

No. 36111-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent

vs.

TRAVIS L. WEIGHALL,
Appellant

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DIVISION II
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STATE OF WASHINGTON
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RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Whether, in light of Crawford v. Washington, when the principal is called to the stand and testifies that he remembers neither the crime to which he pled guilty nor his confession which implicates the defendant on trial as an accomplice, the recorded transcript of that confession may be read to the jury.

Appellant's assignment of error No. 1: *The trial court erred in finding Fowler available and in admitting his out-of-court testimonial statement to Detective Haller in violation of Weighall's confrontation rights.*

2. Whether, when (a) Defendant's counsel has objected to the admissibility of a recorded confession of a principal called as a witness, and (b) the court has ruled the statement admissible under either ER 803(a)(5) (witness available/recorded recollection) or ER 804 (a)(3) (witness unavailable/can't recall), counsel's failure to specifically argue violation of the confrontation clause as interpreted in Crawford v. Washington amounts to incompetence of counsel requiring reversal.

Appellant's assignment of error No.2.: *The trial court erred in permitting Weighall to be represented by counsel who provided ineffective assistance by failing to object to the admission of Fowler's out-of-court testimonial statement to Detective Haller because it violated Weighall's confrontation rights.*

B. STATEMENT OF THE CASE

On March 22, 2007, a Thurston County jury found Weighall guilty of being an accomplice to an attempted robbery with a firearm which occurred August 19, 2005. Aaron Fowler was the principal. The two other accomplices were Martin Deubert and Amanda Deubert. (Amanda Farra at the time of the crime; she and Martin married in December 2005.) The victim was Ronald Nelson. All were called to testify at Weighall's trial. Fowler and both of the Deuberts had already entered guilty pleas.

Fowler wanted to rob Nelson because he thought Nelson owed him some money and a car title. His plan was simple. He called Nelson in the early morning hours asking for help with a car problem in a relatively remote area. He drove there himself with Weighall and the Deuberts, carrying a shotgun in his vehicle. En route, Weighall called Nelson on Fowler's cell phone to be sure he had good directions to the rendezvous. Weighall was to take Nelson's car after the robbery.

When the victim Nelson arrived and exited the car of the friend who gave him a ride, Fowler got out of his car with his shotgun and, to the apparent surprise of his accomplices, fired three rounds at Nelson, who went down. His frightened friend drove away. Instead of proceeding with the robbery, Fowler got back into the passenger side of his vehicle. Weighall drove them away, swerving and speeding. Nelson was able to find his way to a pay phone and summon help.

Ronald Nelson testified. [V.I RP 33-75]. He knew Weighall. It was Weighall who called him on the cell phone to give him directions to the rendezvous. [V.I RP 38].

Martin Deubert testified. [V.I RP 90-183]. He explained how Fowler asked him to help with the robbery and he agreed. [V.I RP 108]. He described the actual plan and robbery attempt including Weighall's role. Weighall called Nelson to be sure he had good directions. Weighall planned to take Nelson's car after the robbery. After the shooting Weighall was the one who drove the four of them away from the scene swerving

and speeding. The shotgun was beside him in the front of the vehicle. [V.I RP 118-135]. Martin Deubert pled guilty on December 27, 2005. [V.I RP 155].

Amanda Deubert testified. [V.II RP 206-234], [V.II RP 261-234]. She heard the discussion between Fowler, Weighall and her husband about the plan to commit a robbery, including Weighall's agreement to take the vehicle that Nelson showed up in. [V.II RP 226]. Amanda Deubert pled guilty on December 27, 2005.

Aaron Fowler, then incarcerated in the Department of Corrections, was called to testify. After the court and counsel discussed what to do if he either refused to testify or claimed loss of memory, [V.II RP 234-240], he testified during an offer of proof by the State. [V.II RP 240-261]. After first indicating he would flatly refuse to testify, he went on to claim that was because he didn't remember anything that happened. He claimed he had just met Weighall in the Thurston County jail. Although he remembered where he lived and what kind of car he drove in August 2005, he claimed not to know Ronald Nelson, Martin Deubert or Amanda Deubert. [V.II RP 241-243]. Although he knew he was in prison for assault and attempted robbery, he claimed not to remember anything about the events of August 19, 2005 even though he recognized his signature on his guilty plea statement dated April 11, 2006. Nor would he admit remembering turning himself in on August 20th or 21st, 2005 or giving a statement on November 18th, 2005, even though he recalled his then

attorney's name. [V.II RP 246-249]. Even when Weighall's attorney handed him his written signed statement to Detective Haller, he claimed he couldn't remember giving it. [V.II RP 253]. After hearing all this, the court allowed him to take his written statement with him and look it over before being recalled. [V.II RP 258]. Upon recall, he claimed that reading his written statement had not refreshed his recollection. [V.II RP 307-310].

Detective Haller testified in an offer of proof explaining the circumstances surrounding the interview with Fowler and the written statement taken on Nov.18th, 2005. [V.II RP 311-320]. Prior to meeting with Fowler, he spoke with Fowler's then attorney, Richard Woodrow, and received authorization for the interview of his client. [V.II RP 312]. Fowler acknowledged his attorney's permission, gave a very detailed statement consistent with everything else the detective knew about the case, claimed every thing he said was true and even agreed to take a polygraph if requested.

The Detective then made two other comments of particular significance to this appeal. First, after taking the statement from Fowler, he had interviewed the other two accomplices, Martin and Amanda Deubert on December 27th, 2005. Their statements meshed with what Fowler had told him on November18th, 2005. [V.II RP 315]. Second, in the company of the prosecutor and another detective who met with Fowler just before he was to be called to testify, Fowler made it very clear that he

wasn't going to be sworn in and wasn't going to testify no matter what. [V. II RP 316]. He did not then claim lack of memory.

The court then met with counsel to discuss options and hear argument about how to proceed. [V.II RP 321-335]. Weighall's attorney clearly objected to the admissibility of Fowler's statement.

“And again, I reiterate that it was given not subject to cross-examination, it's not given under the penalty of perjury, and so that's the basis for my objection to it being admitted as far as an exception to the hearsay.” [V.II RP 328].

This is a clear Crawford objection; a statement of a “nonavailable” witness may not be admitted unless the statement was made subject to cross-examination. Counsel didn't have to utter the specific words “confrontation” or “Crawford” to make his point.

Comfortable to proceed under either ER 804(a)(3) (a witness who “can't recall” is deemed unavailable) and ER 803(a)(5) (the recorded recollection of an available witness is admissible) the Court explained its ruling as follows:

“All right. Well, here's the way I see this. I think it's an issue for the court, that is, a legal issue rather than an issue for the jury about whether or not Mr. Fowler is available or unavailable, and I think that I could exercise my discretion in either way in this particular case based on the facts presented. It's how I interpret those facts. And while I will candidly tell you that I'm skeptical about Mr. Fowler having no memory about this situation, or the giving of a statement, he has agreed to take the oath, and so I plan to have him called as a witness, asked by the court to take the oath.” [V.II RP 328-329].

Fowler did take the stand. Fowler did take the oath. Although he remembered pleading guilty to first degree assault and first degree attempted robbery, and recognized the *judgment and sentence* shown him, he claimed to recall nothing about the events of August 19, 2005. [V.II RP 336-341]. Pursuant to ER 803 (a)(5), Detective Haller was then called and read to the jury the statement Fowler had given him November 18th, 2005. The memorandum itself was not received as an exhibit.

C. ARGUMENT

1. When an already sentenced principal is subpoenaed for the trial of an accomplice and testifies to substantial lack of recollection about either the crime or his written signed statement which implicates the accomplice, it is a proper exercise of the trial court's discretion and not a violation of the Confrontation Clause as interpreted in *Crawford v. Washington* to allow the detective who took the statement to read it into the record. (Appellant's Assignment of Error No.1)

Weighall argues that the written signed statement of Aaron Fowler, the principal in the armed robbery who had already pled guilty and been sentenced, should not have been allowed to be read into the record for the jury's consideration. It is abundantly clear from the record that the trial judge and counsel gave studied consideration to Fowler's asserted lack of recollection. Before he was called to the stand, they were not sure whether he would refuse to testify or, should he be required to testify, claim faulty memory. [V.II RP 237].

