

No. 77281-9
SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

KENDRA LYNN WATT,

Petitioner

SUPPLEMENTAL BRIEF OF PETITIONER

August 3, 2006

Douglas D. Phelps
Attorney for Petitioner

WSBA #22620
PHELPS AND ASSOCIATES
2903 N. Stout Rd.
Spokane, WA 99206
(509) 892-0467

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A. Assignments of Error

1. The state has chosen, in their answer, to put into issue whether or not the errors committed by the trial court were harmless. Even should the court find that harmless error analysis applies to *Crawford*, the admission of the statements was not harmless error under the stricter constitutional approach which must be applied.

B. Statement of the Case

The defendant, Kendra Watt, resided at her home at 402 Abbott Street, Richland, Washington, with her husband James Watt. (RP 317-318) The Tri-City Metro Drug Task Force Detective Rick Runge obtained a search warrant based on his affidavit. (CP 192-205) On June 1, 2001 at approximately 11:00 A.M., the officers of the Metro Drug Task Force executed the search of 402 Abbott Street, Richland, Washington. (RP 51-52) The home was a ranch style home with a detached garage located in the northeast corner of the backyard. (CP 192) Mr. James Watt and Mrs. Kendra Watt were both arrested and charged with drug charges involving the manufacture of methamphetamine and criminal mistreatment in the second degree. (CP 262-263, 174-175, 241-246).

On February 14, 2002, the state issued a subpoena for James E. Watt. (CP 165) The case proceeded to trial on March 18, 2002 (RP Vol. 1 p. 1) before the Honorable Carolyn A. Brown. At trial the prosecution indicated that they had no intention of calling James Watt. (RP 8-10) The state argued that it wanted to introduce in opening argument the plea of Mr. James Watt in the trial against Mrs. Watt. The defense objected and the court ruled that this information should not come in during opening statements. (RP 10) But the court indicated a willingness to allow the state to introduce the "Statement of

Defendant on Plea of Guilty” at trial. (RP 11) The defendant noted an exception to the court’s ruling. (RP 11)

During the trial, the prosecution called Robert Savage who was referred to as the concerned citizen in the search warrant affidavit. Mr. Savage testified that “he used to get drugs from Kendra Watt.” (RP 12) He testified at the trial and claimed to have provided evidence against James Watt out of concern for children. (RP 15-18) Mr. Savage described the process he observed Mr. Watt use in cooking methamphetamine. (RP 18-20) He testified that he assisted the police with cases involving Yance Bradley and Sean Dorman prior to Mr. Watt’s case. (RP 23-25) The defense questioned Mr. Savage regarding his ability to “recollect” events (RP 26 line 6-21). The defense questioned him about his drug use and psychiatric admissions. (RP 26 line 11-19) The prosecution objected (RP 26 line 17) arguing it was merely to discredit the witness. The defense argued that the information regarding drug use and psychiatric admissions was admissible for consideration of how it affects the witness’s memory or powers of observation and ability to testify accurately. (RP 22 line 13-25 to RP 29 line 14) The court ruled that was not allowed as an area of cross-examination. (RP 29-32)

The state prepared a certified copy of Mr. Watt’s Statement of the Defendant on Plea of Guilty, crossing out “I have reviewed the evidence against me on my own with my attorney. I’ve come to the conclusion that a jury would find me guilty after hearing the evidence on all three counts, as well as the enhancement. I wish to take advantage of the State’s offer.” (RP 87 line 19-25) Other information blocked out included “I admit to making a small amount of meth” and “For my wife’s use.” (RP 88) The prosecutor sought to admit the redacted pages 1 and 7 of Mr. Watt’s Statement on Plea of guilty as

Exhibit 83. (RP 88) The two pages that were admitted had large spaces that were blacked out. (Ex 83) The argument against admission of the document was renewed again prior to admission of the document. (RP 294-300) Cases cited by defense counsel included *State v. Hoffman*, 116 Wn.2d 51 (1991), *Bruton v. United States*, 391 U.S. 123 (1968), and *Gray v. Maryland*, 532 U.S. 185 (1998). A limiting instruction was requested and the court stated, "I will do the limiting instruction. The sole purpose of the admission is to establish Mr. Watt pled guilty and the jury may consider it for no other purpose." (RP 300 line 2-5) The defense-requested and court ordered instruction was never given after the decision was made by the court to give the limiting instruction. (RP 394-408; CP 119-145).

