

66022-5

66022-5

NO. 66022-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM BROWN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether Brown's claim that his rights under the Confrontation Clause were violated should be rejected because the statement in question was not testimonial, and any possible error is harmless.

2. Whether Brown's claim that the trial court abused its discretion in admitting unflattering testimony about Brown should be rejected because the trial court's rulings were reasonable, the claim is waived because Brown did not make a timely objection at trial, and any possible error is harmless.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, William Brown, with possessing stolen property in the second degree (access device) and possessing stolen property in the first degree (value exceeding \$1500) based on the possession of a stolen purse belonging to Barbara Brittain. Brown's co-defendant, Christina Lux, was charged with theft in the second degree and theft in the first degree based on the theft of Brittain's purse. CP 1-7, 18-19.

The defendants were tried to a jury in August 2010 before the Honorable Jeffrey Ramsdell. At the end of the trial, the jury acquitted Brown of possessing stolen property in the second degree, and as to first-degree possessing stolen property, the jury convicted Brown of the lesser degree offense of possessing stolen property in the third degree. CP 58-59; RP (8/18/10) 334. The jury acquitted co-defendant Lux of theft in the second degree, and could not agree on a verdict as to theft in the first degree. RP (8/18/10) 334. Brown received a suspended sentence, and now appeals. CP 63-67.

2. SUBSTANTIVE FACTS

In June 2009, Frank Harris was living in an apartment in the Richmond Beach neighborhood of Shoreline. RP (8/12/10) 54. Defendants Christina Lux and William Brown were living in Harris's apartment, as was Barbara Brittain. RP (8/12/10) 54-55.

In the early morning hours on June 20, 2009, Brittain was moving some of her things into the apartment, and she briefly left a suitcase and her purse in the lobby next to the elevator to get more things out of her friend's car. When Brittain returned to the lobby, her purse was gone. RP (8/12/10) 91. The purse contained,

among other things, Brittain's ATM card for a Money Tree account and her dentures, which she estimated would cost over \$2000 to replace. RP (8/12/10) 92-95.

That same morning, Frank Harris awoke to noises in the kitchen; Harris came out of his room and found Lux in the kitchen making a sandwich after having just returned from the hospital. RP (8/12/10) 55, 81. Lux told Harris that she had found a purse next to the elevator and took it, but she did not realize it was Brittain's when she took it. Harris told Lux to put it back where she found it, but Lux gave it to Brown instead. RP (8/12/10) 55-56.

Harris offered to put the purse back where Lux had found it. Brown said he would give it back to Brittain eventually, but he "want[ed] to make her sweat." Brown did not explain this remark, but Harris assumed it was because Brown did not like Brittain. RP (8/12/10) 58-59. When Brown was rummaging around in the purse, Harris heard Brown say "ooh, teeth." RP (8/12/10) 58. When Harris later asked Brown if he gave the purse back to Brittain, Brown said he had thrown it away. RP (8/12/10) 61.

A few days later, Lux admitted to Brittain in Harris's presence that she had taken the purse. Lux said she took the purse "and

gave it to William[.]”¹ RP (8/12/10) 63. Lux also said she had ingested "150 pills," and then she vomited on the stove after turning on the burners. RP (8/12/10) 64. Harris and Brittain called 911 and helped the paramedics put Lux on a gurney to take her to the hospital. RP (8/12/10) 64, 98.

Brittain was very upset by the loss of her purse, and particularly the loss of her dentures. RP (8/12/10) 91. Brittain was unable to replace them for nine months. RP (8/12/10) 93.

When Brittain was asked about the source of the animosity between her and Brown, Brittain stated (without objection) that about two weeks before her purse was stolen Brown had "shorted" her on a crack cocaine deal, meaning that he had not given her enough crack for the money she had paid, and that their relationship changed for the worse after that. RP (8/16/10) 185-86, 188. Brittain also stated that she found Brown intimidating, and she had heard him say that he was going to kick a woman in the crotch and beat her because she owed him money. RP (8/16/10) 187.

Although Brown's trial counsel argued that this testimony was

¹ The trial court sustained Brown's counsel's timely objection to this remark. RP (8/12/10) 63. The parties had agreed prior to trial that Lux's statement that she gave the purse to Brown would not be admitted. RP (8/11/10) 133.

inadmissible, counsel specifically stated that she was "not moving for a mistrial." RP (8/16/10) 204. The trial court denied counsel's request to instruct the jury to disregard the testimony, but invited her to propose a limiting instruction. RP (8/16/10) 204. No instruction was proposed.

