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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KENDRAN L. WATT, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF BENTON COUNTY

HONORABLE CAROLYN BROWN

SUPPLEMENTAL BRIEFING OF APPELLANT REGARDING CRAWFORD V. WASHINGTON

January 25, 2005

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I. ASSIGNMENTS OF ERROR

A. The trial court committed reversible error in admitting a co-defendant's guilty plea absent witness unavailability and a prior opportunity for cross-examination mandated by *Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004).

B. The trial court committed reversible error in admitting statements allegedly made to Detective Rick Runge that "he made his own anhydrous ammonia....also that he didn't believe in theft" violated the clear term of *Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004).

C. The trial court committed reversible error in admitting statements both in guilty plea statement and police interrogation requiring reversal of the case and a new trial under a harmless error analysis.

D. The trial court committed reversible error in admitting statements both in guilty plea statement and police interrogation requiring reversal of the case and a new trial as *Crawford v. Washington,* 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004) created a "watershed rule" requiring reversal and a new trial.

II. ISSUES PERTAINING TO ASSIGNEMENTS OF ERROR

A. Did the trial court commit reversible error in admitting a co-defendant's guilty plea absent witness unavailability and a prior opportunity for cross-examination mandated by *Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004)?

B. Did the trial court commit reversible error in admitting statements allegedly made to Detective Rick Runge that "he made his own anhydrous ammonia....also that he didn't believe in theft" violated the clear term of *Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004)?

C. Did the trial court commit reversible error in admitting statements both in guilty plea statement and police interrogation requiring reversal of the case and a new trial under a harmless error analysis?

D. Did the trial court commit reversible error in admitting statements both in guilty plea statement and police interrogation requiring reversal of the case and a new trial as *Crawford v. Washington,* 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004) created a "watershed rule" requiring reversal and a new trial?

I. STATEMENT OF THE CASE

The defendant, Kendra Watt, resided 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 and that of a "concerned citizen." (CP 204-217) 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 204) Mr. James Watt and Mrs. Kendra Watt were both arrested and charged with drug charges involving the manufacture of methamphetamine. (CP 186-187, 253-258, 274-275)

The prosecution brought a motion to join Mr. and Mrs. Watts' trials. (CP 260; RP Sept. 19, 2001 p. 1-8) The trials were not consolidated and ultimately Mr. Watt pled guilty (CP Exhibit 83; RP 313-316) while Mrs. Watt proceeded to trial. (RP Vol. 1-3)

Prior to the plea and trial, the parties challenged the sufficiency of the affidavit for the search warrant (CP 239-247) and requested in the same motion that the confidential informant be disclosed. (CP 239-247, CP 248) Additional briefing was filed by the defendant Kendra Watt asking the court to grant a request for both a "Franks Hearing" and a

"Casal Hearing." (CP 200-217, CP 188-190) The defense motions regarding the search and seizure issues were argued before the Honorable Craig J. Matheson on November 2, 2001. (RP November 2, 2001 p. 1-63) Findings of Fact from that hearing were prepared and filed on December 7, 2001. (CP 180-182) That document refers to "Defendant's List of Witnesses" attached (CP 180) which is in the record in CP 218-220.

On February 14, 2002, the state issued a subpoena for James E. Watt. (CP 177) 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) however, 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 defense argued against admission of the document arguing that if the purpose of admitting the document was to show Mr. Watt's plea that could be accomplished without using the Statement of Defendant on Plea of Guilty. (RP 89-93) 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 131-157)

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 131-157) Kendra Watt never testified at her trial. (RP Vol. I – III) The defense moved the court for a new trial (CP 71-80, 107-115 RP April 19, 2002 p. 1-12) which was denied by the court. (CP 60).

On May 22, 2002 Kendra Watt was sentenced before Judge Carolyn Brown (CP 10-17, RP May 22, 2002). The court imposed a standard range sentence required by the Sentencing Reform Act as the

court cites the ranges mandated by statute. (RP May 22, 2002, lines 1-12). At the time of sentencing, the trial judge Carolyn Brown stated; "I've read the pre-sentence investigation. I've considered the letters which have been sent to the court. And I'm sorry that Mr. Watt did not testify at trial. That may have made some difference with the jury. I don't know."

On appeal, Division III set the case for oral argument and denied the appellant's appeal based upon the denial of the right of confrontation under the Sixth Amendment and Article I, Section 22. The Court of Appeals allowed admission of the "statement of defendant on plea of guilty" citing ER804 (b) (3) holding "Mr. Watt's guilty plea statement bears sufficient indicia of reliability to satisfy the requirements of Confrontation Clause." (Court of Appeals Opinion filed July 31, 2003). The petitioner then sought Discretionary Review in the Washington Supreme Court and was denied review on April 6, 2004. The petitioner then sought review by Writ of Certiorari with the United States Supreme Court which was granted and remanded to the Court of Appeals Division III for a decision in consideration of *Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004).

II. ARGUMENT

A. <u>The trial court committed reversible error in admitting a co-defendant's guilty plea absent witness unavailability and a</u>

prior opportunity for cross-examination mandated by *Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004).

