2014 IL App (1st) 123150-U

FIRST DIVISION
SEPTEMBER 30, 2014

No. 1-12-3150

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 15404
	)	
LAMONT BELL,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's right to confront witnesses pursuant to *Crawford v. Washington* was violated by a police officer's testimony that a witness who did not testify at trial identified defendant in a photo array. The officer's testimony was inadmissible hearsay because it was offered to establish the identification of defendant, not to show the course of the police investigation. However, its admission constituted harmless error given the positive identification of defendant by the State's main witness.

¶ 2 Following a bench trial in 2012, defendant Lamont Bell was convicted of burglary and sentenced to seven years in prison. On appeal, defendant contends his constitutional right to confront witnesses was violated when the trial court allowed a police officer to testify about the

identification of defendant in a photo array by Devon Nash, who did not testify at trial. Defendant argues he should receive a new trial because he was not able to question Nash regarding his identification.

¶ 3 Nash and his sister, Shunda Tolliver, each identified defendant in a photo array and physical lineup within three weeks of the crime. Before trial, defendant moved to suppress those identifications, arguing the composition of the photo array and physical lineup were suggestive because his age, complexion and facial hair differed from that of the other participants and because Nash and Tolliver were in the same room before and after the lineup, thus allowing them time to discuss their identifications. The trial court denied defendant's motion to suppress, finding that the photo array and lineup were properly conducted.

¶ 4 At trial, Tolliver testified that at about 1:25 p.m. on August 14, 2011, she and Nash were at her home at 1547 South Trumbull in Chicago when she received a phone call from a friend who told her someone was in Tolliver's garage. Tolliver and Nash went to the garage, where two cars were parked; one car was owned by Nash, who had driven it into the garage that morning. Tolliver testified that when she entered the garage, defendant was crouched down "ready to take off another tire" from Nash's car. Three tires were already missing from the car.

¶ 5 Tolliver told defendant to put down the items or she would call the police, and defendant said "okay" and walked out of the garage. Two men were standing outside the garage, and another man was in a green Dodge parked in the alley. Tolliver said she was about three feet away from defendant, which was close enough "to see what he looked like." Tolliver identified defendant in court.

¶ 6 As defendant left the garage, Tolliver looked at the nearby car and saw tires in the back seat. As defendant approached the car, he told Tolliver he would return them to her. Defendant got into the back seat of the car, and as the car backed up, Tolliver noted the car's license plate number, which she reported to police that day. The car then drove away.

¶ 7 About two weeks later, on August 31, 2011, Chicago police officer John Sandoval showed Tolliver a photo array in which she identified defendant. On September 7, 2011, she and Nash viewed a police lineup in which she again identified defendant. Police also took Tolliver to a vehicle parked nearby, which she identified as the vehicle in which defendant left the scene.

¶ 8 On cross-examination, Tolliver said after her friend alerted her to the person in her garage, she and Nash walked to the garage in less than 60 seconds. She viewed defendant for about 30 seconds in the garage and saw defendant "face to face" when they stood in the alley. When police arrived at her house at about 2 p.m., she described two of the offenders. She could not recall if she told police about seeing tires in the car's back seat. She said three tires were missing from Nash's car and one was missing from the other car in her garage; however, she did not see defendant actually remove any tires. Tolliver said she and Nash viewed the police lineup separately. When she selected defendant in the lineup, she told the detective she was "80 percent sure" he was the person she saw in her garage.

¶ 9 Officer Sandoval testified as to the identification of defendant by Tolliver and Nash. He showed the photo array to Nash after Tolliver had identified defendant among those pictured. The following colloquy occurred:

> "MS. RIVERA [assistant State's Attorney]: After viewing that photo array, do you recall if [Nash] picked out anyone?

OFFICER SANDOVAL: Yes.

MS. DILLON [assistant public defender]: Objection, your Honor. Calls for a hearsay answer.

THE COURT: Is he going to testify?

MS. RIVERA: No, Judge.

THE COURT: Sustained.

MS. RIVERA: Did Devon Nash pick out someone?

MS. DILLON: Objection, your Honor.

THE COURT: Overruled.

OFFICER SANDOVAL: Yes, he did. He picked picture number four.

MS. DILLON: Judge, I will object.

THE COURT: That last part is stricken.

MS. RIVERA: He picked out someone?

OFFICER SANDOVAL: That's correct.

MS. RIVERA: Was it the same person that Shunda Tolliver picked?

MS. DILLON: I will renew my objection. This is all based on hearsay. They are trying to get this testimony in through the back door without having the person here so we have no opportunity to cross examine this person.

MS. RIVERA: I am going based on [the] officer's observation that the person Shunda Tolliver and Devon Nash picked out based on officer's observations [*sic*]. I am asking if they are the same person.

THE COURT: I will agree with that. Overruled.

MS. RIVERA: Officer, did Devon Nash pick the same person as Shunda Tolliver?

OFFICER SANDOVAL: Correct."

¶ 10 After Tolliver and Nash viewed the photo arrays, Sandoval and other officers returned to the station and "began to get information on the whereabouts of Lamont Bell."

¶ 11 On September 7, 2011, Sandoval and a partner were patrolling when they observed a green Dodge Stratus with the license plate K989572. After discovering that vehicle was registered to defendant, defendant was arrested and brought to the police station. Tolliver was brought to the vehicle and identified it as the car parked in the alley. The defense objected to that testimony as hearsay, and the court overruled the objection, stating it was "investigatory that [Sandoval] brought her back to the car."

¶ 12 Chicago police detective Steven Composto testified that on August 16, 2011, he compiled the photo array that included defendant's picture after he reviewed the case report and found a license plate number that he traced to defendant.

¶ 13 When the State asked Composto about Nash's identification of defendant in the lineup, defense counsel again objected, asserting that Nash was not testifying at trial. The trial court sustained the defense objection, stating: "[I]f you are going to ask him who he identified and was it the same person[,] that's not course of conduct investigation. It goes to identification."

¶ 14 Composto testified that after Nash viewed the lineup, he interviewed Tolliver. His notes from that interview did not state that Tolliver viewed defendant inside the garage. Tolliver told him she saw two people in the alley, not four, and did not see tires in defendant's car because she was looking at the car's license plate. Composto said no tires were recovered in this case. The

original case report stated that seven tires were taken. The State introduced an Illinois Secretary of State vehicle record indicating that defendant was the registered owner of a 1996 Dodge with the license plate number of K989572.

¶ 15 The defense presented no evidence. The court found defendant guilty of burglary. Defendant's motion for a new trial was denied. Defendant was subject to mandatory Class X sentencing due to his previous felony convictions and received a sentence of seven years in prison.

¶ 16 On appeal, defendant contends Officer Sandoval's testimony that Nash identified him in the police photo array was inadmissible hearsay that violated his right to confront witnesses against him under the confrontation clause of the sixth amendment. He asserts that because Nash did not testify at trial and was not subject to cross-examination by the defense, the admission of Nash's identification via Sandoval's hearsay testimony was error under *Crawford v. Washington*, 541 U.S. 36 (2004). He argues that Sandoval's testimony was hearsay because it was offered to show that Nash identified defendant as the offender.

¶ 17 A defendant's claim regarding the right to confront a witness against him presents a question of law; therefore, our standard of review is *de novo*. See *People v. Lovejoy*, 235 Ill. 2d 97, 142 (2009). In *Crawford*, the United States Supreme Court held the confrontation clause is violated by the admission of out-of-court testimonial statements unless the declarant is unavailable at trial and there was a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 53-54. Testimony that the accused was identified as the perpetrator of a crime by a party who did not testify at trial constitutes inadmissible hearsay. *People v. Armstead*, 322 Ill. App. 3d 1, 11 (2001).

¶ 18 A review of Officer Sandoval's testimony reveals that he offered inadmissible hearsay by testifying that Nash identified defendant as the person he saw in the garage. After testifying that Tolliver had selected defendant from the police photo array, Sandoval testified that Nash viewed a photo array in which he chose the same person Tolliver had picked. Even though Sandoval did not testify as to Nash's precise remarks when viewing the photo array, Sandoval described the content of Nash's identification by saying that Nash chose the same person as Tolliver, *i.e.*, that Nash had chosen defendant. Therefore, Sandoval's testimony was offered for the truth of the matter asserted therein, namely that Nash identified defendant as the person in the photo array. Because Sandoval testified as to an out-of-court statement by Nash, a non-testifying declarant, and Sandoval's testimony was offered for the truth of Nash's out-of-court statement, the testimony violated *Crawford.*

¶ 19 We agree with defendant that Sandoval's testimony is comparable to the testimony that was deemed inadmissible hearsay in *Armstead.* In *Armstead*, the State elicited testimony from a police officer that a person who did not testify at trial told him that the defendant was the shooter. *Id*. at 12. In reversing the defendant's conviction and remanding for a new trial, the court in *Armstead* found the questioning "clearly revealed the substance of the conversation between the non-testifying witness and the police officer." *Id*. at 12-13. No logical distinction exists between the situation in *Armstead* and Sandoval's testimony that Tolliver identified defendant and that Tolliver and Nash identified the same person.

¶ 20 The State maintains that Sandoval's testimony was offered to explain the course of the police investigation, not to establish that defendant was the offender, and thus fell under a hearsay exception allowing testimony relating to the course of a police investigation. The State

argues Sandoval did not describe the content of Nash's identification but merely stated he selected the same person from the photo array that Tolliver had chosen.

¶ 21 Police officers may testify to information they received during the course of an investigation to explain why they arrested a defendant or took other action. *People v. Rush*, 401 Ill. App. 3d 1, 15 (2010). Such testimony does not constitute hearsay because it is not offered for its truth but is offered to show the steps the officer took while investigating a crime. *Id*. However, "an officer may not testify to information beyond what is necessary to explain his or her actions," meaning the officer may not testify to the substance of any conversations or statements he received. *In re Jovan A.*, 2014 IL App (1st) 103835, ¶ 23, citing *People v. Edgecombe*, 317 Ill. App. 3d 615, 627 (2000); see also *People v. Gacho*, 122 Ill. 2d 221, 248 (1988) (substance of conversation would have addressed whether defendant was the person who committed the crime). "Police procedure or not, when the words go to 'the very essence of the dispute' (*People v. Jones*, 153 Ill. 2d 155, 160 (1992)), the scale tips against admissibility." *People v. Warlick*, 302 Ill. App. 3d 595, 599 (1998).

¶ 22 Here, the course-of-investigation exception does not apply because Sandoval testified as to the contents of Nash's identification. The officer's testimony was not offered to show why the police conducted their investigation in a certain way or to explain the steps taken by police to identify defendant as the perpetrator. Rather, the testimony was offered to show that both Tolliver and Nash identified defendant in the photo array.

¶ 23 The State next contends any error from the admission of Sandoval's testimony was harmless in light of the additional evidence against defendant. *Crawford* violations are subject to a harmless error analysis. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). "In determining

whether a constitutional error is harmless, the test to be applied is whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained." *Id*.

¶ 24 The erroneous admission of hearsay evidence is harmless error when it is "merely cumulative or is supported by a positive identification and other corroborating circumstances." *People v. Littleton*, 2014 IL App (1st) 121950, ¶ 65, quoting *People v. Prince*, 362 Ill. App. 3d 762, 776 (2005); *Armstead*, 322 Ill. App. 3d at 12-13. The identification of the accused by a single witness is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 13, citing *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 25 In claiming the error was not harmless, defendant points to various discrepancies in Tolliver's testimony and notes that she was the only eyewitness to testify at trial. However, even without Nash's identification testimony, Tolliver's account alone is sufficient to support defendant's conviction. Tolliver testified she viewed defendant from a distance of three feet and spoke to him, thus allowing her to observe his face. On the day of the offense, Tolliver provided police with a license plate number that was traced to defendant's car, a green Dodge Stratus, which matched the color and make of the vehicle Tolliver described and later identified.

¶ 26 Defendant also contends Tolliver's testimony was questionable because she told police she saw two men near her garage but testified at trial that she saw a total of four men. However, those accounts are not inconsistent; Tolliver testified defendant was inside the garage, two other men were in the alley, and a fourth man was inside the green Dodge. For the same reason, Tolliver's statement to investigators that she saw men in the alley did not impeach her trial testimony that she saw defendant in the garage. Those minor differences do not weaken the

totality of Tolliver's account nor her identification of the defendant. We find the admission of Nash's identification to be harmless error in light of the other unassailable evidence presented against defendant.

¶ 27 In conclusion, Sandoval's testimony that Nash identified defendant violated *Crawford* because Nash did not testify at trial and therefore was not subject to cross-examination. Sandoval's testimony constituted hearsay because it was offered for its truth, *i.e.*, that Nash selected defendant from the police photo array. However, Nash's identification of defendant was cumulative of Tolliver's account. Standing alone, Tolliver's identification of defendant, the other cumulative evidence, including the identification of the defendant's vehicle as being involved in the burglary, supported defendant's conviction. Therefore, the admission of the hearsay testimony as to Nash's identification constituted harmless error.

¶ 28 Accordingly, the judgment of the trial court is affirmed.

¶ 29 Affirmed.