Additional facts will be discussed below as necessary for argument.

C. ARGUMENT

1. BROWN'S CLAIM REGARDING THE CONFRONTATION CLAUSE SHOULD BE REJECTED BECAUSE THE STATEMENT AT ISSUE WAS NOT TESTIMONIAL AND BECAUSE ANY ERROR IS HARMLESS.

Brown first claims that his right to confrontation was violated when Frank Harris testified that Lux told him that she had given Barbara Brittain's purse to Brown. He argues that this isolated remark, to which an objection was made and sustained, mandates reversal under Bruton v. United States² and its progeny. Brief of Appellant, at 5-13. This claim should be rejected for two reasons. First, the Confrontation Clause is not implicated by this testimony

² Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

because the statement at issue is not testimonial. Second, any possible error is harmless.

The United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), fundamentally changed the focus of Confrontation Clause analysis. Whereas prior case law had focused on the reliability of out-of-court statements to determine admissibility, Crawford shifted the focus to the question of whether such statements are "testimonial" in nature. Accordingly, under Crawford, a declarant's "testimonial" out-of-court statements are not admissible unless the defendant has been given an opportunity to cross-examine that declarant. However, Crawford "[e]ft for another day any effort to spell out a comprehensive definition of 'testimonial.'" Id. at 68. At the very least, as is relevant here, the Court identified "[s]tatements taken by police officers in the course of interrogations" as being "testimonial under even a narrow standard." Id. at 52. At the other end of the spectrum, an "off-hand, overheard remark" would be subject to hearsay rules, not the Confrontation Clause. Id. at 51.

Some further guidance was provided by the Court's later decision in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). In Davis, the Court ruled that a 911

caller's statements were not testimonial because they were made to assist the police in responding to an emergency, not to assist in a later court proceeding. Davis, 547 U.S. at 822. In reaching this conclusion, the Court emphasized that the Confrontation Clause is implicated only by the admission of *testimonial* statements:

A critical portion of [Crawford's] holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Davis, 547 U.S. at 821 (citation omitted). The Court also reiterated what it had held in Crawford: that custodial interrogation "directed at establishing the facts of a past crime" produces statements (*i.e.*, confessions) that are unquestionably testimonial. Davis, at 826.

In Bruton, which predated Crawford by several decades, the United States Supreme Court considered whether the defendant's robbery conviction should be reversed because his non-testifying co-defendant's custodial confession (which incriminated Bruton) was admitted at trial. Bruton, 391 U.S. at 123-24. As did the Crawford Court many years later, the Bruton Court observed that the Confrontation Clause requires that the defendant be given the

opportunity "to cross-examine the witnesses against him," and that the admission of the co-defendant's confession was unquestionably a violation of this right, even though the jury had been instructed to disregard this evidence in determining Bruton's case. Id. at 126. In so holding, the Court analogized Bruton's case to Jackson v. Denno,³ wherein the Court struck down a procedure by which the jurors were tasked with determining whether the defendant's custodial confession was constitutionally voluntary, and if not, they were expected to disregard it. Bruton, 391 U.S. at 128-31. In so holding, the Bruton Court at least implicitly recognized that a custodial confession is a unique type of out-of-court statement, and that certain safeguards are necessary before a confession is admitted, whether at a joint trial or otherwise.

Although they were decided many years apart, Bruton and Crawford are entirely consistent with one another. Both cases hold that the custodial confession of another person cannot be admitted as evidence against a criminal defendant without an opportunity for cross-examination. Crawford explains why this is the case, *i.e.*, because custodial confessions are quintessentially testimonial

³ Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

statements that trigger the protections of the Confrontation Clause. However, in cases such as this one where the statement at issue is *not* testimonial, the Confrontation Clause is not implicated. Accordingly, although Lux's statement to Frank Harris that she gave Barbara Brittain's purse to Brown was hearsay as to Brown, it does not give rise to a constitutional issue.

