

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PETER D. O'CONNELL, PRESIDING JUDGE
HENRY WILLIAM SAAD AND MICHAEL TALBOT, JUDGES

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

Docket No. 134206

GERACER RAPHAEL TAYLOR,

Defendant-Appellant.
_____ /

REPLY BRIEF ON APPEAL - APPELLANT

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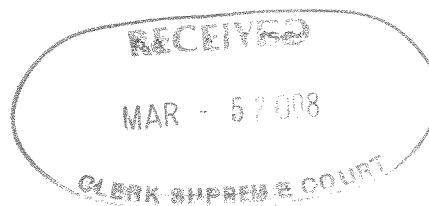


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I.

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ARGUMENT I

THE STATEMENTS AT ISSUE WERE TESTIMONIAL AS THE PROSECUTION FAILED TO MEET ITS BURDEN OF DEMONSTRATING THAT THE PRIMARY PURPOSE OF THE POLICE QUESTIONING WAS TO MEET AN ONGOING EMERGENCY.

The prosecution argues that decedent's statements were non-testimonial because the police were responding to an "ongoing emergency" within the meaning of *Davis v Washington*, 547 US 813; 126 Sct 2266; 165 LEd2d 224 (2006). The prosecution's argument fails as a matter of both fact and law.

As the proponent of the disputed evidence, it is the prosecution's burden to establish a proper foundation for its admissibility. *People v Burton*, 433 Mich 268, 304 n16; 445 NW2d 133 (1989). Thus, it is the burden of the prosecution to establish that the statements were non-testimonial because they were made in response to an actual ongoing emergency.

The prosecution cannot meet this burden. Unlike *Davis*, where the 911 call was placed while the defendant was still at the victim's door, the prosecution here cannot point to any evidence that either the decedent or the police officers thought the shooter was on the premises or nearby at the time the officers questioned Mr. Lasater. All three of the police officers on the scene testified, but not one of them testified that they believed there was an ongoing threat at the time Mr.

Lasater was questioned. Indeed, the prosecution admits that the officers *secured the scene before entering the bedroom.* Appellee's Brief at 4 (citing 102a).

The proof is in the pudding. If, as the prosecution speculates, the officers were concerned that the shooter was still in the vicinity or might suddenly come back, they not only would have testified about that concern, *they would have asked Mr. Lasater different questions.* Specifically, if the officers were concerned about their safety or that of Mr. Lasater from the shooter, they would have asked: (1) if Mr. Lasater knew which way the shooter went; and (2) if Mr. Lasater knew if anyone else was in the house other than the two drunken, unconscious men the officers had already encountered.

The officers did not ask any of those questions because they obviously were unconcerned that the shooter was still nearby. Instead, Officer Kriss, believing Mr. Lasater would not "make it," "tried to conduct an interview" consisting almost entirely of trying to learn the shooter's name (105a).

The prosecution relies on a single post-*Davis* decision, the Maryland Court of Special Appeals' opinion in *Head v State*, 171 Md App 642; 912 A2d 1 (2006), for the proposition that it is an ongoing emergency when the police respond quickly to a shooting scene. But in relying on *Head*, the prosecution ignores the

critical distinction between this case and *Head*: the police in *Head* had not secured the scene and specifically testified that they were fearful that the shooter was still in the house when they questioned the victim. As the court in *Head* explained, "Officer George 'didn't even know if ... the person who caused that gunpowder was still in the house.' Darby kept 'yelling out' the words 'help me, help me,' and in the officer's view, it was still 'potentially even a dangerous situation....'" *Id.*, 912 A2d at 4 (quoting responding officer's testimony). In short, the prosecution in *Head* met its burden of establishing an ongoing emergency. The prosecution in this case did not.

In contrast to *Head*, two state supreme courts recently rejected claims from prosecutors that statements to police from recent victims were non-testimonial absent proof of a genuine ongoing emergency. In *State v Lewis*, 235 SW3d 136, 139-140 (Tenn 2007), the police arrived minutes after a shooting, and the dying victim told an officer that a "lady with the vases" (later identified as the defendant) was involved in the shooting. Rejecting the prosecution's argument that the statement was non-testimonial, the Tennessee Supreme Court reasoned:

While the victim's statements here took place at the crime scene, they were responses to inquiries by the investigating officers. Even though the victim was in a state of distress from his wounds, his comments did not describe an "ongoing emergency" as defined in *Crawford*, and were instead descriptions of recent, but past, criminal activity as in *Hammon*. *Id.* at 147.

