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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002241-MR

JOHN ELWOOD RUSSELL — APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 03-CR-00037

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.[1]

POTTER, SENIOR JUDGE: The single issue in this appeal from a conviction for reckless homicide is whether hearsay statements the victim made to hospital personnel in the course of treatment were properly admitted. Appellant Russell complains that the admission of the statements of an unavailable witness, through the testimony of treating medical personnel, infringed upon his

[1] Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Sixth Amendment confrontation rights and violated the standards for introduction of such evidence set out by the United States Supreme Court in Crawford v. Washington, 541 U.S. 35, 124 S.Ct. 1354, 158 L.Ed2d 177 (2004). We affirm.

Mr. Russell was indicted for murder in connection with a March, 2003 incident in which he drove an all-terrain vehicle into Curtis Bush causing injuries from which he later died. Although Mr. Russell admitted hitting Bush with the ATV, he maintained that he had not intended to strike Mr. Bush and that they were merely engaging in "horseplay" while searching for Mr. Russell's dog. Mr. Bush was taken to the emergency room at Southern Ohio Medical Center where he was treated for a displaced fracture of the right arm and a small laceration over his right eyebrow. While he normally would have been treated and released for such injuries, statements Mr. Bush made to emergency room staff concerning his fear of Mr. Russell resulted in his being admitted for pain management and social services evaluation. Around 11:00 p.m. that same night, Mr. Bush's condition rapidly deteriorated to the point that he became unresponsive and died.

The deputy coroner was called in to investigate the cause of death. An investigation into the circumstances surrounding the ATV accident was also undertaken. In the course of that investigation, it was determined that Mr. Bush was a

forty-two year old mentally challenged adult who had been living with Mr. Russell and his ex-wife, who was Mr. Bush's aunt. A state trooper interviewed Mr. Russell and his ex-wife concerning the events which led up to Mr. Bush being struck by the ATV. Mr. Russell gave a taped statement to the trooper, which was played for the jury, concerning his version of the incident.

According to Mr. Russell, Mr. Bush had left open a gate which allowed Mr. Russell's dog to get out. Mr. Russell and his granddaughter got on the ATV to look for the dog and Mr. Bush accompanied them on foot. As they drove past Mr. Bush, Mr. Russell cut the vehicle towards him, claiming that he only intended to "bump him a little bit" and that they were simply engaging in horseplay. In response to the trooper's questioning on the tape, Mr. Russell admitted that he was driving in high gear, traveling about 10-15 miles per hour and conceded that he might have bumped the throttle a little bit prior to hitting Mr. Bush. As a result of being struck by the ATV, Mr. Bush fell down crying, at which point Mr. Russell stopped to help him up and transported him to the emergency room.

Prior to trial, Mr. Russell sought to exclude statements Mr. Bush made to emergency room staff in the course of his treatment as inadmissible hearsay violative of his Sixth Amendment right to confrontation as explained by the United

States Supreme Court in Crawford v. Washington, supra. The gist of the statements in question concerned Mr. Bush's plea to hospital personnel to be allowed to remain at the hospital because Mr. Russell had struck him on purpose and his fear for his safety should he be sent home with Mr. Russell. After a hearing, the trial judge concluded that the challenged statements did not fall within the Crawford analysis because they were not testimonial in nature. He ruled that the statements could be properly admitted under two hearsay exceptions, as excited utterances and as statements made for the purpose of medical treatment or diagnosis. We concur in the trial judge's assessment.

Mr. Russell's argument that the statements were improperly admitted presents two issues for our review: 1) whether admission of Mr. Bush's statements to hospital personnel infringed upon his Sixth Amendment confrontation rights; and 2) whether the statements were properly admitted as exceptions to the hearsay rule under the Kentucky Rules of Evidence.

As to his confrontation clause argument, the opinion in Crawford very clearly instructs that testimonial statements of witnesses absent from trial may be admitted only upon a showing of the declarant's unavailability and only in situations in which the defendant has had a prior opportunity to cross-examine. 124 S.Ct. at 1369. The Court also emphasized,

however, that nontestimonial hearsay does not fall within the confrontation clause proscription:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does *Roberts* [Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)] and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, 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. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

124 S.Ct. at 1374, footnote omitted. While the Court declined to set out an exhaustive list or comprehensive definition of what would constitute "testimonial" hearsay, it did provide ample guidance for a reasoned application of the type of statement it found inadmissible:

> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused-in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.*

> 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. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> Various formulations of this core class of "testimonial" statements exist: " *ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,"; "extrajudicial statements · · · contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. . . ."

Id. at 1364, citations omitted.

Comparing these examples of impermissible "testimonial" statements to the statements Mr. Bush made to hospital personnel in the course of his treatment, it seems clear that those statements do not fall within the category of testimonial statements described in Crawford or the purview of its conclusion that the focus of the Confrontation Clause is the prevention of inquisitorial abuses:

> Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

> This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

Id. We are therefore convinced that the trial judge properly determined that Crawford has no application to the statements in issue in this case.

We next consider whether the statements qualify as excited utterances and statements made for purposes of medical treatment or diagnosis which would be admissible under KRE 803(2) and (4). Given the fact that Mr. Bush had just been struck by an ATV and rushed to the hospital for treatment of significant injuries, and the fact that hospital personnel described him as being anxious, frightened and very upset, we find no basis for disturbing the decision of the trial judge that the statements he made in the course of that treatment were admissible. As explained by the Supreme Court of Kentucky in Young v. Commonwealth, 50 S.W.3d 148, 166 (Ky. 2001):

> Whether a particular statement qualifies as an excited utterance depends on the circumstances of each case and is often an arguable point; and "when this is so the trial court's decision to admit or exclude the evidence is entitled to deference."

> *Souder, supra,* at 733. That is but another way of saying that when the determination depends upon the resolution of a preliminary question of fact, the resolution is determined by the trial judge under KRE 104(a) on the basis of a preponderance of the evidence, *Bourjaily v. United States,* 483 U.S. 171, 175, 107 S.Ct. 2775, 2778-79, 97 L.Ed.2d 144 (1987); and the resolution will not be overturned unless clearly erroneous, i.e., unless unsupported by substantial evidence.

There is present in the record ample evidence to support the trial court's decision to admit the statements as exceptions to the hearsay rule under KRE 803(2) and (4).

Accordingly, the judgment of the Lewis Circuit Court is in all respects affirmed.

ALL CONCUR.

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