In *Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) the court considered the application of the Sixth Amendment confrontation clause to a Washington State case. The Crawford case established that "where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374. This case requires that testimonial evidence be tested by cross-examination of the witness making the testimonial statement.

The United States Supreme Court in *Crawford* at 1372 made it clear that a long list of in court statements would not be allowed absent an opportunity to cross-examine, including grand jury testimony. *Id.* at 1372 (citing *United States v. Certacchio*, 265 F.3d 518, 527-530 (CA 720011); *United States v. Dolah*, 245 F.3d 98, 104-105 (CA 2000) and others, and prior trial testimony.) *State v. McNeill*, 140 N.C. App. 450, 457-460, 537 S.E. 2d 518, 523-524 (2000). The Supreme Court provided further examples of testimonial statements where the right of confrontation (right of cross-examination) is required, stating: "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a

former trial; and to police interrogations." 124 S. Ct. at 1374. The court cited other examples of testimonial evidence including plea allocution showing the existence of a conspiracy. *Id.* at 1372.

The Crawford case involved the admission of a wife's out of court statements to police officers regarding an incident in which defendant, her husband, allegedly stabbed the victim. Similarly, the Watt case involves the admission of statements by a husband used at trial by the government against the wife. The United States Supreme Court has ruled that such evidence is testimonial and must be tested by the cross-examination of the witness at trial. It is the defense position that the violation of the defendant's right of confrontation requires a new trial.

B. The trial court committed reversible error in admitting statements allegedly made to Detective Rick Runge that "he made his own anhydrous ammonia.....also that he didn't believe in theft" violated the clear term of *Crawford v. Washington,* 124 S.Ct. 1354, 158 L.Ed. 2d (2004).

The United States Supreme Court ruled, "where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required. Unavailability and a prior opportunity for cross-examination." 124 S.Ct. at 1374. The *Crawford* decision provides direction in determining the types of testimonial statements where the

Sixth Amendment Confrontation Clause is applicable.

The court explains testimonial evidence as being where, "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 124 S.Ct. at 1364. Another example of testimonial evidence occurs when there is "involvement of government officers in the production of testimony with an eye toward trial presents a unique potential for prosecutorial abuse." 124 S.Ct. at 1365 n.4. A third scenario constituting testimonial evidence, implicating the right of cross examination occurs with a "recorded statement, given in response to structure police questioning, qualifies under any conceivable definition." 124 S.Ct. at 1365 n.4.

But the court provided further clarification as to what constitutes police interrogation explaining, "we use the term 'interrogation' in its colloquial, rather than any technical, legal sense." *Crawford*, 124 S.Ct. at 1365 n.4. "Structured police questioning 'qualifies as an interrogation' under any conceivable definition." Id., see also Id., at 1371. (characterizing statement in *State v. Bintz*, 650 N.W. 2d 913 (Wis.App. 2002), as testimonial even though statement was given during a non-custodial interview at a police station. As a comprehensive definition of "interrogation," Black's Law Dictionary 825 (7th Ed. 1999), which defines

"investigatory interrogation" as "routine, non-accusatory questioning by police of a person who is not in custody."

As the statement testified to by Detective Runge clearly qualifies as testimonial evidence the failure to allow cross-examination requires reversal and new trial to assure the defendant's constitutional right of confrontation. Additionally, at trial the prosecutor stated that he never intended to bring Mr. Watt to testify at trial. That fact raises the issue that Mr. Watt was never unavailable. In the Watt case there is a lack of proof of unavailability where no efforts were made by the prosecution to bring Mr. Watt before the jury. The defense contends that Sixth Amendment violation of the right of confrontation requires a new trial.

C. The trial court committed reversible error in admitting statements both in guilty plea statements and police interrogation requiring reversal of the case and a new trial under a harmless error analysis.

The admission of allocution statements violates the confrontation clause pursuant to the holding of the United States Supreme Court in *Crawford.* 124 S.Ct. 1354; *U.S. v. McLain*, 377 F.3d 219, 222 (2nd Cir. 2004). Additionally, there is no doubt that statements made to police after arrest are inadmissible absent the opportunity to cross-examine the

witness. 124 S.Ct. at 1374. With the right of confrontation securely in place and requiring opportunity for cross-examination, all that remains is the issue of the proper remedy.

The respondent, it is anticipated, may maintain that the harmless error analysis applies. In conducting a harmless error analysis, the court must determine whether; "The erroneous admission of evidence is not harmless unless [we] can conclude with fair assurance that [this] evidence did not substantially influence the jury." *United States v. Jean-Baptiste*, 166 F.3d 102, 108 (2nd Cir. 1999); see *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946). "An error in the admission of evidence may be deemed harmless if it is highly probable that the error did not contribute to the verdict." 166 F.3d at 108. "In making this determination, we consider principally whether the [G]overnment's case against the defendant[s] was strong; whether the evidence in question bears on an issue that is plainly critical to the jury's decision.....; whether the evidence was emphasized in the [G]overnment's presentation of its case and in its arguments to the jury; and whether the case was close." Id. at 108-109.

