

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2008-2452
Plaintiff-Appellee : On Appeal from the Hamilton County
Court of Appeals, First Appellate
vs. : District
PHILLIP HARRIS : Court of Appeals
Case Number C-080153
Defendant-Appellant :

MEMORANDUM IN RESPONSE

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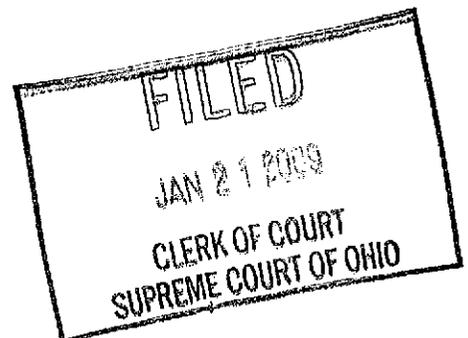


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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR
GREAT GENERAL INTEREST AND DOES NOT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

Harris' case does not present any issues of public or great general interest, as it involved the straightforward application of established law. The constitutional arguments made below were fully argued, and nothing raised represents a substantial constitutional question. In the Memorandum in Support of Jurisdiction, Harris's primary argument was in regard to a statement made by the murder victim to his wife in a private setting. The circumstances of this statement were reviewed by the First District Court of Appeals and found to have made no contribution to Harris' conviction. The issues of testimonial statements and the right to confrontation were reviewed by the First District and the proper standards of review were applied. Nothing in this case raises a substantial constitutional question, and it is not one of public or great general interest. For these reasons, the state requests that this Court deny jurisdiction.

STATEMENT OF THE CASE AND FACTS

Harris was indicted on January 10, 2007 with one count of Aggravated Murder with firearm specifications for the shooting death of Richard Mohammad. Co-defendant Darryck Henson was indicted on February 2, 2007, and was tried separately. Harris' motion to suppress was denied after a hearing, and the case was tried to the bench. A jury waiver was duly filed. Harris was found guilty as charged and was sentenced to serve a life sentence without the possibility of parole for 20 years. He was also sentenced to the mandatory three-year term on the firearm specification. He timely appealed, and his conviction was affirmed by the First District Court of Appeals on November 12, 2008.

b) Facts:

Sharon Mohammad was separated from Richard Mohammad in December 2006, but saw him every day and spoke to him several times a day. On the day of the murder, Richard picked Sharon up from her home and the two had lunch together at a Frisch's restaurant at about 11:30 a.m. During lunch, Richard's cell telephone rang repeatedly. After answering one of the calls, Richard looked visibly upset. Sharon said that "[h]e had a troubled look on his face like something was wrong." He left the table and fixed a salad. Immediately upon returning, Richard told Sharon to get out a piece of paper to write something down. He said that "if something happened to him," Sharon was to tell the police about a man named Phillip. Richard said that Phillip's mother, called "Mama T.," worked at the Dukester's restaurant. He also gave Sharon a cell telephone number to give the police. Sharon asked Richard what was wrong, and he again insisted that she write down the information. He did not ever explain what was wrong, and Sharon was concerned about this. Their lunch lasted only

about 25 minutes, Sharon said, due to the constant interruptions of his telephone. When they parted, Richard asked Sharon to call her later in the day.

Sometime after 11 p.m. that night, police received a call to report a shooting at the Sycamore Hotel. P.O. Thomas Wells was one of the first officers to respond. He found the victim, deceased, on the floor of an apartment.

Angel Ferguson and her husband, Darryl, had lived in the apartment for about three weeks. She said that Richard was a friend, and that he came to the hotel to get high. She said Richard routinely lent his car out to drug dealers who used it to meet clients. He had previously lent his car to Phillip Harris, and it was totaled in an accident.

On the night of the murder, Mohammad had rented a room at the hotel. He asked Angel to come over to get high at about 10 p.m. During the night, Mohammad contacted at least three different dealers to sell him drugs. He paid about \$50 each time. Another friend, Scott, was also there. Mohammad, Scott and Angel drank and smoked crack cocaine throughout the night.

Angel had known Phillip Harris for some time and bought drugs from him frequently. In fact, she said he was her favorite drug dealer. That night, Richard asked Angel to call Harris for some drugs. When he came to the room, he asked Mohammad for his money. Mohammad responded that because Harris had totaled his car, he owed him nothing. Harris left, but said he would return. Angel assumed he would come back with drugs. She said that Harris came back and told her to open the door for him. She recognized his voice and he called to her. "And he hollered Angel, and he was saying open the door, you all. What's up? Why ain't you open the door?" Richard Mohammad yelled back and asked if Harris had anything. Harris answered that he did. Mohammad was on a bed at the time.

Angel said she opened the door and saw Harris wearing a mask. Another man with a hood tied tightly around his face stood behind him. Angel said she asked Harris why he had on a mask. He did not answer her, but said to the other man "That's him, fuck him up." The man immediately shot Mohammad three times. Angel said that by this time, Scott had "morphed out of the room some kind of way," and that Harris and the shooter ran out. She was hysterical, and stayed with Richard Mohammad. When Richard was struck, he fell off the bed and rolled over the phone cord. There was so much blood, she could not lift him off the floor or get to the phone. Angel ran to the office and told someone to call 911.

Angel immediately called Harris on her cell phone and yelled at him, asking him why he had shot Mohammad. Harris asked her if Richard was dead. She replied that she did not know. He then told her "[y]ou don't know nothing, you know what I'm saying." She parroted this back and told Harris, "yeah, I don't know nothing," and hung up.

Angel said that the shooter wore a brownish-tan hoodie with the hood pulled very tightly around his face "and all I could see what his nose and his eyes and his complexion and his eyes." Angel knew Derryk Henson as a drug dealer, a "last resort type person I would call and go to when I was low." He was known as Teardrop because of a mark on his face. It was hidden by the hoodie at the time of the shooting. Surveillance video cameras captured photos of Harris entering and leaving the hotel.

David Sparks said he was showing Phillip Harris where to find "dope fiends" and "licks," on the day of the murder. They rode in Harris' mother's car while she was at work at Dukester's restaurant in Roselawn. Later that night, Harris told Sparks he needed to "sell a 30," a gram of crack cocaine for \$30, at the Sycamore Hotel. When they arrived there, Harris threw his car keys to Sparks

and said that a client who was waiting owed him \$50. He told Sparks "I might beat him up or rough him up," and that he'd "be right back out." Sparks drove Harris' car closer to the entrance. Shortly thereafter, Harris, now wearing a mask, and a man whom Sparks recognized as Derryk Henson, came out of the hotel and got in the car. As Sparks drove off, Henson appeared nervous and kept looking back towards the hotel. Sparks asked him several times what was wrong, but Henson continually said "aint' nothing wrong with me." Later, Sparks identified himself, Harris and Henson in still shots taken from surveillance cameras while entering and exiting the hotel.

Det. Bob Randolph interviewed Harris. Harris stated initially that Angel Ferguson called him because she wanted to buy drugs, as she had in the past. He said he went to the room. When he prepared to leave, another man entered and fired three or four shots. Harris fled in his mother's car, which was driven by a man named Fred. Harris said he did not know who fired the weapon, but was told it was a man named "D." After viewing surveillance photos, Harris admitted that they gave a ride to a man named "D."

As the interview ended, the police received information regarding Darryck Henson. When told about this, Harris asked to speak to Det. Randolph again. At that time, he identified Henson as the shooter, and admitted to giving him a ride after the murder.

At trial, Harris testified that he approached the room of Angel Ferguson, who was inside with her husband, a "white guy," and Richard Mohammad. He said that when Angel opened the door, Henson was standing in the hallway. Harris said that he went into the room and approached Angel to get the money for the drug deal. While he was talking to her, he heard the gunshots. Harris said his back was turned and he did not see the gun.

ARGUMENT¹

PROPOSITION OF LAW I: A statement of a declarant's then existing state of mind is not excluded by the hearsay rule even though the declarant is not available as a witness.

Harris argues that the testimony of Sharon Mohammad regarding her husband's instructions to her in the event "something happened to him" constituted inadmissible hearsay. Under Evid. R. 803(3), the statement was admissible as an exception to the hearsay rule.

Evid. R. 803 sets forth exceptions to the hearsay rule when the availability of the declarant is immaterial. The rule states that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health). . ." is not to be excluded, regardless of availability. Numerous cases exist in which victims' statements expressing fear of a defendant were held to be admissible under the state of mind exception. In *State v. Apanovitch*, six witnesses testified to statements by a victim showing that she was fearful and apprehensive of the defendant.² This Court held that the statements were properly admitted under Evid. R. 803(3). In *State v. Miller*, the victim told a co-worker hours before her death, "If I would come up shot in the head, that bastard [her husband] did it."³ The court also held that this statement was admissible as an expression of the victim's fear of her husband.

¹ The second and third Propositions of Law address issues raised by the Ohio Office of the Public Defender in a separate appellate brief. The fourth and fifth propositions were raised solely by Harris, Pro Se, in his brief. The first proposition was raised in both briefs in support of jurisdiction.

² *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394.

³ *State v. Miller*, 96 Ohio St.3d 384, 775 N.E.2d 498, 2002-Ohio-4931.

These cases predate the United States Supreme Court decision of *Crawford v. Washington*.⁴ That case barred the use of hearsay that was testimonial in nature unless the declarant was subject to cross-examination. The court ruled that the Sixth Amendment Confrontation Clause is violated if testimonial hearsay statements made by unavailable witnesses are admitted at trial, even if those statements fell within an established hearsay exception, and even if the statements bore an adequate indicia of reliability. Testimonial statements include those made at a preliminary hearing, a prior trial, grand jury hearings and police interrogations. The court also stated that they include statements made “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”⁵

Here, Harris argues that Richard Mohammad told his wife to tell the name of “Phillip” to police for the specific purpose of advancing a criminal prosecution in the event he died. This presupposes that Mohammad had the presence of mind to anticipate a future criminal trial and made the statement for that purpose. In actuality, Mohammad made the statement while upset about incessant telephone calls during lunch with his wife. He made the statement to instruct his wife to take a particular action if he was harmed in any way. This showed his state of mind towards Harris. To say that he had the forethought to anticipate the use of the statement at trial takes the Supreme Court’s reasoning on this issue out of context. The type of statements that *Crawford* sought to bar were those deemed to be “‘*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

⁴ *Crawford v. Washington* (2004), 541 U.S. 36, 72 USLW 4229, 124 S.Ct. 1354.

⁵ *Id.* at 52.

prosecutorally.’ ”⁶ Mohammad’s statement was made to his wife in a private setting and is not the type of formal statement in anticipation of trial that was anticipated by *Crawford*. Simply because he used the word “police” in his statement does not make it a part of a prosecution. Further, its spontaneity, without reflection, establishes its reliability.

Harris attempts to distinguish the present case with that on *Giles v. California*, which was cited by the First District Court of Appeals for the proposition that “[s]tatements to friends and neighbors about abuse and intimidation” were not testimonial for purposes of the Confrontation Clause.⁷ In *Doan v. Carter*, a case from the Sixth Circuit Court of Appeals, the court relied in part on the *Giles* decision to find that statements made by a victim, Carrie Culberson, to friends and family before her murder were not testimonial.⁸ Ms. Culberson told had family members and friends that the defendant had abused her and threatened her life and that of her family. Both the First District in the case sub judice and the Sixth Circuit in the *Doan* case cited the following from *Crawford v. Washington* in their analysis of testimonial statements: “[a]n 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.”⁹ Further, the *Doan* court rejected the defendant’s proposition that statements are only nontestimonial for *Crawford* purposes if they are made during an ongoing emergency.

⁶ *State v. Stahl*, 111 Ohio St.3d 186, 855 N.E.2d 834, 2006-Ohio-5482.

⁷ *State v. Harris* (November 12, 2008), 1st Dist. No. C-080153, citing to *Giles v. California* (2008), ___ U.S. ___, 128 S. Ct. 2678 at 2692-2693.

⁸ *Doan v. Carter* (2008), 548F.3d 449 (C.A. 6).

⁹ *Crawford v. Washington* (2004), 541 U.S. 36, 58-59, 124 S.Ct. 1354, 158 L.Ed.2d 177.

Here, as stated previously, Mohammed was having a private conversation with his wife. He was worried, to be certain, but his statements cannot be said to have been made with the presence of mind and forethought of a criminal prosecution. This Court has stressed that “the definition of ‘testimonial’ for Sixth Amendment purposes should therefore focus on the principal evil the clause meant to remedy,” that being the use of *ex parte* examinations as evidence against the accused.¹⁰ A private conversation between spouses over lunch cannot be transformed into an *ex parte* examination under any definition of the term “testimonial.” Because Mohammed’s statement was not testimonial, the First District was correct in affirming Harris’ conviction.

PROPOSITION OF LAW II: Admission of a hearsay statement that does not contribute to the conviction, even if admitted in error, is harmless.

Even if Mohammed’s statement is characterized as inadmissible simply because it referenced the police, it did not contribute to Harris’ conviction and was harmless. Defense counsel made one objection, which he did not renew. On cross-examination, he made the tactical decision to delve into the statement of the victim and ask questions to flesh out this issue, thus waiving his objection.

And even more importantly, as stated by the First District Court of Appeals, “[d]espite Harris’s claims to the contrary, the evidence against him was overwhelming.”¹¹ Any effect of the statement regarding Mohammad’s fear was inconsequential and did not contribute to the conviction. The state presented an eyewitnesses to the shooting, the testimony of the get-away driver, and Harris’ own confession that he was in the apartment when the shooting occurred. The expression of the victim’s fear was a relatively minor piece of evidence, considering the testimony of the state’s

¹⁰ *State v. Stahl*, 111 Ohio St.3d 186, 855 N.E.2d 834, 2006-Ohio-5482, ¶21.

¹¹ *State v. Harris* (November 12, 2008), 1st Dist. No. C-080153.

witnesses at trial. It cannot be said that the outcome of the trial would have been different in the absence of the statement.

PROPOSITION OF LAW III: In order to establish a claim of ineffective assistance of counsel, it must be shown that trial counsel's performance fell below an objective standard of reasonable representation and that prejudice arose from this performance.

Although Harris' appellate counsel raised the *Crawford v. Washington* issue, he argues that his attorney did not raise it "adequately." His attorney was not required to argue the issue in the exact manner as prescribed by current counsel, however, and it cannot be said that appellate counsel's representation fell below an objective standard of reasonable representation.

In order to establish a claim of ineffective assistance of counsel, it must be shown that counsel's performance fell below an objective standard of reasonable representation and that prejudice arose from this performance.¹²

For the reasons stated previously, Mohammed's statement to his wife was not testimonial in nature. This does not change whether it is argued in terms of the elements of the murder statute or in terms of the test for testimonial statements. Harris' current counsel ultimately makes the exact same arguments made in the direct appeal, e.g., that the statement was made in anticipation of Harris' arrest and conviction and that its admission violated the right to confrontation.

Again, the First District Court of Appeals found that there was overwhelming evidence of Harris' guilt, and that the statements of Mohammed did not contribute to Harris' conviction. That being the case, even if the statement was inadmissible, no prejudice can be shown by counsel's

¹² *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-143, 538 N.E.2d 373, 379-381.

failure to argue the hearsay objection in the manner presented below. The reason for the statement's characterization becomes meaningless at this point.

Any argument that it reflected upon the element of prior calculation and design is in essence, an argument as to the sufficiency of the evidence. And as stated, the evidence of guilt was overwhelming, even in the absence of the statement. This issue was considered below, and Harris' arguments against the sufficiency and weight of the evidence failed. Ineffectiveness of appellate counsel for the manner in which the hearsay objection was argued cannot be shown.

PROPOSITION OF LAW IV: A defendant who voluntarily waives his Miranda rights is admissible absent evidence of police coercion.

As stated by the First District Court of Appeals, the evidence at the hearing on the motion to suppress supported the conclusion that Harris understood his Miranda rights and voluntarily waived them. No evidence of police threats, coercion, promises or physical abuse was presented. The denial of the motion was proper, and raises no substantial constitutional issues at this level.

PROPOSITION OF LAW V: The record demonstrates that Harris' conviction is not against the weight or sufficiency of the evidence.

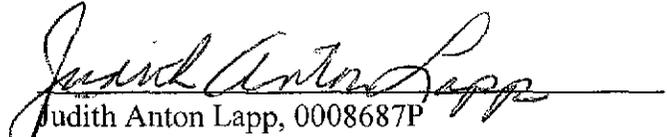
Harris challenges the sufficiency of the evidence at trial. The record was reviewed by the First District and overwhelming evidence of guilt was present. The review of this issue does not raise a substantial constitutional question and nothing within raises a question of public or great general interest.

CONCLUSION

This case involved the straightforward application of established law. The First District properly applied the law regarding testimonial hearsay statements and the applicable standards of review. Harris has not raised a substantial constitutional question and this case is not one of public or great general interest. For these reasons, the state respectfully submits that this Court should deny jurisdiction.

Respectfully,

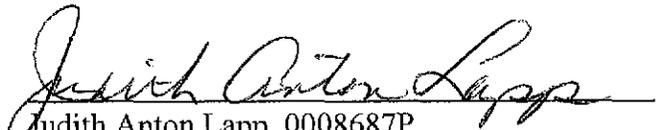
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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Jeremy J. Masters, Office of the Ohio Public Defender, 8 East Long St., 11th Floor, Columbus, Ohio 43215, counsel of record, and Phillip Harris, Pro Se, No. 575-479, Warren Correctional Institution, 5787 State Rt. 63, P.O. Box, 120, Lebanon, Ohio 45036, this 21st day of January, 2009.


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