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Court of Appeals of Washington, Division 1.

***STATE v. MOLINA*, No. 53730-0-I., Aug. 15, 2005.**

UNPUBLISHED OPINION

COX, C.J.

*1 John Molina appeals his judgment and sentence for second degree assault with a deadly weapon enhancement. He contends that testimony admitted at trial regarding out of court statements and a question by Carol Hurtado-Sanchez, the victim, were inadmissible hearsay that also violated his Sixth Amendment right to confrontation. We hold that the testimony of the emergency room doctor was properly admitted as statements for medical diagnosis or treatment and was not testimonial. We also hold that the statements to Naomi Ruiz, Hurtado-Sanchez's friend, during a 911 call were properly admitted as excited utterances and were not testimonial. Finally, we hold that the admission of Hurtado-Sanchez's question to Molina while a police officer listened to the conversation, if erroneous, was harmless beyond a reasonable doubt. We affirm.

Molina and Hurtado-Sanchez had been previously involved in a romantic relationship and have two children together. In February 2003, Hurtado-Sanchez was living with a friend, Ruiz. Molina contacted Hurtado-Sanchez by telephone at Ruiz's apartment. On his arrival at the apartment, Hurtado-Sanchez went outside to speak with Molina. Approximately 10 to 15 minutes later, Hurtado-Sanchez returned to Ruiz's apartment, telling Ruiz to shut the door. Molina prevented Ruiz from closing the door and forced his way into the apartment. Molina finally left when Ruiz threatened to call the police.

In the apartment, Ruiz noticed that her friend was crying and had a swollen eye. Ruiz then called 911. When the dispatcher asked Ruiz whether Molina had any weapons, Hurtado-Sanchez stated, 'Yes, he stabbed me.' Hurtado-Sanchez then lifted her coat and showed Ruiz a bleeding cut on her side. Ruiz also saw that Hurtado-Sanchez's coat and sweater were torn over the site of the cut.

Officer Jim Lindquist responded to the 911 call. While he was in the apartment, Molina telephoned and demanded to speak to Hurtado-Sanchez. At Officer Lindquist's request, Hurtado-Sanchez held the telephone so that both she and Officer Lindquist could hear the conversation. During the call, Hurtado-Sanchez asked Molina, 'Why did you stab me?' Molina responded, 'Because you wouldn't shut up.'

Hurtado-Sanchez was taken to the Overlake Hospital emergency room where Dr. Kamala Rose evaluated her for 'potential life threatening' injuries due to a reported stab wound. Hurtado-Sanchez told Dr. Rose that an ex-boyfriend had assaulted her by hitting her in the face and stabbing her with a pocketknife.

The State charged Molina with second degree assault with a deadly weapon allegation and violation of a no-contact order. Ruiz, Dr. Rose, and Officer Lindquist were among the State's witnesses at trial. Hurtado-Sanchez did not testify. The State was unable to present her as a witness despite numerous attempts to locate her and despite the issuance of a material witness warrant.

A jury found Molina guilty of second degree assault with a deadly weapon enhancement and violation of the no-contact order.

*2 Molina appeals only the assault conviction.

CONFRONTATION CLAUSE

Statements to the Emergency Room Physician

Molina asserts that Hurtado-Sanchez's statement that her ex-boyfriend stabbed her made to her treating physician in the emergency room was hearsay and testimonial. We hold that the statements were properly admitted as statements for medical diagnosis and treatment and were not testimonial.

Hearsay Exception

Under the State hearsay rules, ER 803(a)(4), an out-of-court statement offered to prove the truth of the matter asserted is admissible at trial if it is a statement 'made for the purposes of medical diagnosis or treatment.'^[FN1] The medical treatment exception applies to statements reasonably pertinent to diagnosis or treatment.^[FN2] We review admission of evidence under an abuse of discretion standard.^[FN3]

FN1. State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001); ER 803(a)(4).

FN2. In re Dependency of Penelope B., 104 Wn.2d 643, 656, 709 P.2d 1185 (1985).

FN3. See State v. Swan, 114 Wn.2d 613, 667, 790 P.2d 610 (1990).

