STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 9, 2007
v	No. 269665 Macomb Circuit Court
CHRISTOPHER G. VALLS, Defendant-Appellant.	LC No. 05-005301-FH

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of delivery of marijuana, MCL 333.7401(2)(d)(iii), and conspiracy to deliver marijuana, MCL 750.157a, for which he was sentenced to 18 months' probation. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant challenges the admission of testimony from a police officer regarding statements made by defendant's mother, Janice Short, a separately tried coconspirator who was unavailable to testify at trial. The statements were made while the officer was acting in an undercover capacity during a drug purchase. Defendant argues that Short's statements to the undercover officer constituted testimonial hearsay, the admission of which violated his rights under the Confrontation Clause, US Const, Am VI.

A trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2003). However, when the decision regarding the admission of evidence involves a preliminary question of law, the issue is reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). An error that denies a defendant's constitutional rights under the Confrontation Clause is not grounds for reversal if, after a thorough review of the record, it is clear beyond a reasonable doubt that the verdict would have been the same absent the error. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005).

The police officer testified that, for several months, he worked in an undercover capacity to purchase narcotics from Short's home. On one occasion, he spoke with Short on the phone and asked to purchase an ounce of marijuana. Short told him that defendant, her son, was at her house and would be leaving shortly to pick up the marijuana, which she and defendant would then sell to the officer. When the officer arrived at the home to pick up the marijuana, Short and

defendant were sitting at the kitchen table, and the marijuana was on the table in front of defendant. After Short and the officer agreed on a price, defendant placed his hand on the marijuana and slid it over to Short, who handed it to the officer. The officer then handed Short the money.

We conclude that Short's statements to the undercover officer were not testimonial, and therefore their admission did not violate defendant's right of confrontation.

The Confrontation Clause of the Sixth Amendment states that, "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." US Const, Am VI. In *Crawford v Washington,* 541 US 36, 61; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the Supreme Court held that this provision bars the use at trial of all "testimonial" out-of-court statements when the accused is not afforded a prior opportunity to cross-examine the declarant.

The *Crawford* Court expressly declined to set forth a comprehensive definition of "testimonial," concluding that the statement at issue in that case, which was a recorded statement given in response to "structured police questioning," qualified under any definition. 541 US at 61. It did, however, set forth three possible formulations: (1) ex parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, or prior testimony, (2) extrajudicial statements contained in formalized testimonial material, i.e. affidavits, depositions, or confessions, or (3) statements made under circumstances such that an objective witness would reasonably believe that the statement would be available for use at a later trial. *Id.* at 51-52.

Short's statements do not fall into any of possible formulations of "testimonial" statements set forth *Crawford, supra*. Indeed, Short clearly did not know she was speaking to a police officer and had no reason to expect that her statements might be used in a judicial proceeding. Further, the statements do not represent an attempt by either the police or the declarant to provide a substitute for live testimony. See *Davis v Washington,* ___ US ___; 126 S Ct 2266, 2278; 165 L Ed 2d 224 (2006).

Additionally, *Crawford, supra,* 541 US at 58, and *Davis, supra,* 126 S Ct at 2275, both cited with approval *Bourjaily v United States,* 483 US 171, 181-184; 107 S Ct 2775, 97 L Ed 2d 144 (1987), in which the Court upheld the admission of statements made unwittingly to an FBI informant. In *Davis,* the Court referred to such statements as "clearly nontestimonial," noting that, although *Bourjaily* was decided prior to *Crawford,* its outcome was consistent with the principle that the requirements of unavailability and prior cross-examination can only be dispensed with when the hearsay at issue is not testimonial. 126 S Ct at 2275,

Finally, we reject defendant's argument that Short's statements were made in response to a police "interrogation" as defined by *Rhode Island v Innis,* 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980), which involved the meaning of "interrogation" in the context of a defendant's *Miranda*[1] rights.

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The definition in *Innis* of "interrogation" as including "any words or actions on the part of the police" that are reasonably likely elicit an incriminating response was limited to the context of the *Miranda* decision. See 446 US at 297-298. *Miranda*, in turn, was limited to "custodial" interrogations, defined as "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Innis, supra,* 446 US at 298 (quoting *Miranda v Arizona,* 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 [1966]). In this case, although the undercover officer's actions were likely to elicit an incriminating response from Short, they certainly did not constitute a custodial or formal interrogation.

Further, *Davis, supra,* 126 S Ct at 2276, makes clear that only a certain type of interrogation is likely to produce testimonial statements, namely "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." Accordingly, the relevant inquiry is not whether an interrogation occurred at all, but whether there was an interrogation that was designed to establish the facts of a past crime. *Id.* at 2278. In this case, the undercover police officer did not conduct an interrogation of Short that was designed to establish the facts of a past crime, and no statements regarding past events were elicited. Therefore, we conclude that the challenged statements were not testimonial and their admission did not violate defendant's right of confrontation.

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly