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Kathleen Egan

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

People v. Bradley[1]
(decided July 28, 2005)

Norman Bradley was convicted on two counts of aggravated criminal contempt, two counts of criminal contempt in the first degree, and one count of assault in the third degree.[2] He was given concurrent sentences of two to four years for the criminal contempt convictions and one year for the assault conviction.[3] Due to the fact that the victim could not be found to testify, the chief evidence against Bradley at trial was an out-of-court statement made by the victim to an officer at the scene of the crime.[4] The victim said that "her boyfriend threw her through a glass door."[5]

On appeal, Bradley argued that, according to the rule set forth in *Crawford v. Washington,*[6] the utterance was testimonial,[7] and therefore its admission violated his right to confrontation provided under both the United States Constitution[8] and the New York State

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[1] 799 N.Y.S.2d 472 (App. Div. 1st Dep't 2005).
[2] *Id.* at 475.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 474.
[6] 541 U.S. 36 (2004).
[7] *Bradley*, 799 N.Y.S.2d at 474.
[8] U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ."

Constitution.[9] The court, however, found that the utterance was not testimonial, and thus affirmed Bradley's convictions.[10]

A police officer responded to a 911 call, and was met by the victim at the door.[11] After observing that the victim was visibly shaken, profusely bleeding from her hand, and that she had blood smeared all over her face, the officer asked the victim to explain what had happened.[12] The victim responded that Bradley had thrown her through a glass door.[13] The officer then entered the apartment and observed glass on the floor and several broken French door panes.[14] When the officer found Bradley lying face down on a mattress, he placed him under arrest.[15]

At trial, the victim could not be located and as a result she did not testify.[16] Over the objection of the defense, the prosecutor called on the officer to testify about the utterances made to him by the victim.[17] The prosecutor also introduced two past orders of protection, which instructed Bradley to stay away from the victim.[18]

Bradley took the stand and testified that he was not the boyfriend of the victim, and that because of the orders of protection,

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[9] N.Y. CONST. art. I, § 6 provides in pertinent part: "In any trial in any court whatever the party accused shall . . . be confronted with the witnesses against him or her."

[10] *Bradley*, 799 N.Y.S.2d at 474.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 474-75.

[15] *Bradley*, 799 N.Y.S.2d at 475.

[16] *Id.* at 474.

[17] *Id.* In addition, the People introduced the medical records of the victim, the clothes the victim was wearing on the night of the attack, and photographs of the apartment. *Id.* at 475.

[18] *Id.* at 475.

he did not associate with her.[19] He testified that the victim was friends with the landlord and at times stayed in the apartment.[20] Bradley claimed he had been out drinking on the night of the incident, had returned to the apartment and fallen asleep.[21] He was later awoken by someone trying to get something out of his pocket.[22] Shortly afterwards, he heard the sound of glass breaking and water running.[23] He went to the bathroom, whereupon he found the victim wiping blood from her hand onto her shirt.[24] The defense introduced into evidence a note from the victim, which stated that she herself had punched the glass door, and that the charges against Bradley were false.[25]

After the jury convicted Bradley, the defense argued on appeal that the crux of the People's case was the out-of-court statement by the victim stating that the defendant threw her through the glass door which, according to the rule set forth in *Crawford*, was testimonial.[26] To prove this, Bradley argued that at the time the police officer questioned the victim, the officer was conducting an investigation and consequently, the utterance made was "elicited from the victim by the officer pursuant to an investigation."[27] Bradley further contended that because the victim had sought the involvement of authorities in the past by obtaining orders of

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19 *Id.*
20 *Bradley*, 799 N.Y.S.2d at 475.
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Bradley*, 799 N.Y.S.2d at 475.
26 *Id.*

protection, "a reasonable person in her situation would have understood that any statement she made was likely to be used for prosecutory purposes."[28] Based on this, Bradley argued that his convictions should be overturned because the admission of the testimonial utterance resulted in a violation of his right to confrontation.[29]

The court was required to determine whether the victim's statement was testimonial.[30] The court began by distinguishing the victim's statement from that of the statement made in *Crawford* which was deemed testimonial.[31] The statement in *Crawford* was described as "detailed, particularized and memorialized" as compared to "the simple question posed to the victim in this matter."[32] It was reasoned that "[p]reliminary, on-scene interviews are clearly distinguishable from the ex parte testimony found to be excludable on Sixth Amendment grounds in *Crawford*."[33] In deciding whether the statement was testimonial, the court in *Bradley* reasoned that it was appropriate to look at the purpose of the question posed to the victim.[34] Where the purpose of the questioning "is to gain general familiarity with the situation confronting a police officer . . . the officer is making only a preliminary investigatory inquiry. . . . [t]hus,

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Bradley*, 799 N.Y.S.2d at 476.

