SELECTED POST CRAWFORD MICHIGAN DECISIONS

Confrontation, co-Defendant Confession. *People v Taylor*, 482 Mich 368, 759 N.W.2d 361 (2008). The Court held 5-2 that a murder co-defendant's out-of-court statements to an acquaintance that the co-defendant and defendants had kidnaped victim, and that defendant had shot the victim once in each leg, causing him to bleed to death, did not implicate Confrontation Clause, since the co-defendant's statements were nontestimonial, and therefore admissibility of the statements was governed solely by hearsay exception for statements against declarant's penal interest. The co-defendant's statements were non-testimonial, because they were made informally to an acquaintance, not during police interrogation or other formal proceeding, or under circumstances indicating that their primary purpose was to establish or prove past events potentially relevant to later criminal prosecution; abrogating. The decision was issued *per curiam*, and Taylor was *pro se*. Justice Cavanagh dissented, on the grounds that the Court's interpretation of MRE 804(b)(3) in *People v Poole*, 444 Mich. 151, 506 N.W.2d 505 (1993) should be reexamined in light of the later decision in *Williamson v. United States*, 512 U.S. 594, 600-601, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), where the Supreme Court held that the identical federal rule does not allow introduction of a co-defendant's confession, because the rule only allows admission of those remarks within the confession that are individually self-inculpatory, not a broader narrative. Ironically, the *Poole* majority had relied on the Commentary to FRE 804(b)(3) to justify its decision.

Confrontation, co-Defendant Confession. *People v Desai*, Wayne Circuit No. 95-007158, Hon. David J. Allen. A confession to murder by a separately tried nontestifying co-Defendant to an informant which implicated Defendant was admitted against Defendant as a statement against penal interest over hearsay objections in a 2001 trial. Defendant raised a confrontation claim on appeal, which was rejected under *Ohio v Roberts*. Defendant was then granted a writ by federal District Judge Battani based upon Crawford. The Sixth Circuit reversed, finding that the co-Defendant's confession was nontestimonial, and that the Confrontation is inapplicable to nontestimonial statements. *Desai v Booker*, 538 F 3d 424 (6th Cir. 2008). However, Defendant was allowed to return to federal District Court, and consequently to Wayne Circuit Court, to exhaust a due process challenge to the admission of the confession. In an opinion issued September 9, 2009, Judge Allen ruled that the circumstances surrounding the co-Defendant's confession were such that it was constitutionally unreliable and its admission violated due process. The prosecutor's application for leave to appeal is pending in the Court of Appeals, Docket No. 294287.

Confrontation; Statements to SANE. *People v Spangler*, __ Mich App __; __ NW2d __ (No. 288632, July 21, 2009). The trial court, in this Ingham County case, granted a defense motion in limine to exclude the four-year-old complainant's statements to a Sexual Assault Nurse Examiner (SANE) implicating Defendant in a sexual assault. The trial court found the statements to be a classic example of testimonial statements under *Crawford*. The court of appeals vacated the trial court's order, and sent the case back for an expanded hearing, finding that insufficient evidence was present on this record to establish whether "the circumstances would lead an objective witness to reasonably believe that the statements would be available for use in a later prosecution or objectively indicated that the primary purpose of [the SANE questioning] was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." The court

reviewed cases from other jurisdictions, and set out 13 factors that various courts have looked to in making this determination. While those factors were largely drawn from cases involving similar interviews, many of the factors could be used in other circumstances in analyzing whether the statements are testimonial.

Confrontation, Two-Way Interactive Video Technology. *People v Buie*, __ Mich App __; __ NW2d __ (No. 278732, August 25, 2009). In this CSC case, DNA and medical experts were permitted to testify via two-way interactive video technology. Defendant failed to object, so the issue was reviewed, as an unpreserved, nonstructural constitutional claim, for plain error. After reviewing case law on two-way interactive technology, the court concluded that the technology is not yet sufficient to conclude that confrontation rights, which include the truth-finding effect of a face-to-face appearance, are adequately protected through this process. The matter was remanded for a determination by the trial court as to whether, in this particular case, the procedure was "necessary to further a public policy or state interest important enough to outweigh defendant's confrontation rights."

On February 9, 2007, the Michigan Supreme Court decided *People v Jackson*, 477 Mich 1019 (2007) by order, holding that "the father's hearsay statement made to the police about the event in controversy should not be admitted because it constituted error in light of *Crawford* [citation omitted]."

In *People v Alvin C. Walker*, 273 Mich App 56 (2006), after the MSC remanded the case to the Court of Appeals for reconsideration in light of *Davis* and *Hammon*, the Court held that statements of a purported domestic assault victim to a 911 operator were admissible, but that admission of complainant's written statement recorded by a neighbor and her statements to police at the scene (no evidence of continuing danger) constituted reversible error.