Nonetheless, Brown argues that the Bruton rule applies to all statements by non-testifying co-defendants, whether testimonial or otherwise. In support of this proposition, Brown cites Bruton itself (which, again, predates Crawford by several decades) and a federal trial court memorandum opinion from Virginia that does not appear to be published. See Brief of Appellant, at 8. However, several state and federal appellate courts have recently reached the conclusion that Bruton applies only when testimonial statements are at issue. See, e.g., State v. Usee, ___ N.W.2d ___ (2011 WL 2437271) (Minn. Ct. App. 2011); People v. Arceo, 195 Cal. App. 4th 556, 571-75, 125 Cal. Rptr. 3d 436 (2011); Thomas v. United States, 970 A.2d 1211, 1222-25 (D.C. 2009), *cert. denied*, 131 S. Ct. 196, 131 S. Ct. 282 (2010); United States v. Castro-Davis, 612 F.3d 53, 64-66 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 970, 131 S. Ct. 1056 (2011); United States v. Johnson, 581 F.3d

320, 328 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010); United States v. Spotted Elk, 548 F.3d 641, 662-64 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1688 (2009). As the First Circuit recently explained,

The Bruton/Richardson⁴ framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place. If none of the co-defendants has a constitutional right to confront the declarant, none can complain that his right has been denied. It is thus necessary to view Bruton through the lens of Crawford and Davis. The threshold question in every case is whether the challenged statement is testimonial. If it is not, the Confrontation Clause has no application.

United States v. Figueroa-Cartagena, 612 F.3d 69, 85 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 2930 (2011) (quotation marks and citation omitted).

Moreover, although neither the Washington appellate courts nor the Ninth Circuit have expressly ruled on this issue, both Division Two of this Court and the Ninth Circuit have held that Bruton and Crawford are consistent in that both concern the exclusion of testimonial statements: specifically, the custodial

⁴ See Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987) (confession of non-testifying co-defendant admissible in a joint trial if references to defendant are redacted and jury is given a limiting instruction).

confessions of co-defendants. In re Personal Restraint of Hegney, 138 Wn. App. 511, 543-47, 158 P.3d 1193 (2007); Mason v. Yarborough, 447 F.3d 693, 694-96 (9th Cir. 2006).

In sum, this Court should reject Brown's argument that his Sixth Amendment confrontation rights were violated by the inadvertent admission of Lux's non-testimonial statement that she gave Brittain's purse to Brown. This statement does not implicate the Confrontation Clause, and thus, Brown's claim fails.

But even if this Court were to conclude that Lux's statement somehow implicates the Confrontation Clause, its admission is harmless under any standard of review. A constitutional error is harmless if the court is convinced beyond a reasonable doubt that the verdict would be the same if the error had not occurred. Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

In this case, Harris testified that Lux told him and Brittain that she had taken the purse and "gave it to William[.]" Brown's counsel objected, and the objection was sustained. RP (8/12/10) 63. The remark was made in passing and was not repeated. Immediately after this remark, Harris testified that Lux told him and Brittain that she had taken "150 pills," and that Lux then turned on all the

burners on the stove and threw up on them. RP (8/12/10) 64. This testimony was far more likely to attract the jury's attention than the passing remark about giving the purse to Brown.

In addition, Harris testified that he personally witnessed Brown in possession of the purse, that he saw Brown rummaging around in the purse, and that while Brown was rummaging, Harris heard Brown say "ooh, teeth," in reference to Brittain's dentures. RP (8/12/10) 56-58. Harris also testified that when he later asked Brown if he had given the purse back to Brittain, Brown said he had thrown it away. RP (8/12/10) 61. In short, there was ample evidence other than Lux's remark that established Brown's possession of the purse.

Also, the jury acquitted Brown of one count of possessing stolen property, and found him guilty of a gross misdemeanor instead of a felony on the other count. CP 58-59. There is no basis to doubt that this verdict would have been the same absent Lux's statement that she gave the purse to Brown. Thus, any error is harmless, and this Court should affirm.

2. BROWN'S CLAIM REGARDING THE TRIAL COURT'S EVIDENTIARY RULINGS SHOULD BE REJECTED BECAUSE THE TESTIMONY WAS ADMISSIBLE, THE CLAIM IS WAIVED, AND ANY ERROR IS HARMLESS.

