Case no. 09-2079

ORIGINAL

In the

Ohio Supreme Court

STATE OF OHIO, *Plaintiff-Appellee,*

v.

LEE MASCORRO, *Defendant-Appellant*

On Appeal from the Lucas County Court of Appeals

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT- APPELLANT LEE MASCORRO

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STATEMENT IN SUPPORT OF JURISDICTION

This case presents the substantial constitutional question of whether, in a prosecution for rape, the testimony of a responding police officer that the alleged victim stated 'yes' in response to his question as to whether she was raped, is inadmissible hearsay under the analysis of *Crawford v. Washington, 541 U.S. 36 (2004)*

By accepting jurisdiction in this case, this court can clarify the issue of what constitutes a testimonial statement under the analysis of *Crawford, supra.*

STATEMENT OF THE CASE

Appellant Lee Mascorro was indicted by the Lucas County grand jury on October 9, 2007 on one count of rape, in violation of Ohio Revised Code §§ 2907.02(A)(2) and (B), one count of kidnapping, in violation of Ohio Revised Code § 2905.01(A)(4), and one count of aggravated burglary in violation of Ohio Revised Code § 2911.11(A)(1).

The matter proceeded to a jury trial in the Lucas County Common Pleas Court on August 25, 2008. The jury returned a verdict acquitting Mascorro of aggravated burglary, and convicting him of rape and kidnapping.

Mascorro was sentenced by the trial court on September 11, 2008 to a term of nine years imprisonment for rape and five years imprisonment for kidnapping. The terms of imprisonment were ordered to be served consecutively, for an effective prison term of fourteen years.

Mascorro's conviction was affirmed by the Lucas County Court of Appeals, Sixth Judicial District, on September 30, 2009.

A Notice of Appeal from the decision of the Court of Appeals has been filed with this court.

This Memorandum in Support of Jurisdiction is submitted contemporaneously with the notice of appeal.

STATEMENT OF FACTS

Defendant, a military veteran, and JL, a law student, moved into a house being purchased by Ms. JL at 1107 Brookley Road, in Toledo, Lucas County, Ohio, in 2005. At the time of the trial, the couple had known each other for approximately five years. (Testimony of JL, Tr. at 151). They met each other while working with at-risk, MRDD, and delinquent youths. *Id.*

The couple separated in August of 2007. Initially, JL moved out of the residence, (*Id.,* at 154), and later returned to the residence after changing the locks without giving Mascorro a key, (*Id.,* 155). After changing the locks, JL did permit Mascorro to spend one night in the house, on the condition that he leave prior to her returning from her third-shift job. (*Id.,* 156)

JL testified that on September 28, when she returned home from work, she saw Mascorro in his Jeep, parked in her driveway. She told him to leave, and then went into her house, locked the doors and windows, took a shower, and went to bed. (*Id.,* 57-158). She was awakened by the sound of keys in the lock of her door. She testified that she dialed 911, but that Mascorro came into her bedroom and took the phone from her before she could complete the call. (*Id.,* 159)

She asked Mascorro to leave, but he said that he needed to talk to her. JL testified that Mascorro tried to discuss their relationship, and that when she asked him to leave, he punched her. (*Id.,* 162)

JL testified that she left the bedroom to use the bathroom, closed the bathroom door, and removed the bathroom window screen. She attempted to jump out the window, (*Id.,* 163), but, according to her testimony, Mascorro came into the bathroom and pulled her back into the bathroom. (*Id.,* 164) JL testified that Mascorro dragged her into an adjacent bedroom, forced her to switch shirts with him, turned up the volume on a computer system, and then forced her into the basement of the house. (*Id.,* 164-165) In the process of this, JL testified, she scraped her leg on the frame of the window and hit her head on the bathtub. (*Id.,* 164)

Once in the basement, Mascorro again talked to JL, attempting to persuade her to continue their relationship. (*Id.,* 170) JL testified that when she insisted that she would not resume the relationship, Mascorro commented that he "[had] nothing to lose". (*Id.,* 172)

At that point, according to JL, Mascorro forced her to the floor, pulled her T-shirt and bra up over her head, pulled her pants and underwear down, and penetrated her vagina with his penis. (*Id.,* 172) JL testified that she was attempting to roll around, but that she was unable to move due to Mascorro's weight advantage. (*Id.,* 172)

