

NO. 67414-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRANDON ROBERTS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A declarant's out-of-court statement to medical providers will not be deemed "testimonial" when it is made for purposes of obtaining a proper diagnosis and medical treatment and where the caregivers are not working on behalf of the police or prosecutor. In this case, the victim, of her own accord and unaccompanied by any law enforcement personnel, visited an emergency room several hours after being strangled by the defendant, complaining of neck and facial pain due to the defendant's actions. There is no evidence to suggest that the medical caregivers were aware of the existence of a police investigation or that either the victim or the medical personnel were interested in anything other than obtaining or providing appropriate care. Did the trial court properly conclude that the victim's conversations with her caregivers were non-testimonial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Brandon Roberts, was charged by information with one count of assault in the second degree (domestic violence). CP 1. The State alleged that, on December

29, 2010, Roberts strangled his girlfriend, Melissa Cole. CP 1. By jury verdict rendered on March 28, 2011, Roberts was found guilty as charged. CP 97.

2. SUBSTANTIVE FACTS

On the morning of December 29, 2010, King County Sheriff's Office (KCSO) deputies responded to a Kenmore home where Roberts lived with his mother and stepfather, Kristie and Steven Hanson, following a report of a hit-and-run. 2RP 19-21.¹ Upon their arrival, KCSO deputies Nicholas Minzghor and Jon Coffman found Roberts, Mr. and Mrs. Hanson, and Roberts' girlfriend, Melissa Cole, standing in front of the house. 2RP 21-22, 34; 3RP 71, 73. When Roberts spotted the deputies, he ran into the woods behind the home, disregarding all commands to stop and, initially, evading the deputies' foot pursuit. 2RP 22, 34.

Dep. Minzghor ended his chase and returned to the home, where he found two damaged vehicles that matched the descriptions given to him in his dispatcher's report. 2RP 26.

However, Ms. Hanson told the deputy that he "should probably

¹ The verbatim report of proceedings consists of six volumes, referred to in this brief as follows: 1RP (3/22/2011); 2RP (3/23/2011); 3RP (3/24/2011); 4RP (3/28/2011); 5RP (4/8/2011); and 6RP (6/10/2011).

know about this too," and pulled back Cole's collar, revealing red marks and bruising around her neck. 2RP 24-25. After speaking with Cole, Dep. Minzghor advised his fellow officers to arrest Roberts for felony assault. 2RP 26.

As the deputies arranged for a K-9 unit to respond, Roberts was seen returning to his mother's backyard. 2RP 27. After failing to comply with Dep. Minzghor's order to submit to arrest, Roberts was tackled and taken into custody. 2RP 28.

Dep. Coffman requested a paramedic to treat Cole, and a medical aid unit arrived at the home shortly thereafter. 2RP 38. A paramedic recommended that Cole go to the hospital. 3RP 75.

After being advised of his rights as an arrestee, Roberts told Dep. Coffman that the injuries on Cole's neck were just a "hickey." 2RP 40. Dep. Coffman then transported Roberts from the scene. 2RP 39. On January 12, 2011, as Dep. Coffman was transporting Roberts to a court hearing, Roberts apologized for "being an idiot" on December 29th. 2RP 41.

During the evening of December 29th, Ms. Hanson accompanied Cole on a visit to the emergency room at Evergreen Hospital. 3RP 75. There, Cole was initially evaluated by nurse Kerry Groves. 3RP 16. Groves asked Cole why she had come to

the hospital, and Cole answered that she had been "choked" by her boyfriend, who had put his hands around her neck. 3RP 19. Cole complained of pain on the right side of her neck and on her right cheek. 3RP 20.

Dr. Neil Donner then examined Cole in the emergency room. 4RP 7. When Donner asked Cole what was wrong, she explained that she had been "choked" and hit in the face by her boyfriend, and was suffering from throat and facial pain. 4RP 8-10. Cole explained that she had been assaulted after an argument with her boyfriend. 4RP 10.

Later during her visit, Cole told Nathan Nelson, a social worker in Evergreen Hospital's emergency room, that she had been choked by her boyfriend. 4RP 20-21, 24.

Cole could not be located for trial, and the State proceeded without her. The trial court allowed Cole's declarations to the personnel at Evergreen Hospital to be admitted into evidence as non-testimonial statements made for purposes of medical diagnosis and treatment. 3RP 11, 13-15. The State also introduced photographs of Cole's injuries that were taken by police at Roberts' home on December 29th, as well as recordings of jail phone calls placed by Roberts to Cole and to Ms. Hanson shortly after his

arrest. 3RP 72, 77-79. In his conversation with Cole, Roberts declines to provide any explanation when she tells him that he is incarcerated because he choked her, instead only cautioning her that their call is being recorded. State's Ex. 9 (CD Containing Jail Calls, admitted Mar. 28, 2011).² During his phone calls with Ms. Hanson, Roberts asks her to tell Ms. Cole to not speak with any victims' advocates and to not appear as a witness at his trial. State's Ex. 10 (CD Containing Jail Calls, admitted Mar. 28, 2011).

Roberts did not testify in his defense or call any witnesses. 4RP 34.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF COLE'S STATEMENTS TO MEDICAL CAREGIVERS.

Roberts contends that the trial court erred by admitting into evidence the statements made by Cole to several caregivers at Evergreen Hospital's emergency room. He argues that the descriptions of the assault that Cole gave to a nurse, physician, and social worker at the hospital amounted to "testimonial" declarations, and that the admission of Cole's accounts through the caregivers'

² The State has designated transmission of the trial exhibit list to this Court.

testimony deprived him of his constitutional right to confront adverse witnesses. The crux of Roberts' argument is that both Cole and her caregivers intended for her statements at the emergency room to be used in Roberts' prosecution. Roberts lacks sufficient factual and legal foundation to support his contention, and his claim should thus be rejected.

Under the Sixth Amendment, a defendant has the right to confront witnesses bearing testimony against him. U.S. Const. amend. VI. The Confrontation Clause bars the admission of "testimonial" hearsay unless the declarant is unavailable to testify *and* the defendant has had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The Crawford Court declined to provide an authoritative definition of "testimonial." Id. at 68. But the Supreme Court has chosen to distinguish hearsay that is elicited in the context of a police interrogation from that which arises in other settings. In Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court ruled that where the police are responsible for procuring an unconfrosted statement, Confrontation Clause analysis involves examination of the "primary purpose" of the

interrogation, and a statement will be deemed "testimonial" if the police questioned the declarant in order to obtain evidence for prosecution, as opposed to being motivated by a need to meet an ongoing emergency. Davis, 547 U.S. at 822, 826.

In contrast, when out-of-court statements are made to medical caregivers, trial courts are to look not only at the questioner's intent, but also at the larger context of the interaction with the declarant. A statement provided to medical personnel will not be deemed "testimonial" when it is made for diagnosis and treatment purposes to a caregiver who is neither employed by nor working on behalf of the police or prosecutor. State v. Moses, 129 Wn. App. 718, 729-30, 119 P.3d 906 (2005).

In his opening brief, Roberts asks this Court to eliminate summarily the distinction drawn by the Davis Court between police interrogations and other contexts in which out-of-court statements are made, and adopt the "primary purpose" test for all Confrontation Clause analysis. He provides limited authority for his position, which would amount to a significant change in post-Crawford case law in this state were it to be adopted. It is unnecessary for this Court to take such a dramatic step, however, because, under either the traditional test applied to non-police

hearsay or under the Davis test, Roberts' claim of deprivation of his confrontation right fails.³

The factual record regarding Cole's obtainment of medical care is somewhat thin, but the existing record provides no reason to conclude that the trial court erred in concluding that Cole visited the emergency room to seek care rather than to provide the functional equivalent of in-court testimony. Though Cole did not appear at the trial, Roberts' mother, Kristie Hanson, testified in the State's case-in-chief about her observations of Cole's interaction with police at her residence on December 29, 2010, and later that day when she accompanied Cole to Evergreen Hospital. She explained that it was a paramedic, rather than police officers, who suggested to Cole that she seek further medical care for her injuries.

3RP 75, 81. Ms. Hanson stated that it was Cole's decision to go to the hospital later that day, with Ms. Hanson's encouragement.

3RP 75, 80.

In their testimony, Ms. Groves and Dr. Donner, the emergency room nurse and the physician who treated Cole, depict ordinary interaction between a caregiver and a patient, rather than

³ Alleged Confrontation Clause violations are reviewed de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

the type of specialized medico-legal evaluation that some courts have identified as producing "testimonial" hearsay. Compare 3RP 16-21 (testimony of Groves) and 4RP 7-10 (Donner) with People v. Vigil, 104 P.3d 258 (Colo. App. 2004), and In re T.T., 351 Ill. App. 3d 976, 815 N.E.2d 789 (2004) (both concerning hospital examinations specifically performed by physicians assigned to abuse-investigation teams for purpose of preparing for prosecution).

There was no evidence presented at trial to suggest that Groves or Donner was even aware of an ongoing police investigation, much less that they had chosen to actively gather evidence for later use at a criminal trial. Nor was there any basis to conclude that the police directed Cole to a particular medical provider who had agreed to act as an agent for the State, or that they requested that she take specific actions or make particular disclosures to her medical caregivers. There was nothing to suggest that Cole subjectively considered her experience at the emergency room to be the equivalent of a police interrogation, or that a reasonable person would feel that way. Thus, under either the Davis test, which focuses on the purpose of the questioning, or under the traditional Crawford analysis, which looks at the

expectations of a reasonable declarant, it is clear that Cole's statements to her caregivers were not testimonial.

While it appears to be true that the patrol officers who initially responded to Roberts' family home provided Cole with a standardized permission form allowing a future medical provider to release its records to the police,⁴ Roberts reaches too far in suggesting that this dictates the conclusion that Cole's later statements to the caregivers at Evergreen Hospital were testimonial. First, as the Supreme Court of Ohio has observed, when a victim has given a statement to the police identifying her attacker, "the victim 'could reasonably have assumed that repeating the same information to a nurse or other medical professional served a separate and distinct medical purpose.'" State v. Fry, 125 Ohio St. 3d 163, 181, 926 N.E.2d 1239 (2010) (citations omitted). It is abundantly clear from the record that Cole identified Roberts to the police as her assailant, and was aware that Roberts' mother had implicated him as well, long before Cole decided to take herself to the hospital. 2RP 25, 35. Also, any rational crime victim would recognize the different responsibilities borne by police officers and

⁴ Roberts' trial counsel discussed the form with the trial court, but apparently did not seek its admission into evidence, apparently. 3RP 3-4; Supp. CP __ (sub no. 39F, Exhibit List, filed on Mar. 28, 2011).

by emergency room medical personnel, and would not expect treatment providers to be acting as state agents in hospital scrubs. And, again, there was no evidence presented that the medical providers were aware of the existence of Cole's medical release form prior to their interaction with her, or anything suggesting that Groves or Dr. Donner sought to obtain Cole's medical history for any purpose other than to provide proper care.

One can readily envision other scenarios in which the timing and setting of the presentation of a medical release form could raise reasonable concerns about the true purpose of a doctor-patient conversation, but those hypothetical conditions are not present in this matter. The existence of a standardized form here does not control in light of all of the circumstances that demonstrate the true, non-investigative character of Cole's interaction with hospital personnel.

The State does not concede that the circumstances of Cole's interaction with Evergreen Hospital social worker Nathan Nelson rendered her statements to him testimonial, notwithstanding Nelson's understanding that police might be interested in Ms. Cole's report to him. 4RP 24-25. Under the Crawford test, there is little reason to believe that a reasonable patient in Cole's

position would know that Nelson could have seen himself in any way as a liaison to police, or that his documentation of his social worker-patient contact with her would constitute a "medical record" subject to the provisions of the standardized release form she signed. As to the Davis criterion, Nelson himself explained that his purpose in speaking with Cole was not to obtain evidence for prosecution, but, as he testified, to ensure her future safety as part of her recovery plan. 4RP 25.

In any event, admission of Nelson's testimony, if deemed erroneous, does not require reversal so long as this Court is satisfied that there is "no reasonable probability that the outcome of the trial would have been different had the error not occurred." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). Here, Nelson's account of Cole's identification of Roberts as her attacker is merely duplicative of the properly-admitted testimony of Groves and Donner. 3RP 19; 4RP 10, 24. Evidence that is merely cumulative of convincing untainted evidence is harmless. State v. Nist, 77 Wn.2d 227, 236, 461 P.2d 322 (1969); see also Dennis J. Sweeney, An Analysis of Harmless Error in Washington: A Principled Process, 31 Gonz. L. Rev. 277, 319 (1995) (noting that "[r]egardless of the announced standard of review for harmless

error, Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative.”).

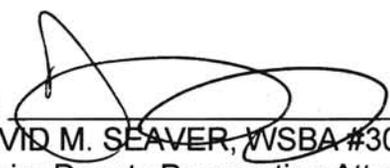
D. CONCLUSION

The trial court properly admitted the victim's statements to medical caregivers as non-testimonial declarations. Roberts' conviction should be affirmed.

DATED this 19th day of June, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. BRANDON ROBERTS, Cause No. 67414-5-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

6/19/12
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