

7/22/04

CERTIFIED FOR PUBLICATION

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL THOMAS ADAMS,

Defendant and Appellant.

C040891
(Sup.Ct.No. 00F09421)

APPEAL from a judgment of the Superior Court of Sacramento County, Brian R. Van Camp, Judge. Reversed.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, David A. Rhodes and Alan Ashby, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Daniel Thomas Adams of uttering a criminal threat (Pen. Code, § 422 - count one),¹ assault by

¹ Undesignated statutory references are to the Penal Code.

means of force likely to produce great bodily injury (§ 245, subd. (a)(1) - count two), false imprisonment (§ 236 - count three), and unlawfully inflicting corporal injury upon a cohabitant (§ 273.5 - count four). The court found true a prior Florida conviction for rape and ruled it a violent felony and "strike" under California law. It sentenced defendant to an aggregate term of eight years.

On appeal, defendant argues the trial court violated his constitutional rights by: (1) admitting out-of-court statements of the victim, under Evidence Code section 1370 in lieu of her trial testimony; (2) admitting out-of-court statements of defendant's ex-girlfriend, under Evidence Code sections 1109 and 1370; (3) instructing the jury with the 1999 version of CALJIC No. 2.50.02; and (4) instructing the jury with CALJIC No. 17.41.1. We granted defendant leave to file a supplemental brief to discuss the impact of *Crawford v. Washington* (2004) ___U.S.___ [158 L.Ed.2d 177] (*Crawford*). Defendant argues *Crawford* requires reversal.

We agree with defendant that the court erred in admitting evidence of the victim's out-of-court statements, and the error was prejudicial. We therefore reverse the judgment. Given this resolution, we need not address the remaining issues raised on appeal.

FACTUAL BACKGROUND

The prosecution witnesses revealed evidence of defendant's October 2000 fight with the victim which led to the current charges against him. Trial testimony also revealed prior

incidents of a similar nature involving the victim in July 2000 and defendant's ex-girlfriend in February 2000, and defendant's rape and kidnapping of his first wife in May 1991. Neither the victim nor ex-girlfriend testified at trial. Defendant testified, providing his own account of the events described by the prosecution witnesses. We summarize the trial testimony.

A. The Charged Offenses Involving the Victim:

Michael Booth, an emergency medical technician, was dispatched to a 7-Eleven store in Carmichael on October 28, 2000, where he met the victim. She had a laceration on her cheek, and complained she had been kneed in the stomach. Because the victim also stated she was pregnant, the technicians felt she should be checked out at a hospital.

Sacramento County Sheriff's Deputy Susan Hanrahan also responded to the emergency call. She spoke with the victim "very brief[ly]" -- between three and five minutes -- before the paramedics arrived. The victim stated that her boyfriend, the defendant, had thrown a glass at her and caused the laceration. Hanrahan testified that the victim "was calm and in control of her emotions, and that her eyes were red and puffy from crying."

Deputy Lawrence Craft, Deputy Hanrahan's beat partner, corroborated Hanrahan's account of their brief contact with the victim at the 7-Eleven. He described the victim as "fairly upset." The paramedics were already on the scene assessing the victim's medical condition. They were eager to transport her to the hospital because she was experiencing abdominal pain. Deputy Craft did not try to find defendant at the apartment

complex because the victim did not know the apartment number and said he already had left.

Deputy Hanrahan continued the interview in more depth at the hospital approximately 45 minutes later. The victim recounted that the injury occurred at defendant's nearby apartment. She had traveled to Sacramento from Reno on October 27th, and spent the night with defendant. They quarreled twice on the 28th, the second argument resulting in the injury to her face.

The second argument began late in the evening when the victim and defendant were in bed together. Defendant wanted to have sex and she did not. At that point, the victim noticed a red light in the closet, and discovered a video camera hidden there. She did not know she was being taped until she saw the light. After grabbing the camera and rewinding the tape to replay what had been recorded, the victim discovered pictures of three sexual encounters -- one with her, one with defendant's ex-girlfriend, and one with his ex-wife. She became angry.

Defendant succeeded in taking the camera away from the victim, and the argument became physical. He punched her in the back of the head, and she fell to the floor. When the victim attempted to call 911, defendant pulled the cord from the wall. Defendant threw a drinking glass at the victim. It struck her on the cheek and shattered. The victim's statement was consistent with the injury Deputy Hanrahan observed on her face.

While the victim was on the floor, defendant sat on top of her with one of his knees pushed into her abdomen. She told

Deputy Hanrahan that she was four months pregnant with defendant's child and concerned about the welfare of the baby. According to the victim, defendant was in a rage and threatened to kill her. She pleaded with him not to kill her and the baby.

The victim told Deputy Hanrahan that she tried to leave the apartment several times, but defendant stood between her and the door. He kept asking her not to leave but finally relented. The victim drove to the 7-Eleven and called 911.

Sacramento County Sheriff's Detective Michael Dwyer interviewed defendant after his arrest on November 9, 2000. Defendant told Detective Dwyer that the October 2000 incident occurred when he and the victim were breaking up. She became upset when she found the video camera he had set up to record their last sexual encounter. Defendant told Dwyer that some glass candlesticks fell and broke on the floor. He and the victim rolled off the bed onto the floor "and continued to roll around . . . struggling over the camera."

B. The Uncharged Offense Involving the Victim:

Billy Glenn was a security guard at the Silver Club Hotel in Sparks, Nevada. On July 21, 2000, he witnessed an incident in the hotel parking lot involving a man and a woman. The couple appeared to be arguing over a suitcase. Defendant drove away in his maroon BMW after the chief of security asked him not to leave.

Police Officer Donald Player made contact with the victim in her room at the Silver Club Hotel at 11:43 a.m. the same day. He observed that her face was swollen. The victim told Officer

Player that her boyfriend, the defendant, hit her on the left side of the face with his closed fist. They had argued because she and a friend "were out late and didn't return to the room [un]til the early morning hours." The victim said defendant walked out. She did not want him to leave and followed him outside to the parking lot. The victim told Officer Player that defendant pushed her down, slapped her a few times, and drove off in his car.

C. The Uncharged Offense Involving the Ex-girlfriend:

El Dorado County Sheriff's Deputy Steve Klang responded to a call at an El Dorado County residence on February 1, 2000. Defendant's ex-girlfriend told Klang that defendant had left in a red BMW. Her eye was swollen and she had cuts around her nose. The ex-girlfriend said that she had awakened early and decided to drink a beer or two. An argument ensued when her boyfriend found her drinking. She stated that her boyfriend hit her in the face several times. Deputy Klang testified that the ex-girlfriend appeared to be under the influence but not intoxicated.

Deputy Matt Cathey took a detailed statement from ex-girlfriend after he arrived on the scene. She told him she had formerly worked as a prostitute but was living with defendant in a boyfriend-girlfriend relationship. Deputy Cathey obtained a more detailed account of the incident. The ex-girlfriend told Deputy Cathey she was going to take the train to her mother's house in Wisconsin.

D. The Rape and Kidnapping of Ex-Wife:

Defendant's ex-wife traveled from Florida to testify at trial. In May 1991, she was separated from defendant after a 17-year marriage. Defendant was known as Jimmy Daniels at that time.

Defendant entered his ex-wife's residence uninvited on the morning of May 24, 1991. She was doing the laundry in preparation for a weekend trip. Defendant asked her to go to the beach but she declined and asked him to leave. Defendant refused. He tied her arms behind her back, placed duct tape over her mouth, forced her into the bedroom, and raped her. Thereafter, defendant disconnected the telephones. She freed herself and drove to the sheriff's department to report the incident.

E. Defendant's Testimony:

Defendant testified that he had served in the United States Air Force and worked in law enforcement in Florida. Defendant changed his name after the assault on his ex-wife, served time in Florida for rape and kidnapping, and eventually moved to Nevada. He started an advertising business in Reno.

Defendant began frequenting brothels after his second marriage broke up. He met his ex-girlfriend in June 1999, a relationship developed, and she moved in with him in Placerville. After that relationship ended in February 2000, defendant met the victim, again in a brothel. They became friends and the victim and her young son moved in with defendant in April 2000.

Defendant generally agreed with the prosecution witnesses' account of prior acts of domestic violence against his ex-girlfriend and ex-wife. He testified that he hit the victim in July 2000 in self-defense.