After his testimony (twice) in the State's offer of proof, it is clear why they were not quite sure how to characterize it. To call his testimony, both before, [V.II RP 240-259], and after, [V.II RP 307-311], he was

given an opportunity to review his signed statement, equivocal is an understatement. See for example [V.II RP 308]:

Q. (prosecutor) “Do you have any reason to think that your statement given on November 18th, 2005 was untruthful?”

A. “I couldn’t say so or not. I don’t believe so. I’m not a liar.”

Q. “In that statement that you read, the officer, Detective Haller, asked you, “Is this statement true to the best of your knowledge?” And you said “Yes”. Is that consistent with what you read?”

A. “Yes, that is.”

On several occasions the trial court and counsel discussed the arguably applicable rules of evidence, focusing on ER 804(a)(2)(3) and ER 803(a)(5) set forth in pertinent part below: [V.II RP 321]

RULE 804 HEARSAY OBJECTIONS: DECLARANT UNAVAILABLE

(a) Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant:

(2) Persists in refusing to testify concerning the subject matter of the declarant’s statement ; or

(3) Testifies to a lack of memory of the subject matter of the declarant’s statement;

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

(a) Specific Exceptions. The following are not excluded by the hearsay rule, *even though the declarant is available* as a witness. (emphasis added)

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

In this context, the trial judge's following comment is of interest, "It does not appear that either attorney is telling me that I should rule one way or the other. You're saying it could go either way." [V.II RP 324].

Had he ruled Fowler *unavailable* because of his testimony to lack of memory (or, it is submitted, because his claim of memory loss after being ordered to take the oath and the stand during the offer of proof was so transparent it could be deemed refusal to testify) he would not be called before the jury. He eventually ruled Fowler *available* triggering ER 803(a)(5) cited and quoted above. [V.II RP 328].

He went on to make it clear that he would have been comfortable admitting the statement itself into evidence under ER 804(b)(3) as an exception to the hearsay rule because he was convinced it was a statement against penal interest with sufficient indicia of reliability.

"But on the issue of indicia of reliability, I'm convinced that the facts surrounding the giving of this statement in this particular context would support that either as a recorded recollection or under Rule 804 as a statement against penal interest." [V.II RP 331].

Although the trial judge did not base his ruling explicitly on whether or not Fowler's confession was made under oath or subject to perjury, even though that was one of the bases of counsel's objection, [V.II RP 328], it appears clear that both counsel and court were aware of the applicable law. The prosecutor specifically mentioned some possible concerns about the possible consequences of ruling the witness "unavailable" [V.II RP 321].

The State respectfully submits that Aaron Fowler was clearly “available” as a witness; he was three times subject to cross-examination by Weighal’s attorney. It was Weighall’s attorney who confronted him with his very detailed statement to Detective Haller. [V.II RP 253].

It is not unusual for a witness in a criminal case to have a change of heart at trial and “disremember” a recorded statement to police. State v. Alverado, 89 Wn. App. 543, 949 P.2d 1831 (1998) addressed this situation. There an eyewitness to a murder gave an oral statement to police which was recorded on a tape recorder. At trial he claimed he could not remember the events in question and refused to verify the accuracy of the tape-recorded statements. Considering the detailed nature of the statements and other circumstantial factors, the court held that the hearsay exception for recorded recollections applied.

“...the rule provides no particular method of establishing accuracy and that the issue must be resolved on a case-by-case basis. We hold that the requirement that a recorded recollection accurately reflect the witness’ knowledge may be satisfied without the witness’ direct averment of accuracy at trial.”

Alverado, *supra* at 551.