[31] *Id.* at 477.

[32] *Id.* ("It is difficult to imagine a more spontaneous, general and preliminary inquiry addressed in an unstructured context than a police officer arriving at a crime scene and merely asking, 'What happened?' ").

[33] *Id.*

[34] *Id.* at 480.

the response is not the product of a structured police interrogation and should not be regarded as testimonial."[35]

However, when the purpose is to gain incriminating evidence against a particular person, "the officer is advancing a potential prosecution, and the response takes on a testimonial character."[36] The *Bradley* court ultimately held that the statement in question was not testimonial because it was a response to a "preliminary and nonspecific question."[37] In addition, the officer was not aware of Bradley's presence and thus could not view him as a particular suspect.[38] Therefore, the court found that the questioning was "not calculated to elicit incriminating evidence."[39] Based on the finding that the out-of-court statement was not testimonial, the court concluded that Bradley's right to confrontation had not been violated, and thus his conviction was upheld.[40]

In *Crawford v. Washington* the petitioner was convicted of stabbing a man who had allegedly tried to rape his wife, Sylvia.[41] The petitioner and his wife were interrogated by police officers shortly after the stabbing.[42] Sylvia did not testify at trial because of spousal immunity, but the prosecution was granted the right to introduce her tape recorded out-of-court statements made to police

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[35] *Bradley*, 799 N.Y.S.2d at 480.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Bradley*, 799 N.Y.S.2d at 474.
[41] *Crawford*, 541 U.S. at 38.
[42] *Id.*

based on the hearsay exception for statements against penal interest.[43] The defense objected, arguing that the introduction of the statement would violate Crawford's right to confrontation, but Crawford was subsequently convicted of assault.[44] Later, he appealed the conviction based on the introduction of his wife's statement.[45]

Prior to *Crawford*, the rule regarding out-of-court statements was set forth in *Ohio v. Roberts*.[46] In *Roberts*, the Court balanced the relationship between the age old exceptions to hearsay and the Sixth Amendment's Confrontation Clause.[47] At the time of trial, a key prosecution witness was unavailable, and thus did not testify.[48] Therefore, the prosecution introduced into evidence the transcript of this witness's prior testimony given at the preliminary hearing.[49] The transcript was admitted into evidence and Roberts was subsequently convicted.[50]

On appeal, the Court held that out-of-court statements made by unavailable witnesses are admissible if those statements enjoy an "adequate 'indicia of reliability.' "[51] Reliability can be assumed if "the evidence falls within a firmly rooted hearsay exception" or if there is "a showing of particularized guarantees of trustworthiness."[52]

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[43] *Id.* at 40. ("Noting that Sylvia had admitted she led petitioner to [the victim's] apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest . . . ."). *See* WASH REV CODE § 5.60.060 (1) (2005).

[44] *Crawford,* 541 U.S. at 40-41.

[45] *Id.* at 38.

[46] 448 U.S. 56 (1980).

[47] *Id.* at 62.

[48] *Id.* at 59.

[49] *Id.*

[50] *Id.* at 60.

[51] *Roberts,* 448 U.S. at 66.

[52] *Id.*

The *Roberts* Court ultimately reasoned that the transcript possessed an indicia of reliability because the defense counsel was given an opportunity to cross-examine the witness at the preliminary hearing.[53] In examining the importance of cross-examination, it was stated that "[t]he Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross-examination.' "[54] Cross-examination gives:

> the accused . . . an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge him by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[55]

The Supreme Court in *Crawford*, however, reconsidered the *Roberts* test, and noted that it did not conform to the original meaning of the Confrontation Clause.[56] After examining the history of the Confrontation Clause, the Court set forth "two inferences about the meaning of the *Sixth Amendment.*"[57] The first explained that "the principal evil at which the *Confrontation Clause* was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[58] The second

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[53] *Id.* at 73.
[54] *Id.* at 63 (citing Douglas v. Alabama, 380 U.S. 415, 418 (1965)).
[55] *Id.* at 63-64 (citing Mattox v. United States, 156 U.S. 237, 242-43 (1895)).
[56] *Crawford,* 541 U.S. at 60.
[57] *Id.* at 50.
[58] *Id.*

stated "that the Framers 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."[59]

According to *Crawford*, the *Roberts* test departed from these inferences in two ways.[60] The *Roberts* test "applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony . . . [and] [i]t admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability."[61] *Crawford* pointed out that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the *Sixth Amendment's* protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' "[62] The *Crawford* Court thus determined that when a statement is deemed testimonial, "the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination."[63]

However, little guidance was given as to how lower courts should determine when a statement is testimonial.[64] Yet it was noted that the term testimonial "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to

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[59] *Id.* at 53-54.

[60] *Id.* at 60.