Additionally, the prosecution at trial sought to introduce hearsay statements allegedly made by Mr. James Watt to Detective Rick Runge that "he manufactured his own anhydrous ammonia." (RP 235) The defense objected arguing that this was an attempt to introduce testimony without granting the defense the right of confrontation. (RP 235-238 and 248-250) The court ruled that only testimony that Mr. Watt made his own anhydrous would be admitted. (RP 238 line 3-10). Then the prosecution brought testimony beyond that allowed by the court's order. Detective Runge testified that "It was fewer people to be aware of what he was involved in and he also didn't believe in theft and that's how. . ." (RP 250 line 6-10). The defense sought a mistrial for the prosecution's violation of the court's order. (RP 250-251) The court refused the defense motion for a mistrial. (RP 251)

The state moved the court to exclude any evidence of physical violence or domestic violence. (RP 303 line 15 to RP 307 line 19) The defense argued for admission

of the evidence to show the power and control exerted by Mr. Watt over Mrs. Watt and to show that Mrs. Watt was not allowed into the garage. (RP 305-307) The court excluded testimony about domestic violence perpetrated by Mr. Watt. (RP 307 line 3-14)

In closing argument, the prosecutor argued that, “Mr. Watt, you’ll see his Statement of Plea of Guilty, pled guilty because he has the methamphetamine lab and because he was around children.” (RP 418) The prosecution argued that if the jury convicted her of manufacture, “that this follows as night follows day – that she created an imminent and substantial risk.” (RP 418) Further, in closing argument during rebuttal the prosecutor argued repeatedly, “Mr. Phelps said” (RP 440 line 17-18); “Mr. Phelps said” (RP 441 line 4-5); “Mr. Phelps said, well, maybe” (RP 441 line 13) at which time the defense objected to the personalization of the argument. The court admonished and instructed the prosecutor on how to form the argument. (RP 441-442) The prosecutor then returned to argue, “We know that’s true. You can take a look at what Mr. Watt said about this in his Statement on Plea of Guilty. He said I make methamphetamine.” (RP 442 line 1-8) Then the prosecutor returned to arguing about the defense counsel stating, “There is nobody who says that ...I’m gonna go back to this – except the defense attorney.” (RP 442-443 line 1-2) An objection was made, citing the prosecutorial misconduct in continuing this tactic after a court instruction, with a motion for mistrial. (RP 443 line 7-21) The court denied the motion for mistrial and instructed the prosecutor again. (RP 443 line 23-25)

The case proceeded and the jury was instructed by the court without any limiting instruction on the use of the Statement of Defendant James Watt designated as Exhibit 83. (RP 394-408; CP 119-145) Kendra Watt never testified at her trial. (RP Vol. I – III)

The defense moved the court for a new trial (CP 57-67; 95-104; RP April 19, 2002 p. 1-12) which was denied by the court. (CP 46) On May 22, 2002 Kendra Watt was sentenced before Judge Carolyn Brown (CP 6-13; RP May 22, 2002).

C. Argument

1. Crawford violations require analysis under the stricter harmless error analysis.

If an error affects a constitutional right, then that error must be held to a stricter standard of scrutiny than standard harmless error analysis. See *State v. Traweck*, 43 Wn. App. 99, 108, 715 P.2d 1148 (1986). An appellate court “must reverse unless we are convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt.” *Id.*

Crawford v. Washington established a new procedural right. *Crawford v. Washington* 541 U. S. 36 (2004). That procedural right was grounded in the Sixth Amendment confrontation clause. *Id.* Therefore, a violation of the case law in *Crawford* is a violation of the Confrontation Clause, and implicates a constitutional right. The correct standard for harmless error analysis, then, is whether this court can find beyond a reasonable doubt that the evidence in this case is so overwhelming that it necessarily leads to a finding of guilt.

2. The evidence in this case is not so overwhelming that it necessarily leads to a finding of guilt.

The first piece of *Crawford* evidence that was unlawfully admitted by the trial court was the statement of the Defendant’s husband to a detective. (RP 234-238). The state sought admission of this piece of evidence because its own expert had testified to

the fact that anhydrous ammonia or some substitute thereof was essential to the creation of methamphetamine. (RP 120 lln. 15-20, 186 lln 18-25, 187 lln. 1-7). Indeed, the state focused its case on the creation of what is known as “anhydrous methamphetamine.” (RP 189 lln. 10-18).

After being “challenged pretty severely – or strenuously,” as the state itself put it (RP 234 ln. 23), on the issue of whether or not there was anhydrous ammonia on the scene, the state sought to present the statement of James Watt to Detective Runge to the court. (RP 234-238). This statement was that James Watt had admitted to Detective Runge that he had made his own anhydrous ammonia on the scene; a crucial piece of evidence, placing the last necessary ingredient for the creation of methamphetamine on the scene.