Here, Dr. Rose examined Hurtado-Sanchez in the emergency room to treat a stab wound and a bruised left eye. Dr. Rose asked how Hurtado-Sanchez got the wound. Hurtado-Sanchez responded that her ex-boyfriend stabbed her. The response from Hurtado-Sanchez was necessary to ascertain the nature of the wound inflicted and to provide her with appropriate medical treatment. The statement was reasonably pertinent to diagnosis and treatment of Hurtado-Sanchez's injuries.

Furthermore, even though Hurtado-Sanchez did not identify her attacker by name to Dr. Rose, statements made identifying the perpetrator in a case of domestic violence are admissible. They are admissible under the statement for medical treatment exception because a doctor or social worker may recommend counseling or escape from the dangerous domestic environment as part

of a treatment plan.^[FN4] We conclude the trial court did not abuse its discretion in admitting Hurtado-Sanchez's statement to the emergency room physician under ER 803(a)(4).

FN4. *State v. Sims*, 77 Wn.App. 236, 239-40, 890 P.2d 521 (1995) (victim's statements to ER doctor and social worker admissible where identified person who broke victim's jaw was boyfriend).

Testimonial

Molina also argues that the statements to Dr. Rose were testimonial under the circumstances. We disagree.

Where the admissibility of testimonial evidence is at issue, the Sixth Amendment of the United States Constitution demands that the witness be unavailable at trial and that the accused had a prior opportunity to cross-examine the witness.^[FN5] Among those statements that are testimonial are '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.'^[FN6]

FN5. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

FN6. *Crawford*, 541 U.S. at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3).

Here, Dr. Rose examined Hurtado-Sanchez in the emergency room in order to treat a stab wound and a bruised left eye. Focusing on Hurtado-Sanchez's statement, there was no reason for a reasonable person to expect that communications between the victim and her doctor would later be used in a prosecution of Molina. To the contrary, a reasonable person would assume that such communications between doctor and patient would remain confidential. In short, there was no violation of the Confrontation Clause in this situation.

Statements Made in the Course of the 911 Call

*3 Molina next argues Hurtado-Sanchez's statement 'Yes, he stabbed me,' that Ruiz relayed to the 911 dispatcher was testimonial hearsay and improperly admitted at trial. We disagree.

Hearsay Exception

Under ER 803(a)(2),^[FN7] an excited utterance is not excluded by the hearsay rule. We review a trial court's decision to admit an excited utterance for an abuse of discretion.^[FN8]

FN7. ER 803(a)(2) states: (a) The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (2) A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

FN8. *Woods*, 143 Wn.2d at 595 (citing *State v. Gribble*, 60 Wn.App. 374, 381, 804 P.2d 634 (1991)).

Here, there was evidence that Hurtado-Sanchez made the statements to Ruiz during the course of a 911 call made to secure assistance after she had been stabbed by Molina. Molina was also trying to push through the door of Ruiz's apartment immediately before Ruiz called 911. There does not seem to be any dispute on appeal that the statement was made while the victim was under the stress of the stabbing – an excited utterance.

Testimonial

Molina principally argues that Hurtado-Sanchez's statements to Ruiz were improperly admitted because they were testimonial under the circumstances, violating his Confrontation Clause rights. We disagree.

Recently, in *State v. Davis*, the Supreme Court concluded that the nature of 911 calls should be analyzed on a case-by-case basis.^[FN9] The court explained that in most cases, the one who calls 911 for emergency help is not 'bearing witness,' and thus the call will not be the equivalent of a 'testimonial statement,' but a 911 call to the police to report a crime may be the functional equivalent of testimony to a government agent, and thus testimonial in nature.^[FN10] 'The call must be scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness.'^[FN11]

FN9. See *State v. Davis*, 154 Wn.2d 291, 28, 111 P.3d 844 (2005).

FN10. *Davis*, 154 Wn.2d at 28.

FN11. *Davis*, 154 Wn.2d at 24.

Here, Ruiz called 911 and Hurtado-Sanchez relayed information to the operator through Ruiz. This was a call for help in response to a dangerous situation. Ruiz made the 911 call after she saw Hurtado-Sanchez's injured eye. When the dispatcher asked Ruiz whether the assailant had used any weapons, Hurtado-Sanchez answered 'Yes, he stabbed me.' The answer informed the 911 operator that the assailant was armed with a knife and allowed the 911 operator to inform emergency response of safety concerns.