As to the charged offenses, defendant's testimony differed from the victim's out-of-court statements about the incident on October 28, 2000. Defendant described an argument earlier in the day. Thinking it might be their last night together, defendant set up the video camera to tape them if they had sex. When the victim discovered the camera and saw the ex-girlfriend on the tape, she went "ballistic" and began pounding on the camera. Defendant intervened and eventually rescued the camera.

Defendant testified that when the victim tried to call the police, he disconnected the phone and said, "You are not going to call the police for something this stupid, not from my house. You got your cell phone, you use your cell phone" The victim attempted to call a regular phone number from the kitchen and defendant pushed the hang up button and tried to calm her down. When the victim attempted to leave, defendant stepped in front of the door, suggesting that they discuss the situation like adults.

Defendant testified that the victim went to the bedroom to pick up her things. He returned to the bedroom when he heard crashes and saw the victim with a lamp in her hand. The pair began wrestling for the lamp. Defendant pushed the victim from the bed onto the floor in defensive action. He denied hitting

the victim or pushing his knee into her stomach. Defendant testified he held his knee against her, urging her to settle down.

According to defendant, the victim was "really hot instead of calming down." He was hurting and did not want a physical confrontation. He balled up his fists, looked her in the eyes, and said, "[Y]ou make me so mad. I can fucking kill you. I really could. You stop it." He said he did not threaten to kill her but only intended to stop her assault. At that point, the victim said "okay" and sat down on the bed. Defendant noticed the victim had blood on her cheek, and saw a broken candleholder on the floor. The victim went to the bathroom to clean off the blood, saying that she needed stitches. Defendant testified the victim declined his offer to take her to the hospital and left the apartment.

Defendant testified he saw the victim the following day. She came back to the apartment, they had sex, and he gave her several hundred dollars for herself and the child she was expecting.

DISCUSSION

Evidence Code section 1370 establishes a hearsay exception for out-of-court statements made to law enforcement officials, among others, by victims of assault or threats of assault if the declarant is "unavailable" and the statements are "trustworthy."²

² Evidence Code section 1370 provides:

"(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:

"(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

"(2) *The declarant is unavailable as a witness pursuant to Section 240.*

"(3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.

"(4) *The statement was made under circumstances that would indicate its trustworthiness.*

"(5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

"(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

"(1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

"(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

"(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

"(c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement."

Evidence Code section 240 reads in relevant part:

"(a) Except as otherwise provided in subdivision (b), 'unavailable as a witness' means that the declarant is any of the following:

"(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

"(2) Disqualified from testifying to the matter.

"(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(See e.g., *People v. Kons* (2003) 108 Cal.App.4th 514 (*Kons*) [statements to police by shooting victim identifying his assailant lacked sufficient indicia of trustworthiness and were therefore inadmissible]; *People v. Hernandez* (1999) 71 Cal.App.4th 417 (*Hernandez*) [statements to police by victim of domestic violence were sufficiently reliable and therefore admissible].)

In pretrial proceedings held on Thursday, December 13, 2001, the prosecutor moved to admit evidence of the uncharged July 2000 offenses -- but not the October 2000 offenses -- under Evidence Code sections 1109³ and 1370. In the following exchange with the court, the prosecutor suggested the victim might be unavailable:

"THE COURT: Well, you talked to her two or three weeks ago. She was incarcerated and you told her you need her here. She was released in the interim. You have been unable to reach her. She has a court date tomorrow in Washoe County. You corresponded with the D.A. there and served a subpoena.

"(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

"(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Italics added.)

³ Evidence Code section 1109, subdivision (a)(1) provides: "Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

"[THE PROSECUTOR]: We have an out of state subpoena. We've given it to the D.A. up there to serve on her tomorrow with the court date scheduled for the magistrate in Sparks, Nevada to sign and have her ready for pick up Monday morning."

The defense disputed the claim that the victim was unavailable, argued there was "more than ample bias to show the lack of trustworthiness of her statement to the officer" about the July 2000 incident, and maintained the prejudice outweighed the probative value of the evidence. The court deferred ruling on the Evidence Code section 1370 motion, stating, "If she's a no show, we'll hear about it at that time." At the same time, the court admitted evidence of the July 2000 incident under Evidence Code section 1109, and commented, "I see nothing on trustworthiness obviously subject to 352."