Similarly, in *State v Kirby*, 280 Conn 361; 908 A2d 506, 523 (2006), the Connecticut Supreme Court found a 911 call from an assault victim to be testimonial because the complainant, who had escaped from her assailant, was not under a "bona fide physical threat" at the hands of the defendant at the time she made the call. The court explained that "although the complainant might have needed emergency medical assistance at the time she made the call, the bulk of her conversation with Gomes nevertheless consisted of her account of a crime that had happened to her in the recent past, rather than one that was happening to her at the time of the call." *Id.*

Rejecting the prosecution's claim that the call was non-testimonial, the Court recognized that accepting such an argument would effectively nullify *Davis* and *Hammon*:

[A]ccepting the State's arguments on this point would render meaningless the distinction drawn by the United States Supreme Court, as they would render virtually any telephone report of a past violent crime in which a suspect was still at large, no matter the timing of the call, into the report of a "public safety emergency."

Id., 908 A2d at 523 n19. Exactly as in *Kirby*, the prosecution's arguments here would render virtually any on-scene report of a past violent crime where a suspect was still at large into an "ongoing emergency" because the suspect might theoretically return.

In some cases, on-scene statements from victims to officers will be non-testimonial because of a genuine ongoing emergency. But it always will be the prosecution's burden to prove the existence of such an emergency. *Burton, supra*. Here, there was no testimony from the officers supporting the existence of a genuine ongoing emergency. The testimony established that the scene was secured and the officers were simply hoping to establish the identity of the shooter before Mr. Lasater died.

In other words, the officers did exactly what they should have done: they tried to establish what had happened in the recent past. The resulting statements were testimonial.

ARGUMENT II

THE PROSECUTION DID NOT AND CANNOT MEET ITS BURDEN OF ESTABLISHING THAT MR. LASATER'S STATEMENTS WERE MADE WITH PERSONAL KNOWLEDGE, AS IS REQUIRED UNDER THE COMMON LAW DYING DECLARATION EXCEPTION.

It is important to note what the prosecution does not contest in its Brief. First, the prosecution does not contest that the dying declaration exception to the Confrontation Clause, if there is such an exception, would extend only to the common law dying declaration exception as it stood in 1791.

Second, the prosecution does not deny that the common law dying declaration exception required that the proponent prove that the declarant had personal knowledge of the subject of his statement. *See People v Christmas*, 184 Mich 634, 647; 148 NW 369

(1914) (explicitly recognizing decedent's statement as inadmissible under common law dying declaration exception because "it is apparent that he had no personal knowledge as to who fired the shot which ultimately caused his death").

Third, the prosecution does not deny that it never proved that Mr. Lasater's statement that "Booger" was the shooter came from seeing the shooter as opposed to inferring that Mr. Taylor was the shooter because of the earlier altercation that evening. Nor, for that matter, does the prosecution deny that the nature of Mr. Lasater's statement strongly supports the conclusion that he was speculating as to the identity of the shooter since he specifically mentioned that he and Mr. Taylor had argued (126a-127a).

Instead, the prosecution makes essentially two arguments. First, the prosecution claims that this Court should not consider whether Mr. Lasater's statement fits within the common law dying declaration exception because Mr. Taylor allegedly failed to make such a claim in the trial court and in the Court of Appeals. Appellee's Brief at 21-22. This claim is erroneous as to both the record and the law.

It is completely uncontested that Mr. Taylor specifically objected to the admission of Mr. Lasater's statements on both hearsay and Confrontation Clause grounds, and that the trial

court ruled on both grounds. Once Mr. Lasater objected on Confrontation Clause grounds, it was the burden of the prosecution, as the proponent of the evidence, to show that the statements were either non-testimonial or that they fell within an exception to the Confrontation Clause. *Cf People v Watkins*, 438 Mich 627, 659 n21, 475 NW2d 727 (1991) (noting "it is, of course, the burden of the prosecution, as the proponent of the disputed evidence, to disprove and overcome the heavy presumption of unreliability cloaking such hearsay statements"); *Burton, supra*, 433 Mich at 280-281 ("it is for the proponent to discharge the burden of proving spontaneousness, or the statement is rejected as hearsay"); *Rogers v Saginaw-Bay City Ry Co.*, 187 Mich 490, 494, 153 NW 784 (1915) (same). Thus, Mr. Taylor fully preserved his Confrontation Clause objection in the trial court, and it was the prosecution's burden to overcome that objection by establishing that the statements were non-testimonial or fell within an exception to the Sixth Amendment. Once the trial judge overruled Mr. Taylor's hearsay and Confrontation Clause objections, the burden shifted on appeal to Mr. Taylor to explain why those rulings were erroneous, and Mr. Taylor met that burden. In his Brief on Appeal to the Court of Appeals, he specifically argued that Mr. Lasater's statements were speculative and lacked personal knowledge:

Even according to Kriss, there was nothing said about why decedent allegedly believed Defendant shot him. Assuming hypothetically that decedent said this, however, his statement reflected only suspicion and speculation. According to Kriss, decedent was unsure about the method of direction of the shots. After the questioning by Kriss, it was clear that decedent was not looking in the direction of the shooter, and could not have seen who shot him.

Prior to trial, based on the fact that the only evidence on the issue of identity was the victim's statement made to Officer Kriss, Defendant requested that the trial court conduct an evidentiary hearing to suppress the victim's statements . . .

As a result of this error, the prosecutor was permitted to introduce at trial the hearsay statements of decedent referred to herein. Those statements lacked credibility, could not be subject to cross-examination, and - assuming that such statements were ever made - were at best only suspicion and speculation on the part of decedent. Nevertheless, the jury was allowed to hear decedent's alleged suspicion or speculation that Defendant shot him.

Appellant's Brief on Appeal, Court of Appeals at 18-19, 27-28. Similarly, Mr. Taylor specifically raised the issue that Mr. Lasater lacked personal knowledge in his Application for Leave to Appeal to this Court. Application for Leave to Appeal at 19, 34-35, 41.

Second, the prosecution speculates that Mr. Lasater might have seen the shooter from the fact that Dr. Spitz testified that the shotgun barrel intruded through the window and that, therefore, the shooter's head might have also intruded. Appellee's Brief at 22-23. But the description of the window in Appellee's Brief at 7 actually reduces the likelihood the victim saw the shooter: (1) half the window is covered by air-

conditioner; (2) the available area to the shooter would barely allow for entry: 13" x 24" (43b, 59b); (3) vinyl blinds covered the window and blocked the view to the outside, and (4) the blinds "looked sort of tattered" (107a-108a), creating a reasonable inference the gun was fired from behind the blinds. (Appellee's Brief, pp. 4, 7).

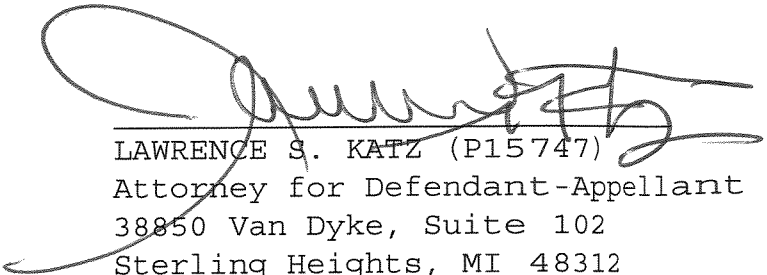
Dr. Spitz's testimony does not rise to a reasonable inference that the victim saw his shooter. After all, a shotgun, with a long barrel, was used, not a handgun. The window was open and was not broken, so there would have been no advance warning of a shooting. Most importantly, all of the evidence, including the bits of blanket and pillow fluff in the air, strongly suggests that Mr. Lasater, who was intoxicated, was asleep in the bed at the time of the shooting (Appellee's Brief, pp. 4-5). Indeed, Officer Kriss testified, "it looked like [Mr. Lasater] had been in bed when he was shot" (104a).

Exactly as in the numerous cases Mr. Taylor cited in his Brief on Appeal applying the common law dying declaration rule on virtually identical facts where there was little or no or evidence the victims saw their assailants, see Appellant's Brief at 36-41 (citing cases), there is no evidence here that Mr. Lasater saw the shooter. On the contrary, since Mr. Lasater specifically mentioned the altercation earlier in the evening,

the obvious inference is that he blamed Mr. Taylor because of that altercation. That is strong evidence that he drew the conclusion from the earlier events, not from what he saw at the time of the shooting, exactly like the cases addressing this issue in Appellant's Brief.

The wisdom of the common law rule is evident from this case. Had Mr. Lasater lived to testify, he could have been cross-examined as to whether his identification of Mr. Taylor arose from seeing the shooter or from speculation from earlier events. Since Mr. Lasater did not live to testify, it was incumbent upon the prosecution to establish that Mr. Lasater's statement was based upon personal knowledge, and this burden was clearly was not met.

Finally, the prosecution never argues that any error was harmless beyond a reasonable doubt. For the reasons set forth in Appellant's Brief at 43-44, the error here was certainly not harmless.



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