After about five minutes, JL heard knocking at the side door, and someone yelling 'police'. (*Id.,* 174) A police officer came into the basement, saw JL on the floor naked and sobbing, and called for a female officer; a female officer responded and helped JL dress herself. JL was taken by ambulance to

Toledo Hospital, where she was examined by a nurse, and interviewed by a police detective. (*Id.,* 176-177)

The examining nurse at Toledo Hospital, Jeanette Sayers, testified that JL had swelling on the right side of her nose, a bruise on her upper lip, abrasions inside her upper lip, on her face, shoulder, right hip, back, a large abrasion on her lower right leg, (Testimony of Jeanette Sayers, Tr. 228-229), and abrasions to her vaginal area, (*Id.,* 231-232). The nurse testified that JL stated that "he" had broken into her house, she attempted to escape from the bathroom window, "he" pulled her back in, took her to the basement of the house, forced her to the floor and raped her. (*Id.*, 229)

Toledo Police Detective Regina Lester testified that she interviewed Mascorro after he gave a written waiver of his *Miranda* rights. The interview was video-recorded, and the recording was played to the jury as State's exhibit 15.

In the interview, Mascorro told the detective that he was at the Brookley Road house, when JL returned home from work on the morning of September 28, sometime around 7:00. (State's exhibit 15 at 20:01:25 - 20:01:38). He had called her and told her that he would be there. (*Id.,* 20:01:40 - 20:01:46) When JL arrived home from work, he was outside the house, the couple had a short discussion, she went into the house, and Mascorro stayed in the garage, (*Id.,* 20:01:55 - 20:02:25). After a few hours, while JL was sleeping, Mascorro went into the house, which was unlocked. (*Id.,* 20:02:25 - 20:02:35)

Mascorro was in the basement of the home, gathering some of his belongings, when he and JL had consensual sex. (*Id.,* 19:52:50 – 19:53:20) Regarding the bathroom screen which had been removed from the window, Mascorro told the detective that JL had threatened to commit suicide by jumping out the bathroom window, that he believed she made the threat for "attention", and that he prevented her from jumping out the window. (*Id,* 19:57:42 – 19:59:00)

ARGUMENT

Proposition of Law:

> The testimony of a responding police officer that an alleged rape victim stated 'yes' in response to his question as to whether she was raped is inadmissible hearsay under the analysis of *Crawford v. Washington, 541 U.S. 36 (2004)*

The responding police officer testified that the alleged victim stated to him that she had been raped. (Tr. 208) This statement was made out of court, and to the extent that it had bearing on the issue of consent, then it was a statement offered to prove the truth of the matter asserted, i.e., that the couple's sexual conduct had not been consensual. It is therefore hearsay. R. 801(C), Ohio Rules of Evid. And the statement obviously had significant bearing on the issue of consent.

The trial court overruled objection to the testimony on the theory that the evidence was given "to lay the foundation of what if anything thereafter this witness or any other person present there did." (Tr. 208)

The hearsay rules, however, do not provide a basis to admit out of court statements in order to lay such a foundation. This ruling by the trial court violated appellant's right, under the Sixth Amendment of the United States Constitution, which guarantees a criminal defendant the right to confront his accuser. *See, e.g., Davis v. Washington,* 547 U.S. 813 (2006); *Crawford v. Washington,* 541 U.S. 36, (2004), The ruling also violated Article I, § 10 of the Ohio Constitution.

This hearsay statement went directly to the ultimate issue of this trial, it was severely prejudicial to appellant, and it violated appellant's Sixth Amendment rights under the United States Constitution, and his rights under the Ohio Constitution, Art. I, §10.

The Court of Appeals, in its decision, determined that the statement was non-testimonial in nature, because it was elicited by the responding officer for the purpose of dealing with an ongoing emergency, citing the analysis in *Davis* v. *Washington*, 547 U.S. 813, 822 (2006), and *Crawford v. Washington, 541 U.S. 36 (2004).*

At the time of asking the question, however, the responding officer in this case was no longer dealing with an "ongoing emergency". The officer had already obtained entry to the alleged victim's house, had secured the area, and was now clearly in the process of "interrogation ... to establish or prove past events potentially relevant to later prosecution", *Washington, supra*, 547 U.S. 813, 822.

The alleged victim's statement to the officer's question was therefore testimonial in nature and should have been excluded pursuant to *Crawford, supra*.

This court should accept jurisdiction in this case, and apply *Crawford, supra* and *Washington, supra*, to clarify that an alleged victim's statement to a responding police officer, that she was raped, is inadmissible hearsay under the Sixth Amendment of the United States Constitution.

CONCLUSION

This court should accept jurisdiction in this appeal for the reasons stated above, and the ruling of the Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is certified that a copy of the foregoing Brief of Appellant was this November 12, 2009, served upon the Montgomery County Prosecutor by ordinary mail addressed to:

Lucas County Prosecutor
Lucas County Courthouse
Adams and Erie Streets
Toledo, Ohio 43604

Thomas P. Kurt
Attorney for Appellant

APPENDIX: OPINION OF THE COURT OF APPEALS

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Lee Mascorro

Appellant

Court of Appeals No. L-08-1355

Trial Court No. CR-2007-3095

DECISION AND JUDGMENT

Decided: SEP 30 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Timothy F. Braun, Assistant Prosecuting Attorney, for appellee.

Thomas P. Kurt, for appellant.

* * * * *

KNEPPER, J.

{¶ 1} Appellant, Lee Mascorro, appeals his conviction for rape and kidnapping entered by the Lucas County Court of Common Pleas in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

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{¶ 2} Appellant was indicted on October 9, 2007, on one count of rape, in violation of R.C. 2907.02(A)(2) and (B), one count of kidnapping, in violation of R.C. 2905.01(A)(4), and one count of aggravated burglary, in violation of R.C. 2911.11(A)(1).

{¶ 3} At trial on the matter, evidence of the following facts was adduced. Appellant, a military veteran, and J.L., a law student, moved into a house that was purchased by J.L. At the time of trial, the couple had known each other for approximately five years.

{¶ 4} The couple separated in August 2007. Initially, J.L. moved out of the residence. Within a month or so, she changed the locks and returned to the residence. She did not give appellant a key. After changing the locks, J.L. did permit appellant to spend one night in the house, on the condition that he leave prior to her returning from her third-shift job.

{¶ 5} J.L. testified to the following facts. When she returned home from work, at approximately 7:15 a.m., on September 28, 2007, she saw appellant in his Jeep, parked in her driveway. She told him to leave, and then went into her house, locked the doors and windows, took a shower, and went to bed in her upstairs bedroom. She was awakened by the sound of keys in the lock of her door. She dialed 911, but appellant came into her bedroom and took the phone from her before she could complete the call.

{¶ 6} She asked appellant to leave, but he said that he needed to talk to her. Appellant tried to discuss the relationship, but when J.L. asked him to leave, he punched her.

{¶ 7} J.L. left the bedroom and went downstairs to use the first-floor bathroom. She closed the bathroom door, removed the bathroom window screen, and attempted to climb out the bathroom window. But when she was half-way out the window, appellant came into the bathroom, grabbed her from behind and pulled her back into the bathroom, causing her to rip her shirt, bump her head on the tub, and scrape her leg on the window frame. At this point, J.L. began screaming, hoping that someone would hear her.

{¶ 8} Appellant dragged her into an adjacent bedroom, forced her to switch shirts with him, turned up the volume on some music that was playing, and then forced her into the basement of the house. Once in the basement, appellant again talked to J.L., attempting to persuade her to continue their relationship.

{¶ 9} When she insisted that she would not resume the relationship, appellant commented that he had "nothing to lose." He then pulled her T-shirt and bra up over her head, pulled her pants and underwear down, and penetrated her vagina with his penis. J.L. attempted to scream, but appellant had his hand over her mouth. She also attempted to fight back, but she was unable to move due to appellant's weight advantage. After about five minutes, J.L. heard knocking at the side door, and someone yelling, "Police."

{¶ 10} Toledo Police Officer Charles Leroux testified that he and his partner, Officer Eric Board, were dispatched to J.L.'s house in response to a 911 call reporting that there was a female screaming for help at the residence. Upon reaching the residence, Officer Board kicked in the door after he heard somebody screaming for help. When Officer Leroux entered the basement of the residence, he found J.L. on the floor, naked

and in the fetal position, shaking and sobbing. Appellant was inside the residence, dressed only in his underwear. Officer Leroux called for a female officer, who responded and helped J.L. dress herself.

{¶ 11} J.L. was taken by ambulance to the hospital, where she was examined by sexual assault nurse examiner Jeanette Sayers and interviewed by Toledo Police Detective Regina Lester.

{¶ 12} Nurse Sayers testified that J.L. had "many injuries," including swelling on the right side of her nose; bruising, swelling and abrasions on her upper lip; an abrasion in the corner of her mouth that made it difficult for J.L. to talk and open her mouth; abrasions, tears and scratches on her right upper arm and shoulder area; a "very large" abrasion in her mid back area; abrasions on her left shoulder, right hip, abdomen and left lower leg; and a "very long" abrasion that ran the length of her lower right leg.

{¶ 13} Sayers further testified that J.L. had stated to her that "he" had broken into her house, she attempted to escape from the bathroom window, and that "he" pulled her back in, took her to the basement of the house, forced her to the floor and raped her.

{¶ 14} Detective Lester testified that she interviewed appellant after he gave a written waiver of his *Miranda* rights. The interview was video-recorded, and the recording was played to the jury.

{¶ 15} In the interview, appellant told the detective the following. He was at J.L.'s house when J.L returned home from work, sometime around 7:00 a.m., on the morning of September 28. He had called her and told her that he would be there. When J.L. arrived

home from work, he was outside the house. The two had a short discussion, after which she went into the house, and he stayed in the garage. After a few hours, when J.L. was sleeping, appellant went into the house, which was unlocked.

{¶ 16} According to appellant, he was in the basement of the home, gathering some of his belongings, when he and J.L. had consensual sex. Regarding the bathroom screen that had been removed from the window, appellant told the detective that J.L. had threatened to commit suicide by jumping out the bathroom window, that he believed she made the threat for "attention," and that he prevented her from jumping out the window.

{¶ 17} Following the presentation of evidence in the case, the jury returned a verdict acquitting appellant of aggravated burglary, and convicting him of rape and kidnapping.

{¶ 18} Appellant was sentenced by the trial court on September 11, 2008, to a term of nine years in prison for rape and five years in prison for kidnapping. The terms of imprisonment were ordered to be served consecutively, resulting in an aggregate prison term of 14 years.

{¶ 19} Appellant timely filed an appeal of his conviction, raising the following assignments of error:

{¶ 20} I. "THE TRIAL COURT ERRED IN PERMITTING THE RESPONDING POLICE OFFICER TO TESTIFY, OVER THE OBJECTION OF DEFENDANT, THAT HE HAD PRIOR CONTACTS WITH DEFENDANT AT THE COUPLE'S HOME,

WHERE SUCH PRIOR CONTACTS HAD NO RELEVANCE TO THE MATTERS AT ISSUE IN THE TRIAL."

{¶ 21} II. "THE TRIAL COURT ERRED IN PERMITTING THE RESPONDING POLICE OFFICER TO TESTIFY, OVER THE OBJECTION OF DEFENDANT, THAT THE ALLEGED VICTIM STATED THAT SHE HAD BEEN 'RAPED,' IN VIOLATION OF APPELLANT'S RIGHT TO CONFRONTATION WHICH IS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 10 OF THE OHIO CONSTITUTION."

{¶ 22} Appellant argues in his first assignment of error that the trial court abused its discretion when it permitted Officer Charles Leroux to testify, over the defense objection, that he had a prior contact with the defendant at the victim's residence.

{¶ 23} Looking at the record, we see that the circumstances of the challenged testimony were as follows. On direct examination by the prosecution, Officer Leroux was asked, "When you arrived at [J.L.'s address], what did you find?" Leroux responded, "We pulled up and recognized the address as an address we had been to prior." Defense counsel made an objection, and the trial court overruled the objection, permitted the response, and stated, "Lay foundation for what if anything occurred thereafter." The only additional testimony about the prior contact that the officer offered was that he had spoken with appellant and had seen his white jeep at the address several weeks prior to the September 28, 2007 incident. Defense counsel did not object to this testimony. In

addition, he elected not to develop testimony regarding this prior contact during his cross-examination of Officer Leroux.