The issue of the victim's availability as a witness came up again the following morning, December 14, 2001. The prosecutor informed the court that the victim had failed to appear for her scheduled hearing in Nevada. He represented that the Nevada authorities would be issuing a warrant on her failure to appear, but it would "take a few days to hit the system." The prosecutor did not anticipate finding the victim before the jury began hearing evidence, and asked the court -- for the first time -- to admit pursuant to Evidence Code section 1370 her out-of-court statements relating to the charged offenses. He emphasized that the subpoena was the only jurisdiction he had over the victim, and asserted, "[M]y diligence has clearly been made, numerous attempts to locate her, what court, what time,

arrange with the district attorneys up there . . . to serve her with that subpoena. [¶] But she makes herself willfully unavailable. I can't just start[] looking around Nevada for her person by person."

The defense objected on the grounds it previously asserted, including the fact she was "not truly unavailable." The court also had questions and asked the prosecutor: "She was around on November 30th. What about holding her until the 17th?" The prosecutor responded that he did not know the exact day the victim was going to be released from Washoe County jail. He represented that he had been unable to contact her independently or through her mother since approximately the 20th of November.

The court granted the prosecution's Evidence Code section 1370 motion, stating: "The statutory requirements are that the witness is unavailable. I think the record will reflect the efforts have been made. To think that the police or jailer in Reno could hold Ms. [P.] for three weeks or so after completion of her time is ambitious, and sounds like - and she was under a number of Court orders to show up this morning in court for those matters. [¶] If she wasn't abiding by those, I have no reasons [sic] to think that she would cooperate with some of these others, so I will grant the motion." It made no finding on the trustworthiness of the victim's statements regarding the October 2000 incident.

Defendant contends that admission of the victim's out-of-court statements under Evidence Code section 1370 violated his rights under the confrontation clause of the United States

Constitution. Citing *Crawford*, he argues that where the admissibility of testimonial statements is at issue, the Sixth Amendment requires a showing of unavailability and a prior opportunity for cross-examination. (*Crawford, supra*, 158 L.Ed.2d at pp. 198-200, 203, overruling *Ohio v. Roberts* (1980) 448 U.S. 56 [65 L.Ed.2d 597] (*Roberts*).) Although the record supports the court's determination that the victim was unavailable, it also demonstrates her testimonial statements to sheriff's deputies were never subjected to cross-examination. We conclude they are inadmissible under *Crawford's* restatement of Sixth Amendment law.

Under *Roberts*, the Sixth Amendment did not bar admission of the statement of an unavailable witness against a criminal defendant if the statement bore "'indicia of reliability.'" (*Roberts, supra*, 448 U.S. at p. 66.) Reliability could be "inferred without more in a case where the evidence [fell] within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." (*Ibid.*) As we explained in *Kons*, Evidence Code section 1370 contains several provisions designed to address the reliability requirements set forth in *Roberts*. (*Kons, supra*, 108 Cal.App.4th at p. 522.) These provisions were important in light of our conclusion in *Kons* that Evidence Code section 1370 was not a firmly rooted hearsay exception. (*Kons*, at p. 523.)

Crawford changed the constitutional analysis based on its detailed review of the historical roots of the Sixth Amendment.

(*Crawford, supra*, 158 L.Ed.2d at pp. 187-196.) Two important principles emerged from this review. First, the confrontation clause applies to "testimonial statements." (*Id.* at p. 193.) Thus, "[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." (*Id.* at p. 192.) Although *Crawford* did not provide a clear test for determining what constitutes a "testimonial statement" subject to its rule, it held that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." (*Id.* at p. 193.) Second, the framers of the constitution "would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id.* at p. 194.) The *Crawford* court emphasized that it "[did] not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability." (*Id.* at pp. 194-195.) Thus, *Crawford* holds that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. . . . Whatever else the term ["testimonial"] 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.” (*Id.* at p. 203.) We conclude that under the circumstances of this case, the victim’s statements to the sheriff’s deputies violated defendant’s Sixth Amendment right to confront the witnesses against him.

Violations of the confrontation clause are subject to harmless error analysis. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308 [113 L.Ed.2d 302].) Defendant testified, offering his version of the events of October 28, 2000. The victim was the only witness who could contradict defendant’s account of the evening’s events. Indeed, without her live testimony or admission of the out-of-court statements, there was no prosecution case. Thus, we cannot conclude that a rational jury would have reached the same verdict in the absence of the error and reversal is required.

DISPOSITION

The judgment is reversed.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.