Here, Fowler’s statement was written and signed with the permission of his attorney. It was detailed. It was corroborated by the trial testimony of the other accomplices. Weighall’s trial counsel called Alverado to the court’s attention as well as this Division’s opinion in State v. Florek, 140 Wn. App. 135 (2002). [V.II RP 237-238]. There this court found error in the trial court’s admission as substantive evidence under ER

804 of a witness' testimony the witness called a lie. To the State's argument that the statement was admissible under ER 803, this court responded that the Alverado court found it significant that the witness did not specifically disavow the statement. Florek did disavow his statement. In this case, however, State's witness Fowler, like the witness in Alverado, did not disavow his; he simply chose not to remember it. The trial court did not admit his written statement into evidence. Pursuant to ER 803 it simply allowed Detective Haller to read it to the jury. Even if that were to be construed as error,

“An error in admitting evidence is nonconstitutional if the hearsay declarant and recipient testify and are cross-examined”

Florek, *supra*, at 140.

The court then went on to point out that a nonconstitutional error in admitting evidence requires reversal only if the error materially affected the outcome. Here, both the declarant Fowler and the recipient Detective Haller testified. Given the detail of the testimony of the two other accomplices a reasonable jury could have convicted Weighall even without Fowler's testimony.

In effect, Weighall argues that even if the witness Fowler was *available* pursuant to ER 803, he was not *constitutionally available* for 6th amendment confrontation clauses purposes, citing Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed. 2d 177 (2004), because his asserted lack of memory rendered him not subject to effective

cross examination. Our State Supreme Court recently rejected this argument in a thorough discussion of the implications of Crawford, concluding as follows:

“Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. (quoting footnote 9 of the U.S. Supreme Court’s opinion)...It is therefore irrelevant that the reliability of some out-of-court statements cannot be replicated even if the declarant testifies to the same matters in court. The clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.”

State v. Price, 158 Wn.2d 630, 647, 146 P.3d 1183 (2006)

The California Courts recently addressed an analogous situation in People v. Gunder, 151 Cal. App. 4th 412, 59 Cal. Rptr. 3rd 817, Cal. App. 3 Dist (2007). There the prosecutor called a longtime friend of defendant who had had an opportunity to review the transcript of his interview with investigators. The witness claimed lack of memory “because of medication” and asserted a general inability to confirm his statements in the interview. On appeal Gunder argued violation of his right to confront the witness and ineffectiveness of counsel for failing to object on that ground, (the same arguments Weighall makes). The California Court responded as follows:

“The circumstance of feigned memory loss is not parallel to an entire refusal to testify. The witness feigning memory loss is in fact subject to cross-examination, providing a jury with the opportunity to see the demeanor and assess the credibility of the witness, which in turn gives it a basis for judging the prior hearsay statement’s credibility. When a hearsay declarant is present at trial and subject to

unrestricted cross-examination the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness's demeanor satisfy the constitutional requirements. In the face of an asserted loss of memory, these protections will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. (Weighall's Assignment of error No.1). In light of this authority, a reasonably competent lawyer would not have bothered to assert an objection based on a violation of defendant's right to confrontation. (Assignment of error No.2)

Gunder, *supra*, at 420.

The Illinois Courts reached the same conclusion in People v. Bakr, 373 Ill. App. 3rd 981, 869 N.E.2d 1010, Ill. App. 1 Dist. (2007). There the prosecutor called several co-defendants whose confessions implicated the defendant. One, Nevarez, testified he did not remember conversations with Chicago police at the scene or his statements to them in a videotaped interview. Counsel argued his statement was inadmissible pursuant to Crawford because he was "unavailable." The trial court disagreed. The appellate courts affirmed.

"In Crawford v. Washington, the United States Supreme Court reinterpreted the Confrontation Clause and held that the 'testimonial' hearsay statements of a witness who is unavailable at trial may not be admitted against a criminal defendant unless the defendant had a prior opportunity for cross-examination. The Crawford Court also confirmed that 'when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraint at all on the use of his prior testimonial statements. Furthermore we elaborated on the Crawford Court's reinterpretation of the confrontation clause and held that 'a defendant's rights under the confrontation clause are not absolute; rather 'the confrontation clause' guarantees an opportunity for effective cross-examination not cross-examination that is effective in whatever way, and to whatever extent , the defense might wish'...Moreover, no confrontation clause

problems exist simply because a declarant's alleged memory problem precluded the declarant from being cross-examined to the extent that defense counsel would have liked."

