YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Neighbor's statement to officer victim was nontestimonial and exempt from *Confrontation Clause* scrutiny. [In the Matter of D.G.G.](05-3-31).

On August 4, 2005, the Fort Worth Court of Appeals found that a witness's statement to victim police officer was not "testimonial" in nature and as a result did not violate *Crawford v. Washington*.

05-3-31. In the Matter of D.G.G., Memorandum, No. 2-04-336-CV, 2005 Tex.App.Lexis 6200 (Tex.App.— Fort Worth, 8/4/05).

Background: The trial court adjudicated D.G.G. delinquent for burglarizing a vehicle and fleeing from an officer. It ordered him committed to the Texas Youth Commission for an indeterminate period not to exceed his twenty-first birthday. In his first point on appeal, D.G.G. complains that the court erred in admitting hearsay identification testimony in violation of his *Sixth Amendment* right to confrontation. In his second point, he challenges the factual sufficiency of the evidence underlying his conviction because the victim's testimony contradicts a written statement that he gave to the police.

Held: Affirmed.

Facts: D.G.G. was charged with burglary of a vehicle. n2 The vehicle was owned by Willie Jackson, a certified peace officer. Officer Jackson testified that he saw a boy in the trunk of his car with a bunch of clothes in his hands. When he asked the boy his name, the boy replied "David." n3 "David" is D.G.G.'s first name. When Officer Jackson told the boy that he was a police officer the boy dropped the clothes and ran away. Officer Jackson reported this incident to the police and gave a written statement.

> n2 He was also charged with three counts of fleeing from an officer. He pleaded "True" to all three counts.
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> n3 The names of all minors in this case have been changed.

At a bench trial, Officer Jackson identified D.G.G. as the boy whom he saw in the trunk of his car. He was also allowed to testify over objection, first, that he was present when his neighbor identified D.G.G. and later, that she identified two suspects as being in his car; one being a boy named "Solomon" and the other being D.G.G. The trial court judge adjudicated D.G.G. delinquent for the offense of burglary of a vehicle as well as for fleeing from an officer and committed him to the Texas Youth Commission for an indeterminate period not to exceed his twenty-first birthday. D.G.G. now appeals.

Memorandum Opinion: In his first point, D.G.G. argues that the trial court violated his *Confrontation*

Clause rights by admitting hearsay statements by Officer Jackson's that his neighbor identified D.G.G. as being in the trunk of Officer Jackson's car.

We review de novo the issue of whether the trial court admitted the neighbor's out-of-court statement in violation of the D.G.G.'s *Confrontation Clause* rights. *See Lilly v. Virginia, 527 U.S. 116, 137, 119 S. Ct. 1887, 1900, 144 L. Ed. 2d 117 (1999)* (holding that "when deciding whether the admission of a declarant's out-of-court statements violates the *Confrontation Clause*, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause"). Our review of *Confrontation Clause* issues is governed by the recent Supreme Court case *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. Under *Crawford*, the threshold question is whether the neighbor's statement is testimonial or non-testimonial. *See Woods v. State, 152 S.W.3d 105, 113 (Tex. Crim. App. 2004)*. Though, the Supreme Court declined to provide a complete definition of "testimonial," it did state that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford, 541 U.S. at 68, 124 S. Ct. at 1374*. The Supreme Court held that "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id*. The Court also noted that "where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to . . . [exempt] such statements from *Confrontation Clause* scrutiny altogether." *Id*.

Here, the neighbor's statement does not fall in the "testimonial" category. The fact that Officer Jackson is a police officer does not, without more, make the conversation between him and his neighbor akin to a police interrogation. The record is silent as to whether Officer Jackson was acting in his capacity as a police officer when he talked to the neighbor or whether he was acting merely as the victim of a crime. Nothing in the record indicates who initiated the conversations, the circumstances surrounding the conversation, or any other information showing that the neighbor's statement was made in response to question from an officer acting under color of police authority. *Compare Wilson v. State, 151 S.W.3d 694, 697-98 (Tex. App.--Fort Worth 2004, pet. filed)* (finding that admission of non-testifying witness's self-initiated statements to police officers in response to unstructured questions posed to witness in the context of answering her questions about her stolen car and determining why she was upset did not violate *Crawford*). Finally, the statement was not made in a formalized setting analogous to any of the situations described in *Crawford* as producing testimonial statements. *See Crawford, 541 U.S. at 69, 124 S. Ct. at 1374*; *Wilson, 151 S.W.3d at 698.* Therefore, we conclude that the neighbor's statement was nontestimonial and exempt from *Confrontation Clause* scrutiny.

D.G.G.'s first point also complains that the trial court erred in admitting this evidence over his hearsay objection because D.G.G. did not "open the door" to the neighbor's hearsay testimony by questioning Officer Jackson about the neighbor's statement. However, even if the trial court erred it was harmless.

In reviewing this non-constitutional aspect of D.G.G.'s first point, we analyze it under *Rule 44.2(b)* and disregard the error, if any, unless it affected D.G.G.'s substantial rights. *See TEX. R. APP. P. 44.2(b)*; *Armstead v. State, 977 S.W.2d 791, 798 (Tex. App.--Fort Worth 1998, pet. ref'd)*. A substantial right is affected when the error had a substantial and injurious effect or influence on the verdict. *King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)* (citing *Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946)*; *Coggeshall v. State, 961 S.W.2d 639, 643 (Tex. App.--Fort Worth 1998, pet. ref'd)* (en banc). In making this determination, we review the record as a whole. *Kotteakos, 328 U.S. at 764-65, 66 S. Ct. at 1248*.

After examining the record as a whole, we conclude that the error, if any, in question did not have a substantial and injurious effect or influence in determining the verdict. The neighbor's statement was used to identify D.G.G. as a person who burglarized Officer Jackson's car. But, this information was

established by other evidence as well. First, Officer Jackson's written statement to the police identified the boy who burglarized his car as having the same first name as D.G.G. Then he identified D.G.G. in a photo spread for the police. Finally, he made an in-court identification of D.G.G. during trial. Further, D.G.G. testified that "Solomon" had told police that D.G.G. was involved in the burglary of Officer Jackson's car. Since there was a considerable amount of other evidence from which the identification of D.G.G. could have been established, any error in admitting the neighbor's statement was harmless. *See Huff v. State, 560 S.W.2d 652, 654 (Tex. Crim. App. 1978)* (noting that hearsay may properly be deemed harmless if the fact to which the hearsay relates is sufficiently proved by other and competent evidence).

Conclusion: Thus, we overrule D.G.G.'s first point.

Sufficiency Issues Omitted.