{¶ 24} Appellant claims that the trial judge abused his discretion when he overruled the defense objection, because the officer's testimony "obviously suggested that the couple had a history of domestic strife," "therefore creat[ing] a serious possibility that the jury considered unrelated and unproven prior conflicts between [appellant] and the alleged victim, in reaching the conclusion that [appellant] had kidnapped and raped her." We disagree. The officer's statements were not in and of themselves prejudicial, and did not in and of themselves signal a "history of domestic strife," let alone specific "unrelated and unproven prior conflicts" between appellant and J.L.

{¶ 25} A trial court's ruling admitting evidence over objection is reviewed under the abuse of discretion standard. *State v. Sage* (1987), 31 Ohio St.3d 173, 182. An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Clark* (1994), 71 Ohio St.3d 466, 470.

{¶ 26} In the instant case, it is clear from the transcript that the trial judge recognized that although the officer's (technically nonresponsive) response to the prosecutor's question created a potential for prejudicial evidence, such evidence had not yet been presented. In overruling defense counsel's objection, there was no abuse of discretion. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 27} Appellant argues in his second assignment of error that the trial court erred in permitting Officer Leroux to testify, over defense counsel's objection, that J.L. had

stated that she had been raped. Again, we look to the record to understand the precise circumstances surrounding the testimony. According to the record, J.L. was asked one question by Officer Leroux when he discovered her lying in the fetal position on the basement floor, naked and crying. He asked her if she had been raped. J.L. replied, "Yes." After hearing that response, the officer did not ask any more questions. Instead, he made arrangements to get a female officer to the scene.

{¶ 28} Appellant argues that the admission of the victim's statement was hearsay and should not have been admitted. Evid.R. 803(2) provides an exception to the hearsay rule for an excited utterance. An "excited utterance" is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2). We find that the admission of J.L.'s statement that she had been raped, made while she was curled up on the basement floor, naked and crying, constitutes an excited utterance properly admitted under the rule.

{¶ 29} Appellant also argues that the trial court's ruling violated his right to confront witnesses, as guaranteed by the United States and Ohio Constitutions.

{¶ 30} The Sixth Amendment to the United States Constitution relevantly provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." This procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas* (1965), 380 U.S. 400, 406.

{¶ 31} In *Crawford v. Washington* (2004), 541 U.S. 36, the United States Supreme Court held that out-of-court statements that are testimonial are barred, under the

Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Id., at 68. This is true, regardless of whether such statements are deemed reliable by a court. Id., at 61-62. Thus, the threshold issue for our determination is whether or not the challenged statements are testimonial.

{¶ 32} The Supreme Court of Ohio applies different tests to determine whether statements are testimonial, based on the identity of the questioner and the purpose of the questioning. See *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, ¶ 28; see, also, *State v. Arnold*, 10th Dist. No. 07AP-789, 2008-Ohio-3471, ¶ 18. If the questioner is a law enforcement officer or an agent thereof, the court applies the "primary purpose" test to determine whether the statements are testimonial. See *Siler* at ¶ 28; *Arnold* at ¶ 18. But if the questioner is not a law enforcement officer or agent thereof, the court applies the "objective witness test." See *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482; see, also, *Arnold* at ¶ 18.

{¶ 33} The primary purpose test, first articulated by the United States Supreme Court in *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224, provides as follows:

{¶ 34} "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing

emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution." Id. at 822.

{¶ 35} In the instant case, Officer Leroux was obviously responding to an emergency. His partner had kicked in the door after he heard the victim's screams. Officer Leroux found appellant dressed only in his underwear. The victim was naked and crying. Officer Leroux asked J.L. just one question, and that so that he could properly respond to the situation -- in this case by asking for a female officer to come to the scene. Under the circumstances of this case, J.L.'s statement was clearly nontestimonial and, thus, was not violative of *Crawford*, supra. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 36} For all of the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____ JUDGE

Thomas J. Osowik, J. _____ JUDGE

Richard W. Knepper, J. _____ JUDGE
CONCUR.

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.