Bakr, *supra*, at 1016.

In Johnson v. State, 878 A.2d 422 (2005) the Delaware Supreme Court addressed the same issue. Trial counsel objected to the testimony of a witness who "disremembered": "Your Honor, if this woman cannot recall what happened, I do not have a chance to cross-examine her. If I cannot cross-examine her, my client's confrontation rights are violated." The Court's succinct response, it is respectfully submitted, is appropriate here.

"We find that Johnson's reliance on Crawford is misplaced and his constitutional challenge unpersuasive. Crawford did 'not expressly require any specific quality of cross-examination'. The Confrontation Clause only guarantees a defendant the opportunity for effective cross-examination of the declarant, not effective cross-examination in whatever way and in whatever manner a defendant may wish."

Johnson *supra* at 428.

It is respectfully submitted that the arguments for affirming the trial court's decision that the confrontation clause was not violated are even stronger in this case than they were in Price, the case relied on by Weighall. There the witness was 6 years old. Here the witness was an adult. There the witness was the victim. Here the witness was the convicted principal to the crime. There the witness was emotionally vulnerable. Here the witness's statement was taken with explicit

acknowledged permission of counsel. There the child witness (victim) statement was crucial to the State's case. Here a reasonable jury could have convicted Weighall even without Fowler's testimony, based on the testimony of the two other accomplices.

Given this testimony by the co-accomplices and the testimony of the victim, even if there was error in letting the jury hear the detective recite Fowler's statement immediately after Fowler chose to testify that he "disremembered" it, the error was harmless. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d. 1120 (1997); State vs Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989).

The three tests set forth in Price to satisfy confrontation clause requirements were met here. 1. Fowler was required to testify under oath. 2. Defense counsel had full opportunity to cross examine him. 3. His demeanor was exposed to the jury which could determine whether he was telling the truth about his lapse of memory or whether he was for his own reasons evading. Price, supra, at 649.

2. Counsel for Weighall was not ineffective because he did not specifically mention the confrontation clause in his objection to the admissibility of witness Fowler's testimony. (Appellant's assignment of error # 2)

As discussed above, the record is clear that both counsel and court were well aware of the legal issues raised by Fowler's anticipated conduct on the witness stand, including the confrontation issue. Weighall's counsel had several opportunities to cross examine Fowler, and did confront him

with his signed statement. This case was the opposite of cases where the prosecutor attempted to shield the witness from the defense. In fact the prosecutor made every effort to make the witness available to full and unrestricted cross examination. Counsel clearly objected to the admission of witness Fowler's statement. [V.II RP 328]. The fact that he did not explicitly base his objection on the confrontation clause does not mean he was ineffective. He did object. The court understood his objection. A defense attorney's failure to challenge the foundation for the admission of incriminating evidence does not constitute deficient performance if the evidence is admissible under established evidentiary rules. Alvarado, *supra*, at 551.

D. CONCLUSION

Weighall's 6th amendment rights to confrontation of a witness were not violated and his counsel was not ineffective. For the reasons set forth above, the trial court's rulings and the jury's verdict should be affirmed.

Respectfully submitted this 22d of January, 2008.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, No. 36111-6-II, on all parties or their counsel of record on the date below as follows:

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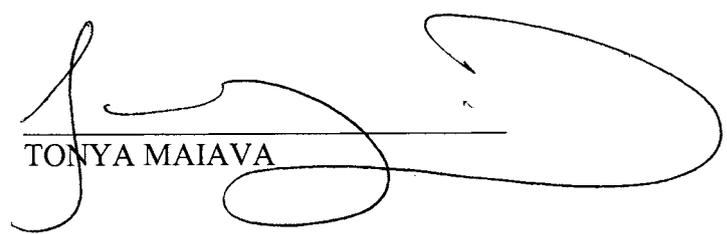
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of January, 2008, at Olympia, Washington.



TONYA MAIAVA