt.[16] Officer Perry's testimony about Tarte's statements was the only evidence tying Rubin to Tarte's injuries. Indeed, it was the only evidence indicating that a domestic battery had occurred. We cannot say that the verdict would have been the same without Officer Perry's testimony about Tarte's statements.[17] Thus, Rubin's conviction must be reversed.

Rubin also argues that the prosecutor committed misconduct in his opening statement when he said, "I've been a prosecutor in Clark County for fifteen years." We agree that the prosecutor committed misconduct. It is improper for a prosecutor to "invok[e] the authority of his or her own supposedly greater experience and knowledge."[18] In Flanagan v. State, we held that a remarkably similar comment to that at issue here was a "prime example" of "a prosecutor's invoking the authority of his office."[19] Because Rubin's conviction must be reversed pursuant to

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[16]See Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993); see also Schoels v. State, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999).

[17]See Schoels, 115 Nev. at 35, 975 P.2d at 1276.

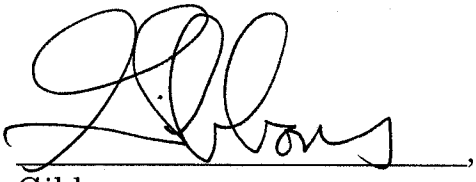
[18]104 Nev. 105, 109, 754 P.2d 836, 838 (1988) (quoting Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985)).

[19]Id.

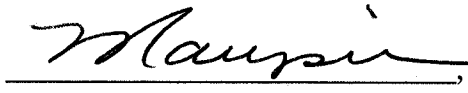
Crawford, we need not address whether this prosecutorial misconduct warrants reversal. However, we instruct the Clark County District Attorney to discontinue making this kind of argument.

Having reviewed Rubin's arguments and concluded he is entitled to relief, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Gibbons



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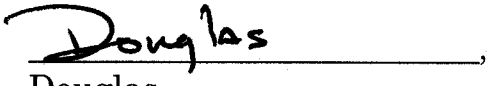

_____, J.
Douglas

cc: Hon. Valorie Vega, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk