In the Court of Appeals
for the
Fifteenth District of Texas,
Fairy, Texas

No. 2004-124-1753-CR

Allen Esparza
Appellant

versus

The State of Texas
Appellee

On Appeal from the 999th District Court
Bosque County, Texas
The Honorable Catherine Ramage

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Bosque County, Texas
The Honorable Catherine Ramage

Before Chief Justice Elliott, Justice Pearcy and Justice Horn.

Opinion of the Court:

Elliott, J., Justice: Allen Esparza appeals his conviction for aggravated robbery. Esparza was sentenced to twenty (20) years following a jury trial. Esparza raises two issues on appeal.

First, Esparza contends the trial court erroneously admitted statements made by Esparza's estranged wife, Lisa Esparza, regarding the robbery because the statements violated his right to confront the witnesses against him under the Confrontation Clause of the Sixth Amendment. Second, Esparza appeals alleging that the trial court erred in failing to suppress a gun found at the time of Esparza's arrest because it was fruit of a warrantless search in violation of the Fourth Amendment. We overrule on both issues and affirm.

Background:

On July 15, 2004, Esparza and a co-defendant, Jim Nash, approached William Oxford and demanded money from him. When Oxford refused, Esparza shot Oxford two times. Oxford was injured, but survived the incident. Several days later, Oxford identified the man he believed shot him as Esparza. A few days after the incident, Officer Garry Lewellen saw a car that generally matched a description of the car Esparza was driving on the night of the shooting[1]. He attempted to pull the car over for a broken tail light. Esparza proceeded to lead Officer Lewellen on a high speed chase which eventually ended up at 123 Clifton Ave., a home occupied by Esparza's estranged wife. During the pursuit, Officer Lewellen turned the corner on Clifton Ave. where he saw Esparza's car parked in front of the house at 123 Clifton Ave. Officer Lewellen called Officer Amy Bryan and Officer Carey Fraser to assist him at the scene. As the officers pulled up, Esparza's wife, Lisa Esparza, came running out of the house. Officer Lewellen approached Mrs. Esparza and asked her what she knew about the car and Esparza's involvement in the robbery of William Oxford. She told Officer Lewellen that Esparza had committed the robbery. He then asked her if anyone else was in the house, to which she responded, "No". Without asking for Mrs. Esparza's consent to enter the house, Officer Lewellen and Officer Fraser went inside to apprehend Esparza. Mrs. Esparza, who was crying, informed Officer Bryan that she and Esparza had been separated for two months, but she knew that he had been involved in two additional robberies during the week, that he had been acting erratically and that she was scared for her safety.

While Officer Lewellen and Officer Fraser were in the house, they apprehended Esparza who was hiding underneath the bed in the master bedroom. As Officer Lewellen led Esparza from the house in handcuffs, Officer Fraser remained in the master bedroom for approximately five minutes. During this time, Officer Fraser observed that a closet door–located in the master bedroom twelve feet from the bed under which Esparza was found–was cracked open approximately six inches. After seeing a shiny reflection in the closet[2], Officer Fraser opened the closet and noticed a gun lying on the floor. It was later determined that the gun found in the closet was the gun used in the robbery of William Oxford as well as two other robberies in the area.

During the trial of the cause, Esparza objected to the admittance of Mrs. Esparza's statements. Mrs. Esparza did not testify at trial based on the marital privilege and the

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[1]Oxford had described the car as a late-model, dark-colored, four-door car. The car Officer Lewellen saw was a 2000 model, Green Buick Regal.

[2]Officer Fraser later testified that he was uncertain whether the gun or a closet mirror caused the reflection.

defendant argued that if Mrs. Esparza's statements were admitted, it would violate his rights to confront the witnesses against him. The trial court held that the statements were admissible against Esparza because the statements were non-testimonial in nature and they met the 'excited utterance' exception to the hearsay rule. Esparza also moved to suppress the gun found during the arrest based on a warrantless search. After finding Esparza could raise the Fourth Amendment challenge[3], the trial court overruled Esparza's motion to suppress the gun and allowed the gun into evidence.

Following the presentation of evidence, the jury found Esparza guilty and sentenced him to twenty (20) years in the Texas Department of Criminal Justice--Institutional Division.

I. Violation of Confrontation Clause:

In its first issue, Appellant contends that the trial court erred in admitting Mrs. Esparza's testimony about the robberies. Appellant argues that admitting the statements was reversible error because the statements violated his Sixth Amendment right to confront the witnesses against him.

The admission of hearsay evidence against a criminal defendant implicates the Confrontation Clause of the Sixth Amendment because the Defendant is not given the opportunity to confront the out-of-court declarant. U.S. Const. amend. VI. The Texas Constitution has a similar provision, which states in part: "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury ... and shall be confronted with the witnesses against him." Tex. Const. Art. I, § 10.

The central point to this case is whether a non-testifying witness' self-initiated statements made to police officers is admissible against the Defendant. The trial court's rulings are reviewed de novo. *See Muttoni v. State*, 25 S.W.3d, 300, 304 (Tex. App.–Austin 2000, no pet.).

Admission of hearsay against a criminal defendant implicates the Confrontation Clause of the Sixth Amendment. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Until recently, the admission of hearsay against a defendant was permissible if the hearsay bore sufficient indicia of reliability. *Roberts*, 448 U.S. at 66. In March of 2004, the United States Supreme Court modified the analysis in *Roberts*. *See Crawford v. Washington*, 124 S. Ct. 1354 (2004). Now, a different analysis is applied to analyze non-testimonial hearsay and testimonial hearsay. *See id.* at 1374.

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[3]County deed records showed that Esparza owned the home located at 123 Clifton Avenue. The testimony established Esparza purchased the home prior to his marriage to Lisa Esparza.

The Court in *Crawford* held that statements taken by police officers in the course of an interrogation are testimonial and shall be excluded from trial if the defendant is unable to confront the witness who made the statements against him. *Id.* Thus, the Court made it more difficult to admit testimonial hearsay against a criminal defendant. As for non-testimonial hearsay, the Court indicated that the *Roberts* analysis was sufficient and that the admission of non-testimonial hearsay may be left to the states' discretion, but that where testimonial evidence is at issue, the Sixth Amendment requires unavailability and a prior opportunity for cross-examination. *Id.* According to Crawford,

> "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause reflects a judgment, not only about the desirability of reliable evidence...but about how reliability can be determined." *Id.*

Thus, *Crawford* deems the *Roberts* decision an inadequate remedy for analyzing testimonial hearsay because *Roberts'* results are not easily predicted. *Roberts* admits testimony that the Confrontation Clause was created to exclude. As a result, *Crawford* declares *Roberts* is an "open-ended balancing test" that does violence to the design of the guarantees provided by the Constitution. *Id.* at 1373.

It is our opinion that the distinction in *Crawford* between testimonial and non-testimonial hearsay may muddy the water for prosecutors trying to admit testimony. "Exceptions to confrontation have always been derived from the experience that some out of court statements are just as reliable as cross-examined in court testimony due to the circumstances under which they were made." *Id.* at 1376. Thus, allowing statements into evidence which may be testimonial in nature, "actually furthers the Confrontation Clause's very mission which is to advance the accuracy of the truth determining process in criminal trials." *Id.*

In this case, we find that the testimony by the out of court declarant is non-testimonial in nature because the statements by Ms. Esparza were not made in response to formal interrogation, but were made while she was excited and under duress. Based on this finding, we would apply the *Roberts* standard to non-testimonial hearsay in accordance with the Supreme Court's ruling in *Crawford*.

The original standard set by the Supreme Court in *Roberts* allows testimony by a hearsay declarant, not available for cross-examination at trial, if the statement bears adequate

indicia of reliability it is admissible. *Roberts*, 448 U.S. at 57. Reliability is inferred where the evidence falls within a firmly rooted hearsay exception. *Id.*

Application of the Roberts Standard

In *Ohio v. Roberts*, the Supreme Court set forth two requirements that the State must meet before hearsay declarations may be admitted against a defendant without violating his or her rights under the Confrontation Clause. *Loven v. State*, 831 S.W.2d 387, 393 (Tex. App.--Amarillo, 1992). "Initially, the State must demonstrate a necessity for the admission of the hearsay evidence; *i.e.,* the State must demonstrate the unavailability of the declarant. Once the unavailability of the witness has been demonstrated, the State must show that the hearsay has sufficient indicia of reliability to warrant its admission. If the evidence falls within a firmly rooted hearsay exception then reliability can be inferred." *Id.*

In this case, Mrs. Esparza's testimony was unavailable to the prosecution due to the marital privilege invoked by Mrs. Esparza. The spousal privilege, as set out in Texas Rule of Criminal Evidence 504(2)(a), does not prohibit evidence of out-of-court statements made by the witness spouse. *Jones v. State,* 859 S.W.2d 537, 540 (Tex.App.– Houston [1st Dist.] 1993, pet. ref'd). The privilege prevents compelled speech, it does not preclude the capture of words already spoken. Therefore, the first prong of *Roberts* requiring the unavailability of Mrs. Esparza was met by the prosecution and the prosecution was not prohibited from offering the testimony.

As to the second prong of the *Roberts* analysis, if the evidence falls within a firmly rooted hearsay exception, reliability can be inferred. *Loven v. State*, 831 S.W.2d 387, 393 (Tex. App.– Amarillo, 1992). In this case, the prosecution argues that the statements were made while Mrs. Esparza was hysterical and nervous, making her statements an excited utterance. The Appellant contends that the statements were made while Officer Lewellen was questioning or interrogating Mrs. Esparza and that the testimony should not be allowed.

The Texas Court of Criminal Appeals has held that, whether the statement was made in response to questioning is simply a factor to be considered, and the statement may still qualify as an excited utterance. *Salazar v. State*, 38 S.W.3d 141, 154 (Tex. Crim. App. 2001). The statements Mrs. Esparza made to Officer Lewellen were not only made in response to police questioning at the scene, but were excited utterances made while she was upset. If the statements are deemed an excited utterance, they would qualify as an exception to the hearsay rule. We agree with this argument due to Officer Lewellen's conduct in initiating the questioning of Ms. Esparza while she was upset and hysterical. Using *Roberts* as it applies to the facts in this case, we find that the exception to the hearsay rule is the excited utterance exception.

Application of the Excited Utterance Exception

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. Tex. R. Evid. 801(d). A statement made relating to a startling event or while the declarant was excited is not excluded by the hearsay rule. Tex. R. Evid. 803(2). This exception to the hearsay rule is called the "excited utterance" exception. Three requirements must be shown for the statement to be an excited utterance:

1) the statement must be the product of a startling occurrence that produces a state of nervous excitement in the declarant and renders the utterance spontaneous and unreflecting,
2) the state of excitement must still so dominate the declarant's mind that there is no time or opportunity to contrive or misrepresent, and
3) the statement must relate to the circumstances of the occurrence preceding it.

Harris v. State, 133 S.W.3d 760, 761 (Tex. App.–Texarkana 2004, pet. ref'd).

A trial court's decision concerning the admission of evidence under the "excited utterance" exception to the hearsay rule should not be reversed unless a clear abuse of discretion is shown. *Zuliani v. State*, 97 S.W.3d. 589, 595 (Tex. Crim. App. 2003). An abuse of discretion occurs only when the trial court's decision "was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Id.*

In the present case, Mrs. Esparza was crying when she answered the questions regarding the Oxford robbery. Officer Lewellen asked her what she knew about the particular robbery knowing how upset she was at the circumstances involving the arrest of her husband. It is not dispositive that the statements made by Mrs. Esparza were answers to a question by Officer Lewellen or that they were separated by a period of time from the startling event; these are simply factors to consider in determining whether the statement is admissible under the excited utterance hearsay exception. *See Lawton v. State,* 913 S.W.2d 542, 553 (Tex.Crim.App.1995). The critical determination is "whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event" or condition at the time of the statement. *McFarland v. State*, 845 S.W.2d 824, 846 (Tex.Crim.App.1992).

Applying the reasoning in *Lawton* and *McFarland*, we find the statements were excited utterances, were non-tesimonial and the trial court did not abuse its discretion in allowing the statements into evidence against Appellant.

II. Suppression of the Gun:

During the trial of this cause, Appellant moved to suppress the gun found during his arrest based on a warrantless search. The trial court overruled Appellant's motion to suppress the gun and allowed the gun into evidence.

When reviewing the trial court's ruling on a motion to suppress, appellate courts must give deference to the trial court's findings of historical facts as long as the record supports the findings. *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Cr. App. 1997). Because the trial court is the exclusive finder of fact, the appellate court reviews evidence adduced at the suppression hearing in the light most favorable to the trial court. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Cr. App. 2000).

Exception for Warrantless Search

The Fourth Amendment bars only unreasonable searches and seizures. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989). The Fourth Amendment permits warrantless searches if the State can show that it had consent or that both probable cause and exigent circumstances existed at the time of the search such as: (1) rendering aid or assistance to persons whom the officers believe are in need, (2) preventing the destruction of contraband or evidence, and (3) performing a protective sweep of the premises. *McNairy v. State*, 835 S.W.2d 101, 106-107 (Tex. Cr. App. 1991).

The third circumstance, or "protective sweep" doctrine, was analyzed extensively in *Maryland v. Buie*. 494 U.S. 325 (1990). The Court in *Buie* held, "a protective sweep is a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of the police officers or others." *Id.* A protective sweep is a very limited search and is "narrowly confined to a visual inspection of those places where a person might be hiding." *Id.* at 327. *Buie* recognized that a special category of a 'permissible sweep', one without even reasonable suspicion, of "closets and other spaces immediately adjoining the place of arrest from within which an attack could be immediately launched" is permissible under the protective sweep doctrine. *Id.* A protective sweep in conjunction with an in-home arrest is also reasonable if the officers believe that there is a danger to themselves or others at the scene. *Id.*

The Supreme Court quoted the Maryland Court of Special Appeals when affirming the trial court's denial of the suppression motion in *Buie*:

> "Traditionally, the sanctity of a person's home–his castle–requires that the police may not invade it without a warrant except under the most exigent of circumstances. But once the police are lawfully within the home, their conduct is measured by a standard

of reasonableness...If there is reason to believe that the arrestee had accomplices who are still at large, something less than probable cause–reasonable suspicion– should be sufficient to justify a limited additional intrusion to investigate the possibility of their presence." *Id.* at 329.

In this case, Appellant argues that his Fourth Amendment right to privacy in the home was violated and that the gun was the product of an illegal search. He argues that because he was already in the custody of Officer Lewellen at the time Officer Fraser found the gun, the gun was not found during a protective sweep because the officers could not reasonably believe that they were in danger. We disagree.

The facts in this case indicate that the closet was partially opened. Officer Lewellen and Officer Fraser had no way of knowing whether Esparza had an accomplice in his home or not. Because Officer Fraser obtained the gun from a closet that was partially opened and in the process of a protective sweep, the warrantless search was permissible.

We resolve Appellant's second issue against him and find that the District Court did not abuse its discretion in allowing the gun found in the closet into evidence.

Conclusion:

The trial court's judgment is affirmed as to Appellant's Issue One and Issue Two.

Dissent:

Justice Pearcy, dissenting in the judgment.

I dissent from the Court's decision as it applies to the first issue. It is my opinion the statements made by Mrs. Esparza are testimonial in nature and *Crawford v. Washington* applies.

I. *Application of the Crawford Standard*

Under *Crawford*, we must first determine whether the statements she made to police at the scene of Allen Esparza's arrest are testimonial or non-testimonial in nature. Mrs. Esparza was not called at trial and the objected to evidence consisted of her out-of-court statements made to police. It is my opinion that *Crawford,* applies here because Mrs. Esparza's statements were testimonial in nature and the statements were improperly admitted.

If we examine what makes a statement testimonial or non-testimonial, we are directed to cases which rely on *Crawford*. "[S]tatements cited by the Court [in Crawford] as testimonial share certain characteristics; all involve a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings." *United States v. Saget,* 377 F.3d 223, 228 (2d Cir. 2004).

In *Saget,* a co-conspirator disclosed statements to a confidential informant. The Second Circuit Court pointed out that the co-conspirator in *Saget* made statements to one he thought was an ally or friend. In this case, Mrs. Esparza's statements were not made to a friend, but to Officer Lewellen. Based on the circumstances involving the statements, I would find that the statements are testimonial, because unlike *Saget* the statements were made in a setting where it might reasonably be expected the statements would be used in judicial proceedings.

In this case, testimony in the trial court evidenced that Officer Lewellen began questioning Mrs. Esparza at the scene regarding the robbery of William Oxford. Officer Lewellen initiated the questioning by asking Ms. Esparza what she knew about Appellant's involvement in the robbery of William Oxford, it is apparent from the testimony that Mrs. Esparza was being formally interrogated. It is my opinion that Officer Lewellen's interview of Mrs. Esparza constituted an "interrogation" as that term is used in *Crawford* and the hearsay in question was testimonial. Thus, the trial court improperly admitted the statements and violated Appellant's rights to confront the witnesses against him.

Because I disagree with the majority that the trial court properly admitted the statements, I dissent from the trial court's decision and find that the trial court abused its discretion in admitting the statements made by Mrs. Esparza.