Filed 7/27/05 In re T.W. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re T. W., a Person Coming Under the Juvenile Court Law.	B175355 (Los Angeles County Super. Ct. No. YJ22598)
THE PEOPLE, Plaintiff and Respondent, v. T. W., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Gary Polinsky, Commissioner. Affirmed in part, reversed in part.

Debra Fischl, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Joseph P. Lee and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

Minor T. W. appeals from an order declaring her a ward of the court pursuant to Welfare and Institutions Code section 602 based on felony violations of Vehicle Code sections 10851, subdivision (a) and 2800.2, subdivision (a).[1] Minor argues the trial court erred in admitting the testimonial hearsay statements by her mother in violation of her Sixth Amendment right to confrontation. She also challenges the sufficiency of the evidence to support each violation.

We conclude that the only evidence of a violation of section 10851, subdivision (a) was a hearsay statement by minor's mother admitted in violation of minor's right to confrontation. Because that evidence should have been excluded, and there is no other evidence to support a violation, we find the error prejudicial and reverse. We find sufficient evidence to support the adjudication that minor violated section 2800.2.

FACTUAL AND PROCEDURAL SUMMARY

Minor was observed at 10:15 p.m. by Los Angeles County Sheriff's Deputy James Mee on Pacific Coast Highway in Malibu. The minor was speeding and driving erratically. She crossed over lane markers, cut into the path of another driver, swerved, and nearly hit a road barrier. Deputy Mee activated the light bar on his patrol car. In response, minor's driving became more erratic, weaving and swerving over lane dividers and not slowing down. At that point, Deputy Mee activated his siren, but minor drove on, speeding up, then slowing, swerving onto the shoulder twice, and nearly hitting parked cars. The pursuit lasted for just under two miles before minor stopped her vehicle.

Over objection based on *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), Deputy Mee testified that he spoke with minor's mother, Stacy Lang, after the pursuit. Ms. Lang told him said she was co-owner of the vehicle and that minor did not have her permission to drive the vehicle. Ms. Lang signed a stolen vehicle report stating that the minor drove the vehicle without permission. Lang asserted her rights under the Fifth

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[1] Statutory references are to the Vehicle Code unless otherwise indicated.

Amendment of the United States Constitution and refused to answer any questions put to her at trial.

Minor, who was on probation at the time, was detained and placed in juvenile hall. A three-count petition was filed under Welfare and Institutions Code section 602, alleging minor violated section 10851, subdivision (a) (count one, felony unlawful taking or driving of a vehicle), section 2800.2, subdivision (a) (count two, felony evading an officer), and section 23103, subdivision (a) (count three, misdemeanor reckless driving).

After an adjudication hearing, the court sustained counts one and two of the petition as felonies.[2] Minor was placed in the care, custody, and control of the Probation Department for suitable placement, with physical confinement not to exceed four years and eight months. She filed a timely appeal.

DISCUSSION

Minor argues the trial court erred in admitting her mother's statement to Deputy Mee that minor did not have permission to drive the vehicle. She relies on *Crawford, supra,* 541 U.S. 36, to argue that the admission of the prior statement violated her right to confrontation under the Sixth Amendment. "Prior to *Crawford,* the admission of a hearsay statement under a firmly-rooted exception to the hearsay rule or when there were indicia of reliability did not violate a defendant's right of confrontation. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 [65 L.Ed.2d 597, 100 S.Ct. 2531].)" (*People v. Corella* (2004) 122 Cal.App.4th 461, 467.) But under *Crawford,* "[w]here a hearsay statement is 'testimonial,' the confrontation clause bars the prosecution from using it against a criminal defendant unless the declarant is available to testify at trial, or the defendant had a previous opportunity to cross-examine the declarant." (*People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1401 (*Sisavath*), citing *Crawford, supra,* 541 U.S. at p. 68.)[3] In

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[2] The juvenile court found that count three merged into the other counts.

[3] The California Supreme Court has granted review in several cases dealing with post-*Crawford* confrontation clause issues, including *People v. Cage*, review granted

Crawford, the Supreme Court overruled *Ohio v. Roberts*, *supra*, 448 U.S. 56 and ruled that most testimonial hearsay is inadmissible "regardless of whether or not the statement falls within a state-law hearsay exception or bears indicia of reliability. . . ." (*People v. Sisavath*, *supra*, 118 Cal.App.4th 1401.)

The *Crawford* court left a comprehensive definition of "testimonial" for another day, but observed that at a minimum it applies to prior testimony at a preliminary hearing, before a grand jury, and to police interrogations. (*Crawford*, *supra*, 541 U.S. at p. 68.) It observed that the Confrontation clause is focused on testimonial statements: "'Testimony,' . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' [Citation.] *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." (*Id*. at p. 51, italics added.)

Respondent argues that Lang's statement to Deputy Mee does not come within any category recognized as testimonial by *Crawford*. In making this argument, supported by selective quotations from *Crawford*, respondent fails to address the language from that case, just quoted, which indicates that statements made to law enforcement officers come within the recognized formulations of "testimonial."

Sisavath, *supra*, 118 Cal.App.4th 1396 is instructive. In a sexual abuse prosecution, the court ruled that four-year-old Victim 2 was not qualified to testify under Evidence Code section 701. The court then admitted statements made by Victim 2 to a police officer and in a videotaped interview conducted at a facility specially designed for interviewing children suspected of being victims of abuse. Because Victim 2 was made unavailable by disqualification and there was no pretrial opportunity for cross-

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October 13, 2004, S127344; *People v. Adams*, review granted October 13, 2004, S127373; *People v. Caudillo* review granted January 12, 2005, S129212; *People v. Kilday*, review granted January 19, 2005, S129567; *People v. Lee*, review granted March 16, 2005, S130570.

examination, the only issue in *Sisavath* was whether these statements were "testimonial" within the meaning of *Crawford*.

The *Sisavath* court quoted *Crawford*: "'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*.'" (118 Cal.App.4th at p. 1402, quoting *Crawford, supra*, 541 U.S. at p. 68, italics added.) It noted that the Supreme Court had recognized that various definitions of "interrogation" could be imagined, but that it used the term in a colloquial rather than technical sense. (*Sisavath*, at p. 1402, citing *Crawford, supra*, 541 U.S. at p. 53, fn. 4.) The statement in *Crawford* qualified under "any conceivable definition" of the term, the Supreme Court held, because it was "knowingly given in response to structured police questioning." (*Crawford, supra*, 541 U.S. at p. 53, fn. 4.)

In *Sisavath*, the court applied this test and concluded that Victim 2's statement to the police officer was testimonial. (*People v. Sisavath, supra*, 118 Cal.App.4th at p. 1402.) Here, Lang's statement that minor was not given permission to drive the Escalade was given in response to questions asked by Deputy Mee in the course of investigating the incident at the conclusion of the pursuit. Under *Crawford* and *Sisavath*, we conclude the statement was testimonial. It follows that because there was no opportunity for cross-examination when the statement was made, and because there was no opportunity for cross-examination at trial since Lang invoked the privilege against self-incrimination, the statement should have been excluded. We also note that no hearsay exception has been suggested that would have made the statement admissible even if *Crawford* did not apply.

In *People v. Pirwani* (2004) 119 Cal.App.4th 770, the Court of Appeal applied *Crawford* and ruled that a victim's videotaped statement to law enforcement officers was an ex-parte, unsworn statement given to law enforcement agents, and thus it was reasonable to anticipate its use at trial in the event the victim became unavailable to testify. The statement was "'knowingly given in response to structured police questioning'" and the *Pirwani* court concluded that it qualified as an inadmissible

testimonial statement under any "'conceivable definition.'" (*Id*. at p. at p. 786, quoting *Crawford, supra,* 541 U.S. at p. 53, fn. 4.) The Court of Appeal in *Pirwani* concluded that *Crawford* did not change the test to determine whether a violation of the confrontation clause requires reversal. It determined that the constitutional error was not harmless beyond a reasonable doubt under either *Chapman v. California* (1967) 386 U.S. 18 or *People v. Watson* (1956) 46 Cal.2d 818, 836 because without the victim's prior statements, it was questionable that the prosecution would have been able to prove theft beyond a reasonable doubt. (*Id*. at p. 791.)

On this record, under either *Chapman v. California, supra,* 386 U.S. 18 or the lower state standard of *People v. Watson, supra*, 46 Cal.2d at p. 836, we cannot say the error in admitting the statement was harmless. Section 10851, subdivision (a) provides in pertinent part that "[a]ny person who drives or takes a vehicle not his or her own, *without the consent of the owner thereof,*" is guilty of violating that statute. Here, the only evidence to support count one, a violation of section 10851, subdivision (a), was Lang's statement. Respondent cites Deputy Mee's testimony that minor was not the registered owner of the car, that she drove recklessly and erratically, and evaded the officer after he activated his lights and siren. But this evidence does not satisfy the element of lack of consent. "The prosecution bears the burden of proving all elements of the offense, and must persuade the fact finder beyond a reasonable doubt of the facts necessary to establish those elements. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 [124 L.Ed.2d 182, 113 S.Ct. 2078]; *In re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 90 S.Ct. 1068].)" (*People v. Diaz* (2005) 125 Cal.App.4th 1484, 1490-1491.)

