

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRAIZER WRIGHT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41004

FILED

JAN 12 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery and two counts of attempted robbery with the use of a deadly weapon. The district court sentenced appellant Alfraizer Wright to 24 to 60 months in prison for the conspiracy and to two consecutive terms of 36 to 90 months in prison for each count of attempted robbery with the use of a deadly weapon. The district court ordered all counts to run concurrently to each other and consecutively to another district court case. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

Wright and his co-defendant, Karlos Antonio Washington, attempted to rob a North Las Vegas Taco Bell restaurant while two employees were closing the restaurant. During the robbery, a nearby resident, Judith Clark, heard a scream come from the direction of the Taco Bell. She then looked out her door and saw two black males eventually climb over a wall behind the Taco Bell. She immediately called 911. Her statement was transcribed onto a "radio ticket" created by a dispatcher from the North Las Vegas Police Department. The victims of the crime

also called 911 and gave descriptions of the perpetrators as well as a description of the events that occurred. Shortly thereafter, Officer Holly arrived at the scene. The two victims gave him descriptions of the perpetrators, which he relayed to a dispatcher who transmitted the description "to other units." Wright and Washington were later located in a backyard shed in a residential neighborhood near the Taco Bell. The police ordered the men to exit the shed. When they exited, they were placed in handcuffs and read their Miranda¹ rights. An officer then asked Washington why he was hiding in the shed. Washington stated that "it was self explanatory" and that he "was running from the police." The officer then asked Washington why he was running from the police, and he responded that he "was selling drugs." No drugs or drug paraphernalia was found on or near Washington. The officer then asked Wright why he was running from the police, and he stated that he was leaving his girlfriend's house and saw two black males running, so he decided to run as well. Wright refused to answer when asked further questions regarding his girlfriend or her address. Minutes later the victims were brought to the alleged perpetrators. Both of the victims identified Washington; however, only one of the victims identified Wright and in doing so stated that she was not sure but that "it was kind of him" because his clothes and his build matched one of the perpetrators. Both men were then arrested and charged. They pleaded not guilty and proceeded to a joint jury trial.

¹See Miranda v. Arizona, 384 U.S. 436 (1966).

At trial, Judith Clark, the victims, and Officer Holly testified. The victims gave descriptions of the defendants as they remembered them on the night of the crime. One of the victims identified both of the defendants, but the other victim could only identify Washington. Despite Wright's objection, the court admitted the "radio ticket" under the business records exception to the hearsay rule. Both defendants were convicted.

In this appeal, Wright claims that the trial court erred in admitting the radio ticket into evidence under the business records exception to the hearsay rule and that its admission violated his right to confrontation.² Specifically, he claims that the radio ticket contained information with no indication as to who provided the information in the ticket; thus, he was unable to specifically cross-examine the declarants regarding the information in the radio ticket. Moreover, the possible declarants of the statements on the radio ticket testified before the ticket was admitted further prohibiting his cross-examination of the possible declarants.

The custodian of records of the North Las Vegas Police Department testified that the radio ticket was a transcription of the 911 call and was produced contemporaneously with the call, and that the radio ticket also contained information received by police officers reporting from the scene. She testified that there was no indication on the ticket to discern who said what. Over the objection of Wright, the court admitted

²Wright did not include the radio ticket in the record on appeal.

the radio ticket under the business record exception to the hearsay rule. The custodian then read the contents of the radio ticket to the jury. It read:

Two B.M.A. jumped the wall to the employment office. Pr heard a female scream. Driving a white vehicle near Poker Palace, possible four door, reclassify 407.

One B.M.A., gray shirt, blue pants, gray mask on face, had handgun, possibly named Ray. Number two, green pants with blue handkerchief on face. Possible Honda or Nissan. Possibly had gold emblem on the back.

She further testified that the ticket showed that the person reporting on the radio ticket was Judith Clark.³ She also testified that two officers were listed on the ticket--Officer Miranda and Officer Holly--but there was no indication whether some of the information on the radio ticket was supplied by these officers as well.

We conclude that Wright was not prejudiced by the admission of the ticket and that his confrontation rights were not violated. The Confrontation Clause of the Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."⁴ The United States Supreme Court, in Crawford v. Washington,⁵ recently reinterpreted the Confrontation Clause

³Judith Clark's testimony revealed that she only supplied a portion of the radio ticket information.

⁴U.S. Const. amend. VI.