Furthermore, the call was a call for help for protection from Molina. There is no evidence in the record that Ruiz and Hurtado-Sanchez contacted 911 for any other purpose than to seek medical assistance for Hurtado-Sanchez and protection from peril. Moreover, Hurtado-Sanchez did not identify her assailant to the 911 dispatcher through her statements. Significantly, there was no evidence that the desire to identify Molina influenced Ruiz's decision to call 911 and no evidence that the call was made with the knowledge by Hurtado-Sanchez that it would be later used to prosecute Molina. Accordingly, Hurtado-Sanchez's statements to Ruiz during the course of the telephone call to the 911 operator were not testimonial and were properly admitted at trial.

Hurtado-Sanchez's Telephone Conversation With Molina While Officer Lindquist Was Present

*4 Molina also argues that admission of testimony at trial that Hurtado-Sanchez asked Molina, ‘Why did you stab me?’ during a telephone call he initiated while Officer Lindquist surreptitiously listened was testimonial hearsay. We hold that her question was not hearsay, but any error in admitting the testimony was harmless beyond a reasonable doubt.

Molina argues that Hurtado-Sanchez’s question was hearsay and should not have been admitted. Case and other authority shows otherwise.

‘A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.’^[FN12] ‘Hearsay’ is a statement ... offered in evidence to prove the truth of the matter asserted.’^[FN13] ‘Assertion is not defined by the rule, but the advisory committee’s note to subdivision (a) of Federal Rule 801, at 135, to which the Washington rule defers, provides that ‘nothing is an assertion unless intended to be one.’^[FN14] Therefore, because an inquiry is not assertive, it is not a ‘statement’ as defined by the hearsay rule and cannot be hearsay, as case authority makes clear.^[FN15]

FN12. ER 801(a) (emphasis added).

FN13. ER 801(c) (emphasis added).

FN14. *State v. Collins*, 76 Wn.App. 496, 498, 886 P.2d 243 (1995).

FN15. *Collins*, 76 Wn.App. at 498; *United States v. Lewis*, 902 F.2d 1176 (5th Cir.1990); see also *United States v. Long*, 905 F.2d 1572 (D.C.Cir.1990).

We acknowledge that Molina argues that this question was assertive under the circumstances. But the general rule supports the opposite conclusion. Accordingly, we cannot say that the trial court abused its discretion in holding that Ruiz’s testimony regarding Hurtado-Sanchez’s question was not hearsay.

Testimonial

While *Crawford* did not define ‘testimonial statement,’ *Crawford* stated that ‘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,’ are testimonial.^[FN16] However, *Crawford* also appears to be primarily focused on testimonial hearsay.^[FN17]

FN16. *Crawford*, 541 U.S. at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3).

FN17. *Crawford*, 541 U.S. at 53 (stating ‘even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object.’).

Here, a government agent, Officer Lindquist, listened in on the conversation between Molina and Hurtado-Sanchez. He repeated the question as well as Molina’s response later at trial. We need

not decide whether Hurtado-Sanchez's question, by itself, is testimonial in this case. We have already held that the question was not hearsay. Thus, it is arguably outside the ambit of *Crawford*'s prohibitions.

In any event, if we assume, without deciding, that the question does violate *Crawford*, we are convinced that the admission of the testimony was harmless beyond a reasonable doubt.

Harmless Constitutional Error

A violation of the Confrontation Clause is subject to harmless error analysis where the error was harmless beyond a reasonable doubt.^[FN18] To determine whether error is harmless, this court utilizes 'the 'overwhelming untainted evidence' test.'^[FN19] Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless.^[FN20]

FN18. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Smith*, 148 Wn.2d 122, 138-39, 59 P.3d 74 (2002).

FN19. *Smith*, 148 Wn.2d at 139.

FN20. *Smith*, 148 Wn.2d at 139 (citing *State v. Guloy*, 104 Wash.2d 412, 426, 705 P.2d 1182 (1985)).

Here, regardless of whether the admission of the testimony of the question of Hurtado-Sanchez made in the presence of Officer Lindquist was erroneously admitted, there was overwhelming untainted evidence that Molina assaulted Hurtado-Sanchez with a knife. The statements Hurtado-Sanchez made to Ruiz and to Dr. Rose were properly admitted and, together with the evidence of serious injury, provided overwhelming evidence linking Molina to the assault.

*5 Any error in admitting the question was harmless beyond a reasonable doubt.