We conclude that the adjudication sustaining the petition as to count one must be reversed for insufficiency of the evidence because the statement by Lang was admitted in violation of minor's right to confrontation.

II

Minor also challenges the sufficiency of the evidence to support her conviction on count 2, a violation of section 2800.2, fleeing or eluding a peace officer. She contends

that there was no evidence that she acted with an intent to evade, willfully flee or otherwise attempt to elude Deputy Mee.

"Vehicle Code section 2800.2 elevates a misdemeanor violation of evading an officer under Vehicle Code section 2800.1 to a felony if the vehicle is 'driven in a willful or wanton disregard for the safety of persons or property.'" (*People v. Chicanti* (1999) 71 Cal.App.4th 956, 960.) Section 2800.2 provides: "(a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail . . . . The court may also impose a fine . . . or may impose both that imprisonment or confinement and fine. [¶] (b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs."

"Vehicle Code section 2800.1 sets forth the elements of flight from a pursuing peace officer: '(a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor if all of the following conditions exist: [¶] (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform . . . ." (*People v. Shakhvaladyan* (2004) 117 Cal.App.4th 232, 236.)

The elements of the crime of felony evading a pursuing peace officer in violation of section 2800.2 are: "the offense is committed by one who, 'while fleeing or attempting to elude a pursuing peace officer,' drives his pursued vehicle in 'a willful or wanton disregard for the safety of persons or property.' (See [*People v.*] *Johnson*

[(1993)] 15 Cal.App.4th [169,] 173; see also CALJIC No. 12.85 (1999 rev.) . . . .)" (*People v. Sewell* (2000) 80 Cal.App.4th 690, 695.) The court in *People v. Chicanti*, *supra*, concluded that the requirements of section 2800.1 are designed to determine "'does the person know or reasonably should know that a police vehicle is in pursuit?'" (71 Cal.App.4th at p. 961, quoting *People v. Estrella* (1995) 31 Cal.App.4th 716, 723.) Here, minor does not dispute that Deputy Mee, while in uniform, drove a marked police vehicle exhibiting a lighted red lamp and sounding a siren, thus satisfying the requirements of section 2800.1.

Instead, minor argues the record does not support a violation of section 2800.2 because there is no evidence that she acted with the intent to evade or willfully flee or elude Deputy Mee. She bases this argument on lack of evidence of her state of mind, or the point at which she became aware the officer was in pursuit. Minor points out that according to Deputy Mee, from the point he turned on his lights and considered himself to be in pursuit, the chase lasted less than two miles, and, upon reaching her home, minor stopped the vehicle on her own. She cites no authority other than the language of the statutes to support her argument.

Section 2800.2 requires that the defendant drive the vehicle in "willful or wanton disregard for the safety of persons or property . . . ." The court in *People v. Richie* (1994) 28 Cal.App.4th 1347 considered the meaning of this term in the context of a violation of section 2800.2. It concluded that the statute requires that "the acts were intentionally performed with a consciousness of and disregard for their potentially dangerous consequences." (*Id*. at p. 1361.) Deputy Mee's testimony established that minor continued to drive recklessly and erratically on Pacific Coast Highway in Malibu after he activated the lights and siren on his marked police vehicle. He also testified that there were people on the street in the area, which the court found relevant. Deputy Mee testified that once he activated the red lights on his vehicle, minor's weaving pattern became more distinct and erratic, with her vehicle weaving and swerving across both westbound lanes and not slowing down. The pursuit continued at that point for an additional two miles, and a little more than two minutes elapsed.

The only reasonable inference from this record is that minor was aware of Deputy Mee's pursuit and continued to drive erratically and recklessly in an effort to evade him. We find sufficient evidence to support the order sustaining the petition as to a violation of section 2800.2.

DISPOSITION

The order sustaining the petition as to a violation of section 10851, subdivision (a) is reversed, and it is affirmed as to a violation of section 2800.2.

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EPSTEIN, P.J.

We concur:

HASTINGS, J.

WILLHITE, JR., J.