⁵541 U.S. 36, 124 S. Ct. 1354 (2004).

as it applies to the admission of extrajudicial testimonial statements. It held that out-of-court statements by witnesses that are testimonial in nature are barred under the Confrontation Clause unless witnesses are unavailable and defendants had a prior opportunity to cross-examine the witnesses,⁶ rejecting the test it had previously established in Ohio v. Roberts.⁷ However, "Crawford does not overrule the Court's pre-existing Confrontation Clause jurisprudence, enunciated in Ohio v. Roberts, and its progeny, as it applies to nontestimonial statements."⁸ The Court also stated that the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."⁹

We conclude that Crawford is not specifically implicated here because Crawford only concerns confrontation violations as they relate to the admission of extrajudicial testimonial statements made by an unavailable witness.¹⁰ Here, it appears that all of the potential declarants

⁶Id. at ___, 124 S. Ct. at 1374.

⁷448 U.S. 56, 66 (1980) (holding that the admissibility of all hearsay evidence is conditioned on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness").

⁸United States v. McClain, 377 F.3d 219, 220 n.1 (2004) (citing Crawford, 541 U.S. at ___, 124 S. Ct. at 1370.).

⁹Crawford, 541 U.S. at ___, 124 S. Ct. at 1369 n.9.

¹⁰See id. at 1369 n.9, 1374; see also Crawford v. State, 139 S.W.3d 462, 464-65 (2004) (holding that Crawford v. Washington was inapplicable because the declarant of the extrajudicial testimonial statement testified at trial, giving the appellant the opportunity to cross-examine the

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of the statements in the radio ticket were available and testified at trial regarding their descriptions and identifications of the perpetrators, which were the subject of the radio ticket, and Wright's counsel cross-examined them. However, to the extent that Wright was unable to cross-examine the witnesses regarding the contents of the radio ticket because it was not admitted until after Judith Clark, the victims, and the officer testified, Wright has failed to show that he could not have recalled the witnesses to specifically question them regarding the contents of the ticket. Because the possible declarants testified at trial and were or could have been cross-examined regarding their descriptions and identifications, Wright's confrontation rights were not violated by the admission of the radio ticket.

We do not decide whether the district court erred in admitting the radio ticket under the business record exception to the hearsay rule. The State did not offer the radio ticket to prove the truth of the matter asserted.¹¹ Instead, the prosecutor sought to have the radio ticket admitted "to get the time that the officer gets there because it's clear . . . that her (Judith Clark) time periods are a little bit long," and also to show that a description of the perpetrators was dispatched before the victims were taken to the show up identification, which would discredit the

. . . continued

declarant); see also United States v. Valdez-Soto, 31 F.3d 1467, 1470 (9th Cir. 1994) (holding that the Confrontation Clause is not violated by the admission of an extrajudicial statement where the declarant is in court and the defendant can cross-examine him).

¹¹See NRS 51.035.

defense's theory that the victims did not ascertain their descriptions until after they were taken to the show up. Therefore, we conclude its admission was not in error.

Next, Wright claims that the district court erred in denying his motion to sever the trial because Washington's statement that he was hiding in the shed from the police because he was selling drugs implicated Wright in the attempted robbery as well as in other felonious activity, which constituted a violation of Bruton v. United States.¹² We conclude that the district court did not err in denying Wright's motion to sever, and we also conclude that admitting the statements made by Washington did not amount to a Bruton violation.

"The United States Constitution's Sixth Amendment right of confrontation prevents the use at a joint trial of a non-testifying defendant's admission if it incriminates another defendant."¹³ NRS 174.165(1) permits the trial court to sever a joint trial if it appears that the defendant is prejudiced by joinder of defendants for trial. However, "severance should only be granted when there is a 'serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or

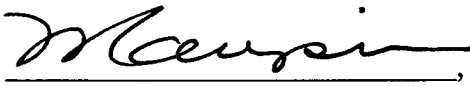
¹²391 U.S. 123 (1968).

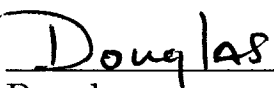
¹³Rodriguez v. State, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001) (citing Bruton, 391 U.S. 123).

innocence."¹⁴ Appellant has a heavy burden "to show that the district court abused its discretion in failing to sever the trial."¹⁵

Wright has failed to demonstrate a Bruton violation. The statements made by Washington did not "facially or expressly" implicate Wright in the attempted robbery.¹⁶ Washington stated that he was running from the police because he was selling drugs, not because he had just attempted to rob the Taco Bell. Wright did not specifically show how he was otherwise prejudiced by the joinder. Therefore, we conclude that Wright failed to meet his heavy burden to show that the district court erred in failing to sever his trial. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

¹⁴Id. at 808, 32 P.3d at 779 (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

¹⁵Id. at 809, 32 P.3d at 779.

¹⁶See id.

cc: Hon. John S. McGroarty, District Judge
Special Public Defender David M. Schieck
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk