

[Cite as *State v. Ali*, 2015-Ohio-1472.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

OMAR ALI

Defendant-Appellant

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C.A. CASE NO. 2014 CA 59

T.C. NO. 13CR326

(Criminal appeal from
Common Pleas Court)

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OPINION

Rendered on the 17th day of April, 2015.

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DONOVAN, J.

{¶ 1} Defendant-appellant Omar Ali appeals his conviction and sentence for two counts of trafficking in cocaine, in violation of 2925.03(A)(1), both felonies of the fifth degree. Ali filed a timely notice of appeal with this Court on May 5, 2014.

{¶ 2} The incidents which form the basis for the instant appeal occurred as a result

of three separate undercover drug buys arranged by the Clark County Sheriff's Office (CCSO) in early 2013. The three drug buys occurred on February 27, 2013, March 1, 2013, and March 5, 2013. In order to effectuate the drug buys, the CCSO utilized a confidential informant (CI) identified as S.R. who agreed to purchase crack cocaine from Ali. The record establishes that at each of the drug buys, S.R. was accompanied by an unidentified male who drove her to and from the locations where she purchased the cocaine from Ali. CCSO Detective Andy Reynolds testified that the male accompanying S.R. was her boyfriend, although he could not remember the individual's name.

{¶ 3} CCSO Sergeant Rick Brumfield testified that prior to each drug buy, S.R. and her boyfriend were searched for contraband. We note that prior to the drug buys on March 1, 2013, and March 5, 2013, the police directed S.R. to call Ali in order to set up the terms of the transaction. Both calls were recorded in an audio format using a device which allows the listener to hear both S.R. and Ali's voices as they discuss the terms of drug transaction. After the initial preparations were made, S.R. was fitted with a "wire," a device used to make an audio recording of the drug transaction. Sgt. Brumfield testified that prior to each of the three undercover drug buys, S.R. was provided a predetermined amount of "buy money" in order to purchase the drugs. In addition to being fitted with a "wire" prior to the transaction on March 1, 2013, S.R. was also provided with another electronic device which made a separate video/audio recording of the drug buy. The drug buy on March 1, 2013, was the only transaction to be recorded in a video format. The other two drug buys were only recorded in an audio format. The officers also drove around the area where the drug buys were occurring in order to conduct surveillance in the event of an emergency.

{¶ 4} After each transaction was completed, S.R. returned to the officers who immediately took possession of the drugs purchased from Ali and removed the recording device(s). S.R. was also searched for additional contraband. Additionally, S.R. was “debriefed” by the officers after each transaction with Ali, during which she was asked to provide a detailed description of the drug buy. The post-transaction “debriefings” were recorded by the CCSO after each undercover drug buy.

{¶ 5} On May 6, 2013, Ali was indicted for three counts of trafficking in cocaine, Count I having occurred on February 27, 2013; Count II having occurred on March 1, 2013; and Count III having occurred on March 5, 2013. At his arraignment on July 17, 2013, Ali pled not guilty to all of the charges alleged in the indictment.

{¶ 6} Ali’s case was tried before a jury on April 15, 2014. Neither S.R. nor her boyfriend testified at trial. Det. Reynolds testified that although she was subpoenaed, he was unable to locate S.R. prior to trial. On cross-examination, Det. Reynolds admitted that he made no attempt to locate S.R.’s boyfriend prior to trial. When the State sought to introduce the audio and video tapes of the undercover drug buys into evidence, Ali’s counsel objected, arguing that his client’s right to confrontation was being violated because S.R. was not available to be cross-examined regarding her involvement in the case. Before the trial court ultimately overruled Ali’s objection, the following exchange occurred at sidebar:

Defense Counsel: I expect you’re going to play the tape?

The State: Yes. For the first one here, the audio recording during the buy.

Defense Counsel: We are going to object to that because the

informant is not here and basically I cannot cross-examine that witness here in the courtroom today.

The State: I guess we are not really offering her statements for the truth of the matter asserted necessarily. There are statements from [Ali] that are also made on the recording and it's properly authenticated by which it is created which is the method it's authenticated to the process and method even if there is not a person who was available this would permit it to be introduced into evidence. But I think too on the recording is [Ali] and that would be very relevant at this point.

The Court: Do you have somebody that can identify his voice on the recording?

The State: Yes. I think if on the video later also you had that, it can also be used to identify [Ali's] voice being the same person because you see who is talking on the video and with him as well [sic] the officer is familiar with him as well – [Ali] and [S.R.'s] voice as well.

Defense Counsel: There's tapes of each incident.

The State: Audio phone calls on the second and third and audio.

Defense Counsel: We object to the vehicle – the video again. The informant, I can't cross-examine about the video. I'm objecting to the playing of the three audio tapes and the video.

The Court: You're objecting on the grounds of confrontation clause and cross-examination?

Defense Counsel: Exactly.

The Court: What's the State's position?

The State: The informant made statements, but there is [sic] not a whole lot of statements made by her, but those are not being proved to the truth of the matter asserted, just to put Mr. Ali's statements in context. I don't know that anything either of them says that is pertinent to us at hand more about what the video shows; the phone calls where there is more statements, the two of them setting up the transaction.

Defense Counsel: But the whole video shows the confidential informant –

The Court: It's not – You are saying it's not hearsay because you're really just offering to [sic] for the statements of the defendant and the statements of the confidential informant made so instead of sort of putting the confidential informant in context –

The State: Right. If [S.R.] said a dollar, that's just as good as him saying that's the dollar amount. So that would be an admission of the defendant or adopted admissions of the defendant.

The Court: I'll overrule the objection.

{¶ 7} The State then proceeded to play portions of the audio and video recordings relating specifically to each of the three undercover drug buys. Because S.R. was unavailable to testify, the State called Sgt. Brumfield, Det. Reynolds, and CCSO Detective Darlene Buxton to testify so that they could describe what was happening in the audio and video recordings to the jury. At the close of the State's case, the following exchange occurred:

The Court: For the record[,] the jury has retired to the jury room. The defendant is present with counsel. The State is represented by counsel. Did you want to offer your exhibits?

The State: Yes. Do you want me to do them one at a time?

The Court: However you'd like to do it.

The State: I'll offer them all. *** State's #4[,] offer that portion of State's #4, the CD played for the jury. Let me make sure. There is one audio file that was not used. That's the wire recording from the second buy because we played the video we didn't use that so that portion of the disk would not be offered.

All the photographs on the disk are also marked as separate exhibits anyway, so I'll offer that part of State's #4. ***

The Court: All right. [Defense Counsel]?

Defense Counsel: Yes, we're going to object to [State's] #4, the CD with all the audio, again for the same reason because the informant isn't here. Also the video that resulted in this case and also all the still pictures resulted out of the video.

The Court: I'll overrule the objections. I will admit State's Exhibits #1 – 17. Is the State resting?

The State: Yes.

{¶ 8} After informing the trial court that it had no witnesses to call, the defense rested, closing arguments were conducted, and the case went to the jury for deliberations. Ultimately, Ali was found guilty of Count II and Count III, trafficking in

cocaine, for the drug buys which occurred on March 1, 2013, and March 5, 2013, respectively. The jury found Ali not guilty of Count I, trafficking in cocaine, regarding the drug buy which occurred on February 27, 2013. On April 17, 2014, the trial court imposed a one year sentence for each Count II and Count III. The trial court ordered the sentences to run consecutively, for an aggregate sentence of two years in prison.

{¶ 9} It is from this judgment that Ali now appeals.

{¶ 10} Ali's sole assignment of is as follows:

{¶ 11} "THE TRIAL COURT ERRED IN ADMITTING TESTIMONIAL HEARSAY THAT ESTABLISHED THE ELEMENTS OF THE CRIME, VIOLATING APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESS AGAINST HIM."

{¶ 12} In his sole assignment, Ali contends that the trial court erred when it permitted the State to introduce the audio and video recordings of the undercover drug buys into evidence. Specifically, Ali argues that pursuant to the U.S. Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), S.R.'s taped statements are "testimonial" in nature and therefore should have been excluded by the trial court as inadmissible hearsay. Additionally, Ali asserts that his Sixth Amendment right to confront the witnesses against him was violated because S.R. was unavailable to testify, and it was only by virtue of her recorded statements that the elements of the trafficking offenses were established at trial.

{¶ 13} Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is generally not admissible, except as provided by the U.S. or Ohio Constitutions, by statute or court rule. Evid.R. 802. We review a trial court's

evidentiary rulings for an abuse of discretion, provided an objection is made at trial. *State v. Cunningham*, 2d Dist. Clark No. 11CA 0032, 2012-Ohio-2333, ¶22.

{¶ 14} The Sixth Amendment's Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." "The United States Supreme Court has held that the right to confrontation is violated when an out-of-court statement that is testimonial in nature is admitted into evidence without the defendants having had the opportunity to cross-examine the declarant. *Crawford*, 541 U.S. 36, 68." *State v. Syx*, 190 Ohio App.3d 845, 2010-Ohio-5880, 944 N.E.2d 722, ¶ 23 (2d Dist.). The *Crawford* court stated that "the core class of testimonial statements includes statements 'that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' *Id.* at 52." *Syx* at ¶ 23.

{¶ 15} "Despite the importance of this right, a violation of the Confrontation Clause can be harmless if 'it is clear beyond reasonable doubt that the admission of these hearsay statements did not prejudice' the defendant." *Matter of Umoh*, 2d Dist. Montgomery No. 16912, 1998 WL 737983 (Oct. 23, 1998). The factors to be considered in determining if error is harmless include " 'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.' (Citation omitted)." *Id.*

{¶ 16} In *Crawford*, the defendant's wife, exercising her marital privilege, did not testify at his trial. *Id.*, 541 U.S. 36. Before trial, however, the defendant's wife described

the stabbing her husband was charged with in a tape-recorded statement to police. *Id.* The recorded statement conflicted with the defendant's claim that the stabbing was self-defense. *Id.* The defendant argued that his wife's statement was not only inadmissible hearsay, but also violated his Sixth Amendment right of confrontation. *Id.* The district court determined that the statement, though hearsay, was reliable and trustworthy, and allowed it into evidence. *Id.* The defendant was subsequently convicted. *Id.*

{¶ 17} On appeal, the U.S. Supreme Court analyzed the reliability of the wife's testimonial hearsay statement under the Confrontation Clause. The *Crawford* court concluded that "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69. Thus, the *Crawford* court found that because the wife's taped statement was testimonial, its admission during the defendant's trial violated his constitutional right to confrontation. *Id.* While the defendant's conviction was reversed, the *Crawford* court further stated that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 60.

{¶ 18} The State argues that the taped statements of S.R. that were admitted into evidence during Ali's trial were not hearsay because they were not offered for the truth of the matter asserted. Furthermore, because the statements are not testimonial, the State asserts that Ali's Sixth Amendment right to confrontation was not violated. In support of its argument, the State relies on the case of *U.S. v. Sexton*, 119 Fed.Appx. 735 (C.A.6 2005), in which several defendants were convicted of conspiracy to distribute cocaine.

Prior to any arrests in the case, the police used confidential informants to conduct controlled drug buys from the defendants. Each undercover drug buy was audiotaped. One of the police informants, Eddie Goins, made several of the undercover drug buys from two of the defendants. *Id.* at 741-742. The drug buys were audiotaped using a hidden recorder supplied by the police to Goins. Most of the tapes of the drug buys, as well as the accompanying transcripts, were admitted into evidence over the objections of the defendants. *Id.* at 742. Goins, however, did not testify at trial. Similar to the instant case, the government introduced the tapes through the testimony of the police officers who participated in the operation who were specifically questioned about the circumstances surrounding the audio recordings. *Id.*

{¶ 19} On appeal, the *Sexton* court concluded that Goins' taped statements were not hearsay because they were not offered to prove the truth of the matter asserted. Rather, Goins' statements were offered "to give meaning to the admissible responses of [defendants]." *Id.* The court also held that Goins' statements did not violate the defendants' Sixth Amendment rights under the Confrontation Clause because they were not testimonial in nature as defined by the U.S. Supreme Court in *Crawford*. *Id.*; see *State v. Smith*, 162 Ohio App.3d 208, 2005-Ohio-3579, 832 N.E.2d 1286, ¶ 14, 16 (8th Dist.) (an informant's taped statements were not offered for the truth of the matter asserted, but provided "a context within which to understand" the encounter; statements were not testimonial and did not violate the defendant's constitutional right to confrontation).

{¶ 20} Count II - March 1, 2013, Undercover Drug Buy

{¶ 21} With respect to the controlled drug buy on March 1, 2013, the jury was permitted to hear the initial recorded phone call between S.R. and Ali and view the video

recording captured by the hidden camera supplied to S.R. by the CCSO. In the recorded phone call made prior to the actual drug buy, S.R. and Ali can both be clearly heard arranging the location where the transaction is to occur, as well as the amount and price of the cocaine to be bought. Det. Reynolds testified that he recognized the male voice on the recording as Ali's when it was played during trial.

{¶ 22} In the video of the actual transaction, S.R. can be seen handing Ali a sum of money in exchange for what appears to be a small quantity of crack cocaine. The recorded exchange occurred in front of Ali's residence located at 35 East Madison Avenue in Springfield, Ohio. In the video, Ali can be seen standing at the passenger side of S.R.'s vehicle in order to conduct the drug transaction. Det. Reynolds testified that he is familiar with Ali and clearly observed him while conducting surveillance near the location of the second drug buy. Additionally, Det. Buxton testified that she observed Ali return to his residence at 35 East Madison Avenue while conducting surveillance with Det. Reynolds immediately after the second drug buy was concluded.

{¶ 23} Upon review, we conclude that the recorded statements made by S.R. during the second drug buy were not offered for their truth, but rather to provide a context within which to understand Ali's otherwise admissible statements. When Detectives Reynolds and Buxton testified regarding the events which occurred during the second drug buy, they used S.R.'s statements at different junctures in the recording and the video to explain the progression of the transaction. Detectives Reynolds and Buxton also testified regarding their own firsthand involvement in the events depicted in the audio and video recording of the second drug buy.

{¶ 24} "Extrajudicial statements made by an out-of-court declarant are properly

admissible to explain the actions of a witness to whom the statement was directed. ***

The testimony was properly admitted for this purpose.” *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980). Where statements are offered to explain an officer’s conduct while investigating a crime, such statements are not hearsay. *Id.*

{¶ 25} Accordingly, we find that the audio and video recordings of S.R.’s statements during the second controlled buy on March 1, 2013, are not hearsay under Evid. R. 801(C). Because S.R.’s statements are not hearsay, they are not testimonial, and *Crawford* is inapplicable. We therefore conclude that the admission of S.R.’s statements from the second drug buy does not violate Ali’s Sixth Amendment right to confrontation.

{¶ 26} Count III - March 5, 2013, Undercover Drug Buy

{¶ 27} In regards to the controlled drug buy which occurred on March 5, 2013, the jury was permitted to hear the initial recorded phone call between S.R. and Ali and the audio “wire” recording of the actual transaction. Both recordings were admitted into evidence in their entirety. In the recorded phone call made prior to the actual drug buy, S.R. and Ali can again, both be clearly heard arranging the location where the transaction is to occur. Det. Reynolds testified that he recognized the male voice on the recording as Ali’s when it was played during trial. We note that after the recorded phone call concluded, the “wire” recording establishes that Ali contacted S.R. and changed the location of the drug buy to the alleyway behind the Ooh Ooh Drive Thru on Lagonda Avenue in Springfield, Ohio.

{¶ 28} Detectives Reynolds and Buxton further testified that they recognized Ali’s voice on the “wire” recording as the controlled buy was conducted behind the drive thru.

Both detectives testified that they were unable to observe the drug transaction as it was occurring. However, Det. Buxton testified that she thoroughly searched S.R. before the drug buy behind the drive thru, and no narcotics were found on her person. More importantly, Sgt. Brumfield testified that he observed Ali walking towards the area behind the drive-thru where S.R. was waiting to conduct the drug buy. Immediately after the controlled buy was concluded, Det. Buxton testified that she searched S.R. again and confiscated the cocaine she purchased from Ali.

{¶ 29} On the record before us, we find that the statements made by S.R. *during* the controlled drug buy on March 5, 2013, are not hearsay under Evid. R. 801(C). Because S.R.'s statements are not hearsay, they are not testimonial, and *Crawford* is inapplicable. We therefore conclude that the admission of S.R.'s statements from the second drug buy does not violate Ali's Sixth Amendment right to confrontation.

{¶ 30} Our analysis, however, does not end there. As previously noted, Det. Buxton "debriefed" S.R. after the controlled drug buy behind the drive thru. The "wire" recording of the drug buy includes Det. Buxton's post-transaction questioning of S.R. During the questioning, S.R. recounts the entirety of the drug buy and clearly implicates Ali as the individual who sold her the cocaine. While S.R.'s recorded statements during the drug buy on March 5, 2013, were not inadmissible hearsay, the narrative statements she made during her "debriefing" were clearly testimonial for purposes of analysis under the Sixth Amendment and must have been subject to confrontation before their admission. An objective witness would reasonably have concluded that the statements that S.R. made to Det. Buxton immediately after the drug buy would have been available for use at a later trial "or would have been used to establish or prove past events

potentially relevant to later criminal prosecution.” *State v. Lewis*, 1st Dist. Hamilton Nos. C-050989, C-060010, 2007-Ohio-1485, ¶ 40. “Indeed, a statement to the police ‘that describes criminal activity is almost always testimonial.’ ” *Id.*, citing *U.S. v. Cromer*, 389 F.3d 662, 675 (6th Cir.2004). Thus, the admission of that portion of the “wire” recording containing S.R.’s debriefing by Det. Buxton was error.

{¶ 31} Nevertheless, we conclude that error did not affect the outcome of the trial. A conviction will not be reversed when other evidence adduced at a defendant’s trial is “so overwhelming, and the prejudicial effect of the [subject statement] is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.” *State v. Moritz*, 63 Ohio St.2d 150, 156, 407 N.E.2d 1268 (1980), citing *Schneble v. Florida*, 405 U.S. 427, 430, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972).

{¶ 32} Initially, we note that the record establishes that during the trial, the prosecutor stopped playing the recording of the drive-thru drug buy well before the portion containing S.R.’s debriefing. Although the recording of the March 5, 2013, drug buy was admitted into evidence in its entirety, it is unclear whether the jury ever heard the testimonial debriefing portion of the recording. However, even assuming that the jury did listen to S.R.’s recorded debriefing, the identification of testimony of Sgt. Brumfield, Det. Buxton, and Det. Reynolds provided an independent basis upon which to convict Ali regarding the controlled drug buy on March 5, 2013. Accordingly, we find that the admission of S.R.’s testimonial “debriefing” after the drive-thru drug buy was harmless error and did not ultimately affect the outcome of the trial.

{¶ 33} Ali’s sole assignment of error is overruled.

{¶ 34} Ali's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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HALL, J. and WELBAUM, J., concur.

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