Brown next claims that the trial court abused its discretion in allowing Barbara Brittain to testify regarding certain unflattering aspects of Brown's behavior. Specifically, Brown claims he was unfairly prejudiced by Brittain's testimony that he "shorted" her on a crack deal, and that he talked about kicking a woman in the crotch and beating her because she owed him money. Brief of Appellant, at 13-20. This claim should be rejected for three reasons. First, the testimony at issue was admissible for tenable reasons. Second, this claim is waived due to the failure to make timely objections on a proper basis at trial. And third, any possible error is harmless.

Evidentiary rulings are matters addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion in deciding whether evidence is admissible only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no

reasonable person would have ruled as the trial judge did.

Atsbeha, 142 Wn.2d at 914.

As a preliminary matter, Brown frames this issue under the rubric of ER 404(b). Brief of Appellant, at 13-15. But this testimony was not admitted under ER 404(b). Rather, as the trial court explained outside the presence of the jury after the testimony had already occurred, the testimony regarding the crack deal was admitted so that Brittain could explain why she and Brown disliked each other, and the testimony regarding Brown's threats to assault a woman who owed him money was admitted so that Brittain could explain why she was intimidated by Brown. RP (8/16/10) 192-93. In other words, the testimony was not admitted in order to prove something about Brown under ER 404(b), such as motive or intent; it was admitted for the purpose of allowing Brittain to explain why, although she had stated during her defense interview that she had no problems with Brown, she had testified at trial that there was animosity between them. Thus, Brown's arguments under ER 404(b) are inapposite. Moreover, because the testimony at issue was admitted for tenable evidentiary reasons, Brown's claim is without merit in any event.

In addition, Brown overstates the record in asserting that all of the testimony at issue was admitted "over defense objection." Brief of Appellant, at 16. Brittain testified about the crack deal where Brown "shorted" her without any objection at all. RP (8/16/10) 185-87. Accordingly, any claim with respect to this testimony is waived. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5. Further, although defense counsel did object when Brittain stated that she had heard what Brown "would do to other people if he didn't get his money," counsel did not state a basis for this objection. RP (8/16/10) 187. Accordingly, the record reveals that the trial court likely sustained the objection on grounds of hearsay, then overruled subsequent objections (which also were made without a stated basis) when it became clear that Brittain was testifying about what she had heard *Brown* say (which is not hearsay under ER 801(d)(1)). RP (8/16/10) 187-88. This issue has also not been preserved for appeal, as a proper basis for an objection is required to make a sufficient record. Kirkman, 159 Wn.2d at 926 (citing State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985)). Thus, Brown's claim fails because it is waived.

Finally, any possible error is harmless. Non-constitutional evidentiary error is harmless unless the record shows a reasonable probability that the outcome of the trial would have been different if the error had not occurred. State v. Templeton, 148 Wn.2d 193, 220, 59 P.3d 632 (2002). Also, a defendant's failure to request a curative instruction or move for a mistrial "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Here, Brown's trial counsel specifically stated that she was not requesting a mistrial. RP (8/16/10) 204. And, although trial counsel asked the court to instruct the jury to disregard the testimony, when this request was rejected, counsel declined the trial court's offer to give a limiting instruction. RP (8/16/10) 204. The jury ultimately acquitted Brown of one count of possessing stolen property, and convicted him of gross misdemeanor instead of a felony as to the other. CP 58-59. This record shows no reasonable probability that the outcome of the trial would have been different absent Brittain's testimony about the crack deal and the threats. Brown's claim fails for this reason as well.

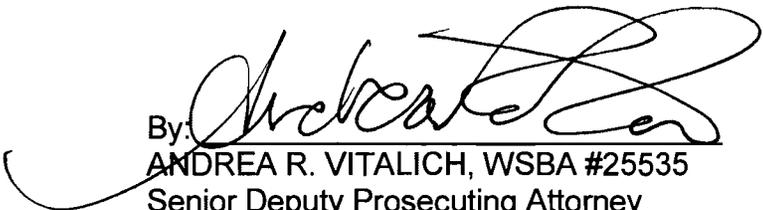
D. **CONCLUSION**

Brown's rights under the Confrontation Clause were not violated by the admission of non-testimonial hearsay, and the trial court's evidentiary rulings were reasonable. This Court should reject Brown's claims for the reasons stated above, and affirm.

DATED this 26th day of July, 2011.

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 Jan Trasen, 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. WILLIAM BROWN, Cause No. 66022-5-1, 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.

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