[61] *Crawford,* 541 U.S. at 60. The court states that "[t]his often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause" and in addition "often fails to protect against paradigmatic confrontation violations." *Id.*

[62] *Id.* at 61. Scalia pointed out that *Crawford* was a perfect example of the problems with the *Roberts* test given that the Court of Appeals and the State Supreme Court could not agree on whether or not Sylvia's statement was reliable. *Id.* at 65-66.

[63] *Id.* at 68.

[64] *Id.*

police interrogations."[65] The Court consequently reversed Crawford's conviction because the Court found that Sylvia's out-of-court statements were testimonial and therefore Crawford must have been accorded the opportunity to cross-examine Sylvia prior to the admission of her statement into evidence.[66]

Relying on *Crawford*, the New York Court of Appeals in *People v. Hardy* reversed the defendant's convictions.[67] Hardy was convicted on several counts, all relating to the robbery and shooting of Mrs. Garcia.[68] At trial, the prosecution was permitted to read to the jury parts of the plea allocution given by one of Hardy's co-defendants, Janerio Hardy.[69] In addition, the prosecution called on Robert Quarles, a person with a long criminal history and "dubious credibility," to testify that on the day of the shooting Hardy informed him that he shot a woman earlier in the day.[70] Mrs. Garcia testified about the robbery and shooting, but was not able to identify the defendant.[71] Her account of the incident, however, matched that given by Janerio Hardy in his plea allocution.[72] The court noted that "[w]hile the Crawford Court refused to supply a definition of testimonial statements, it described plea allocutions as being 'plainly

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[65] *Id.*

[66] *Crawford*, 541 U.S. at 68 "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.* at 68-69.

[67] 824 N.E.2d 953, 956 (N.Y. 2005).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 956, 958.

[71] *Id.* at 956.

[72] *Hardy*, 824 N.E.2d at 956.

testimonial' in nature."[73] In addition to finding the plea allocution testimonial, the court found that the trial court's admission of it constituted reversible error because it was heavily relied on by the prosecution "to stitch all the evidence together."[74]

Nevertheless, it was held in *People v. Newland*[75] that "a brief, informal remark to an officer conducting a field investigation, not made in response to 'structured police questioning' should not be considered testimonial."[76] While searching for witnesses to a robbery, a police officer spoke to a person who directed him to a shopping cart where papers identifying the defendant where found.[77] The defendant was convicted, and the court upheld his conviction on appeal.[78] The court found that the statement was not testimonial because the officer was performing a field investigation and the remark was short and informal.[79] This type of statement "bears little resemblance to the civil-law abuses the *Confrontation Clause* targeted."[80]

In determining whether a statement is deemed testimonial New York courts seem to focus on the purpose behind the interrogation, the environment in which the interrogation took place, and the structure of the interrogation. For example, the court in *Bradley* focused on the purpose of the questions being asked of the

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[73] *Id.* at 957. (quoting *Crawford*, 541 U.S. at 64) (emphasis added).
[74] *Id.* at 958.
[75] 775 N.Y.S.2d 308 (App. Div. 1st Dep't 2004).
[76] *Id.* at 309.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Newland,* 775 N.Y.S.2d at 309.

victim.[81] If the purpose of the questioning is to gain familiarity with the situation, then the statement is part of a preliminary investigation and therefore not testimonial.[82] If the purpose of the questioning is to gain information helpful to a prosecution, then the statement should be deemed testimonial.[83] *Newland* suggests that if the questioning occurs at the scene of the incident during a field interrogation, as opposed to a structured police interrogation at police headquarters, then the statement is not testimonial.[84]

In conclusion, the Supreme Court has made clear that statements deemed testimonial will not be admitted into evidence unless it is shown that the witness was unavailable and that the defendant had the opportunity to cross-examine. There has been confusion, however, among the lower courts as to when a statement is deemed testimonial. One of the many reasons that *Crawford* rejected the *Roberts* test was because it was unpredictable and allowed for too much judicial discretion. Hence, this lack of uniformity may require the United States Supreme Court to take up the issue once again and more clearly define the term testimonial. It is without doubt, however, that all criminal defendants are afforded the opportunity to confront a witness's out-of-court statements under both the federal and state constitutions. The *Sixth Amendment* prefers that this confrontation take the form of cross-examination because cross-examination gives the defendant an opportunity to test the

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[81] *Bradley*, 799 N.Y.S.2d 472, 480 (App. Div. 1st Dep't 2005).
[82] *Id.*
[83] *Id.*
[84] *Newland*, 775 N.Y.S.2d at 309.

motive, recollection and truthfulness of the witness. In addition, it gives the jury an opportunity to view the witness and determine his or her credibility. Accordingly, this fundamental right to confrontation is protected by both the federal and state constitutions.

Kathleen Egan