In *People v Mileski*, after remand from the MSC for reconsideration in light of *Davis/Hammon*, the Court of Appeals issued an unpublished *per curiam* decision (Docket No. 248038), 2007 WL 28288 (January 4, 2007), reversing the conviction because two of three statements were inadmissible under the Confrontation Clause. The CSC complainant's statements to a neighbor seeking help were admissible, but later statements to a police officer and an investigating nurse were meant to build a case against the defendant, not to deal with an emergent situation, and should not have been admitted in the complainant's absence under *Crawford/Davis/Hammon*.

Confrontation, Interrogation of Victim by Police, Testimonial. *People v Bryant*, 483 Mich 132; 768 NW2d 65 (2009). As the victim in a shooting lay dying, police questioned him about what had occurred. His statement implicated Defendant, and Defendant was later convicted of murder. The court of appeals affirmed, holding that the victim's statements constituted admissible non-testimonial hearsay (excited utterance exception). The supreme court, in a 4-3 decision (Corrigan, Young and Weaver dissenting), reversed, holding that under *Crawford*, *Davis*, and *Hammon* the interrogation elicited statements whose primary purpose was to prove past events potentially relevant to later criminal prosecution, as opposed to meeting an ongoing emergency. Because the statements at issue were testimonial, it was not relevant that they might have met the excited utterance exception to the

hearsay rule in light of *Crawford's* sweeping revision of Confrontation Clause jurisprudence. Although *Crawford* left the door open for dying declarations, the prosecution in this case abandoned that issue by failing to attempt to lay a foundation below.

Confrontation, Limitation on Cross Examination. *People v Hill*, 282 Mich App 538; 766 NW2d 17 (2009). In this carjacking case defendant was cut short on cross examination of the complainant (as to her general drug use) and a police witness (as to the defense theory that the complainant traded the jacked car to someone else for drugs). The court turned aside Confrontation Clause challenges to both restrictions, stating that there is no right to confront a witness on general credibility issues, and the defense theory regard to trading the car for drugs was too remote and speculative. The court held that "the Confrontation Clause does not confer a right to impeach the general credibility of a witness. *Boggs v Collins*, 226 F3d 728, 737-738(CA 6, 2000)." The Court failed to acknowledge that *Boggs* has since been rejected as an overstatement by the Sixth Circuit. *Vasquez v Jones*, 486 F3d 135, 144-146(6th Cir. 2007), because "it unquestioningly accepts Justice Stewart's attempt to commandeer the majority opinion in *Davis v Alaska*." *Id.* at 573; *See also Hargrave v. McKee*, 248 Fed. Appx. 718, 727 (6th Cir. 2007)(Sixth Circuit has "recently cast considerable doubt" over whether the holding in *Boggs* is binding). Nothing in the majority decisions in *Davis* or *Van Arsdall* has so limited the right of confrontation solely to issues involving motive, bias or prejudice, as the panel in *Boggs* suggests.

Confrontation, Nontestifying Experts. *People v Payne*, __ Mich App __; __ NW2d __ (No. 280260, July 28, 2009). Citing *People v McDaniel*, 469 Mich 409; 670 NW2d 659 (2003), the court held that lab reports prepared by nontestifying analysts constitute inadmissible hearsay and were not harmless as to two of four CSC counts.

Confrontation, Nontestimonial Emergency Statement. *People v Jordan*, 275 Mich App 659 (2007). Defendant was convicted of CSC I, first-degree home invasion, and unarmed robbery after he broke into the apartment of a 73-year-old woman, raped and robbed her, and then fled. DNA evidence later identified defendant as the perpetrator. Jordan argued that the complainant's statements made immediately following the assault to a gas station owner and the complainant's own landlord were testimonial, and under *Crawford* should be barred by the Confrontation Clause. Under *Davis v. Washington*, 547 U.S. 813; 126 S Ct 2266, "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." The Court of Appeals upheld the trial court's decision and concluded that the complainant's statements were nontestmonial because they were made in an attempt to obtain emergency care, and necessary to resolve the ongoing emergency. The court stated, "[t]he 73-year-old victim, clothed in her nightgown, was outside in the early morning hours yelling for help because she had just been raped and robbed...Under the circumstances, any reasonable listener would recognize that [the victim] was facing an ongoing emergency."

Confrontation vs. Rape-Shield Exclusion. *People v Dabb*, unpublished opinion *per curiam* of the Court of Appeals, issued December 4, 2007 (Docket No. 271566). Defendant was convicted of four counts of CSC 2, victim under 13. The trial court excluded evidence that a male complainant was

caught with his pants down sexually abusing a three-year-old. Because the male complainant's allegations against defendant arose after he was caught, the complainant's sexual misconduct is indicative of bias and goes to show an ulterior motive for making a false charge against defendant. Therefore it was error to exclude this evidence pursuant to the rape-shield statute.

Confrontation vs. Rape-Shield Exclusion. *People v Piscopo*, 480 Mich 966 (2007). Defendant was a pastor convicted of CSC 2 for a touching during a religious ceremony. There were 100 people present and no one would corroborate the complainant's testimony. Defendant sought to admit evidence that the complainant had made prior false allegations of sexual abuse against another pastor, and claimed to have been raped by a demon. None of this was allowed, primarily due to the rape-shield statute. The court of appeals affirmed and the supreme court granted leave. In their December 2007 order the supreme court vacated their earlier leave grant and denied leave to appeal. Justice Markman, joined by Justice Cavanagh, wrote a lengthy dissent, noting that false accusations are not sexual conduct covered by the rape shield statute. *People v. Jackson*, 477 Mich. 1019, 726 N.W.2d 727 (2007)

Confrontation; No Right at Probation Revocation Hearing. *People v Breeding*, 284 Mich App 471; __ NW2d __ (2009). Defendant was violated after the trial court found he was in the company of children under 16, a violation of a probation condition after a CSC 2 conviction. The primary evidence against him was in the form of out of court statements by nontestifying witnesses. After invitation from the Supreme Court, the Court of Appeals held that the right to confrontation does not apply to probation revocation hearings. Probation revocation proceedings are not a stage of a criminal prosecution to which the full panoply of rights need be applied. Defendant's due process challenge to being revoked and sent to prison on the basis of unconfronted evidence was rejected, because his attorney failed to request cross examination and failed to object to the unconfronted evidence.

Confrontation, Dying Declarations. *People v Geracer Taylor*, 275 Mich.App. 177, 737 N.W.2d 790 (2007). The Court of Appeals held a shooting victim's identification of Defendant as the shooter was nontestimonial and qualified as a dying declaration, which Crawford had left open as a possible confrontation exception. The analysis of the dying declaration was conducted under the modern version of the rule, MRE 804(b)(2). The Michigan Supreme Court granted leave to appeal, 480 Mich 946, but after briefing and argument, vacated the leave grant and denied leave to appeal without explanation. 481 Mich 943. Taylor then sought *certiorari* on the dying declaration issue, including whether the declarant had to have personal knowledge - there was some question whether the decedent actually saw the shooter or not, and under the exception as it existed in 1791, when the Sixth Amendment was adopted, personal knowledge was a requirement. The United States Supreme Court denied *certiorari*.

In *People v Lonsby*, 268 Mich App 375 (2005)(oct'05), defendant was convicted of CSC I and II for molesting his twelve-year-old granddaughter. At trial, the prosecution presented a state police serologist who, without objection, testified about results obtained by a different serologist regarding a stain found on the defendant's swimsuit. The testimony was inadmissible hearsay and violated the defendant's right of confrontation under *Crawford*. The trial court's denial of defendant's motion for

new trial on this issue was an abuse of discretion. The error was not harmless as the prosecutor not only relied on this inadmissible evidence but also mischaracterized it to defendant's disadvantage. Only one judge signed the opinion. The other two concurred in result only.

Confrontation, Not Introduced to Prove Truth. *People v Chambers*, 277 Mich App 1 (2007)(oct'07). This case involved an ATM robbery where the culprit's photo was taken by the machine. During trial the lead detective testified that he got a phone call from an FBI agent who told him that the agent's informant had told the agent that the man in the photo was defendant Chambers. The court held that *Crawford* does not apply, and the confrontation clause is not implicated, where the out-of-court statement is not introduced to prove its truth. Here the prosecution claimed that the out of court, testimonial statement identifying Chambers was introduced solely to show why police set up surveillance on Chambers and later arrested him. No indication of whether a limiting instruction was requested or given.

Confrontation, Testimonial Use of Nontestifying Expert's Report. *People v Charles Fackelman*, (MCOA Docket No. 284512, unpublished opinion August 27, 2009). Defendant was tried for assault and asserted insanity as a defense. In direct examination of the prosecution expert, the prosecutor asked whether she had read the report of a nontestifying psychiatrist who had examined Defendant in a psychiatric hospital the day after his arrest. In direct examination, the prosecutor quoted an extensive portion of the report which concluded Defendant was sane. The prosecutor also used the report in cross examining the defense expert. In closing argument, the prosecutor said the report was highly significant even though the psychiatrist had not testified, and mischaracterized the contents of the report. The Court of Appeals agreed that the prosecutor's use of the report with the prosecution expert was testimonial and violated confrontation, but that the use of the report in cross examining the defense expert was proper. The Court also agreed that the prosecutor mischaracterized the report in argument. However, since there were no objections, the Court found there was not plain error, and rejected the claim that counsel was ineffective for failing to object.

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