The second statement unlawfully admitted by the trial court was James Watt’s written Statement Upon Plea of Guilty. (RP 316) The evidence presented in this statement was not merely that James Watt had pled guilty to manufacturing methamphetamine, but also that there were children on the premises. (RP 299 ln. 14-18). The trial in this case was a trial on two separate charges; Manufacture of Methamphetamine, and Criminal Mistreatment in the Second Degree. (RP 404 ln 9). The presence of children on the land at some point had been shown by prior testimony, but the statement of James Watt was particularly incriminating in that it stated that he manufactured his own methamphetamine, and that children were on the premises. It also stated that the children were not “present” when he was manufacturing the meth, but it admitted that they were on “the premises.” (RP 299 ln. 14-18).

The state noticed that this evidence was particularly effective, and used it heavily in its closing argument. (RP 418 ln. 2-12). Because of the Statement on Plea of Guilty, the state said, the Criminal Mistreatment followed from the charge of methamphetamine “as night follows day.” (RP 418 ln. 8). It is the only piece of evidence that the state referred to in closing with respect to the presence of children; from that action alone it is easily inferred that the state believed this to be their best piece of evidence as regards the Criminal Mistreatment charge.

The state now asks this court to find that the admittance of these pieces of evidence were harmless errors, that it is beyond a reasonable doubt that the evidence in this case is so overwhelming that it necessarily leads to a finding of guilt.

The state cannot have it both ways. At trial, the state argued that it needed this evidence because it had been “severely” challenged on these points. At trial, the state relied solely upon one of these pieces of evidence in closing to argue for one of the charges presented. At trial, the state argued hard that these pieces of evidence were necessary to refute claims being made by the defendant.

Now the state wishes to argue that these pieces of evidence were meaningless, that without them the evidence is so overwhelming that it necessarily leads to a finding of guilty. The state asks the court to find in this manner for the reason that the primary contention of the defense at trial was the defendant’s *knowledge* of the existence of the methamphetamine lab, and not the existence of a methamphetamine lab itself. (State’s Answer to Petition for Review, p 10, 11).

There are two flaws with this argument; first and foremost is the fact that the very unlawful admission of the pieces of evidence forced the defense to rely solely upon the

defense of knowledge. The fact that the state used unlawful evidence to preclude argument from the defense does *not* entitle the state to then suggest that the defense's failure to make that precluded argument to the jury makes the admission of that evidence harmless error. That is a circular argument, and it fails to show the court anything of what might happen in a new, properly conducted trial.

The state's own expert on testing methamphetamine labs could not testify that there was methamphetamine production occurring at this residence. (RP 208 lln 11-12). While Mr. Savage was able to testify that he observed methamphetamine production occurring (RP 14 ln 5), he also testified that he was under the influence of methamphetamine at the time (RP 21 ln 18), and his credibility was severely in doubt from other collateral attacks, including his attempting to purchase a piece of property which was originally going to be purchased by the defendant and her husband the day after they went to jail (RP 349 lln 4-5) and the suggestion that Savage may have been testifying solely to eliminate potential competition (RP 259 lln. 2-7). The Drug Task Force officer testified that there was no anhydrous ammonia on scene, and that anhydrous methamphetamine cannot be manufactured without anhydrous ammonia. RP 120 lln. 15-20, 186 lln 18-25, 187 lln. 1-7).

Had the statements of the defendant's husband not been admitted, the state would not have presented any credible witnesses to show that there was actually manufacture of methamphetamine taking place at the residence. There would have been the circumstantial evidence of methamphetamine production found during the search, and the testimony of the unreliable Mr. Savage, but there would not have been the completely conclusive statement of Mr. Watt that he cooked methamphetamine on the premises, that

he made his own anhydrous ammonia with which to cook methamphetamine, and that children were present on the premises. The situation at trial was dramatically altered by the presence of these statements, and as such the defense was forced to rely on the theory of knowledge. The fact that the defense had to rely on that theory because of these statements is not proof beyond a reasonable doubt that the defense would have no other theories available without that evidence.

The second flaw with the state's argument is that it addresses only the charge of manufacture of methamphetamine. The state overlooks the charge of Criminal Mistreatment. The Statement Upon Plea of Guilty of James Watt was the *only* piece of evidence the state referred to in closing with reference to this charge, and for the state to then suggest that without that piece of evidence the evidence of this charge remains so overwhelming that it necessarily leads to a finding of guilt is not only self-contradicting, but also ridiculous.

D. Conclusion

While the defense maintains that application of harmless error analysis is inappropriate as regards *Crawford* statements, as briefed in the petition for review, should this court choose to apply harmless error analysis to this case, the court should find that the errors committed in unlawfully allowing the admission of testimonial statements while denying the defendant his constitutional right to confrontation were not harmless error, and therefore a new trial must be afforded to the defendant in this matter.

Respectfully Submitted this 3rd day of August, 2006.



Douglas D. Phelps, WSBA# 22620
Attorney for Petitioner Watt