In applying this standard to the facts of the Watt case, it must be noted that the facts of this case were not overwhelming but based largely on the credibility of a confidential informant who testified at trial and was

inconsistent in his testimony. Further, this case involves two inadmissible statements attributed to the husband/co-defendant. The Watt case involved a situation where the court failed to instruct the jury as to limitations on their use of the hearsay testimony by a limiting instruction. Finally, the prosecutor, in closing argument, argued that "Mr. Watt, you'll see his Statement on Plea of Guilty, pled guilty because he has the methamphetamine lab and because he was around children." The prosecution argued that if the jury convicted Mrs. Watt of manufacturing, "that this follows as night follows day-that she created an imminent and substantial risk." Further, in closing argument during rebuttal, the prosecutor argued repeatedly, "Mr. Phelps said", "Mr. Phelps said, well, maybe," at which time the defense objected to the personalization of the argument. The court admonished the prosecutor and instructed the prosecutor on how to form the argument. 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 that I make methamphetamine." 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." An objection was made, citing the prosecutorial misconduct in continuing this tactic after a court

instruction, with a motion for mistrial. The court denied the motion for mistrial and instructed the prosecutor to try again.

Additionally, in the Watt case the trial Judge Carolyn Brown stated at the sentencing, "I've read the pre-sentence investigation. I've considered the letters which have been sent to the court. And I'm sorry that Mr. Watt did not testify at trial. That may have made a difference with the jury. I don't know." The Watt case is a case where even the trial judge held the opinion that the testimony of the "unavailable" witness may have made some difference. (RP May 22, 2002, p. 11, lines 1-17).

It is because of this presentation of the hearsay evidence and the prosecutions emphasis of the inadmissible evidence, that the harmless error analysis does not apply in the Watt case. In a case where there are multiple errors in admitting testimonial evidence along with other violations this court should properly remand this case back to state court for a new trial.

D. The trial court committed reversible error in admitting statements both in guilty plea statements and police interrogation requiring reversal of the case and a new trial as *Crawford v. Washington* created a new watershed rule.

It is the appellant's position that the respondent's anticipated

argument of harmless error analysis is misplaced. The *Crawford* court referred to the protections of the Confrontation Clause as a "bedrock procedural guarantee." The *Crawford* case has established a rule of criminal procedure to improve accuracy with which defendants are convicted or acquitted.

The criteria for determining whether the court established a watershed rule of criminal procedure is set forth in *Teague v. Lane*, 489 U.S. 288 (1989); see also *United States v. Mora*, 293 F.3d 1213, 1218 (10th Cir. 2002). New rules of constitutional law apply retroactively to habeas petitions if they "define 'watershed rules' that 'require the observance of those procedures that ... are implicit in the concept of ordered liberty.'" 293 F.3d at 1218.

The court in *Mora* clarified the difference between a "watershed" rule and one which merely modified existing precedent. The defendant in *Mora* argued that the Court's ruling in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), created a watershed rule. 293 F.3d at 1218. The Court in *Apprendi* ruled that any fact increasing the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 490.

The defendant in *Mora* did not prevail on the *Apprendi* argument,

as the court reasoned that *Apprendi* had merely broadened the scope of the pre-existing right to have a conviction supported by proof beyond a reasonable doubt. 293 F.3d at 1219. In contrast, the court stated that a decision like *Gideon v. Wainwright*, 372 U.S. 335 (1963), was a "truly landmark decision" because it "altered our understanding of what constitutes basic due process by establishing that representation by counsel is fundamental to a fair trial." 293 F.3d at 1219.

The *Crawford* decision is landmark akin to the Court's ruling in *Gideon*. While the right to confrontation of witnesses has long been a constitutional guarantee, the well-grounded exceptions to the hearsay rule prior to *Crawford* had been readily accepted as settled. Those hearsay exceptions were used to admit evidence that otherwise would not have been admissible, and likely supported countless convictions. The idea that some of the hearsay rules are no longer viable because they violate the constitutional right to confrontation is an entirely new idea, and hence *Crawford* created a watershed rule of criminal procedure.

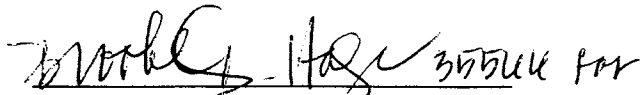
Therefore, the watershed rule requires that the case be remanded for new trial without application of the harmless error analysis.

III. CONCLUSION

The Watt case involves two important pieces of hearsay evidence

admitted in violation of the confrontation clause without limiting instructions and emphasized by the prosecutor in his rebuttal closing argument. The admission of the evidence was so egregious an error, that it requires nothing less than reversal and a new trial. Further, the *Crawford* case set a "watershed rule" requiring reversal for a new trial. For these reasons, the court should grant the Writ of Certiorari.

Respectfully submitted this 25th day of January, 2005.



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