

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEWIS JONES, JR.,

Defendant-Appellant.

UNPUBLISHED

June 5, 2007

No. 267893

Oakland Circuit Court

LC No. 05-203844-FH

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his December 2, 2005, jury trial convictions for assault with a dangerous weapon (felonious assault), MCL 750.82, and domestic violence, MCL 750.81(2).¹ Since then, our Supreme Court remanded this Court's decision in *People v Walker*, 265 Mich App 530; 697 NW2d 159 (2005); *vacated in part and remand by* 477 Mich 856; 720 NW2d 754 (2006), in light of the U.S. Supreme Court's decision in *Davis v Washington*, 547 US ___; 126 S C 2266; 165 L Ed 2d 224 (2006). On remand, this Court determined that the context of statements admitted against the defendant in *Walker*, which is substantially similar to the events here, made the statements testimonial in nature and, therefore, inadmissible "absent an opportunity for cross-examination by defendant." *People v Walker (On Remand)*, 273 Mich App 53, 59; 728 NW2d 902 (2006). In this case, we determine that certain statements admitted into evidence against defendant were testimonial in nature because they were made by a witness who was not unavailable and were admitted without giving defendant an opportunity for cross-examination. While there is evidence in the record to suggest defendant's wrongdoing caused the witness not to testify at trial, which wrongdoing would forfeit defendant's right to confront the witness, we do not need to remand this case to the trial court to determine whether forfeiture occurred; rather, we determine that because defendant did not object to the admission of the witness' written statement, he waived any error regarding its admission and is precluded from raising the issue on appeal.² Because we also determine that there was sufficient evidence to

¹ Defendant was sentenced, as a second habitual offender, MCL 769.10, to one year, six months' probation and 30 days in jail for the felonious assault conviction and 36 days in jail for the domestic violence conviction.

² We determine that the waiver is effective with regard to the written statement only.

convict defendant based on the written statement as well as police officers' observations, and that defendant's trial counsel was not ineffective, we affirm.

I. Basic Facts and Procedure

Defendant's convictions arise from an incident that occurred at approximately 6:50 a.m. on August 5, 2005. Officers Daniel Davis and Christopher G. Swart of the Southfield Police Department were dispatched to an apartment complex for a disturbance. They knocked on the door of an apartment, and Amy Jones ("Jones"), defendant's wife at the time, answered. Jones was visibly upset and had trouble talking at first because she was crying. She also had a red mark on her left forearm that was 4 inches long and half an inch wide. Two chairs were turned over on the floor, and papers and other items were strewn about. Two children were present.

Police asked defendant to step outside with Swart to separate the couple. Davis remained in the apartment with Jones and asked her what happened. Davis testified that Jones said defendant, from whom she was separated, had come over to babysit, looked through her phone bill, and found a number that had been dialed frequently. Defendant called the number, and a man who answered told defendant he had been intimate with Jones. Defendant "flipped out," started turning over furniture, and then grabbed Jones by the arm and threw her to the floor. Davis gave Jones a statement form and asked her to describe what happened. Jones wrote out a statement and signed the bottom. The statement was read into evidence:

My husband, who I'm separated from, came over to my condo to watch the kids. He does not live here. While I was sleeping he went through my phone bill and found a number that was on there frequently. He confronted me about it and I told him it was a friend. He called the number and the guy he talked to told him I slept with him. He flipped out and flipped over the table and chairs and grabbed my arm and flipped me onto the ground. He then made me get up and sit in a chair and started cussing. He had a knife, pocket knife and he pulled it out and said he should stab me but he wouldn't because the kids were here. This went on back and forth with the cussing and him threatening occasionally to kill me, until the police came. When he pulled the knife out he opened it and held it by his side, then closed it up.

Davis testified that he read the statement and asked Jones about the knife. Davis said Jones told him that defendant was standing about two feet in front of her when he pulled out the knife. The police arrested defendant, patted him down, and found the knife in his front pocket. The police interviewed defendant on October 19, 2005. Defendant stated that he carried the knife with him at all times and Jones knew that. During their argument, defendant stated that he never took the knife out of his pocket but only grabbed it over the fabric of his pants. Defendant said he shook the knife and said: I should cut you but I won't because we got kids.

Defense counsel objected to the admission of Jones' conversation with Davis on the grounds of hearsay and violation of defendant's right of confrontation. Defense counsel argued

that, pursuant to *Crawford*,³ Jones' testimonial statements were inadmissible against defendant because she was not "unavailable" as a witness at trial, defendant had no prior opportunity to cross-examine her, and the prosecution did not perform its due diligence to produce her as a witness. The trial court noted that Jones was never listed as a trial witness. The prosecution argued that Jones' statements to Davis were admissible under the excited utterance exception to the hearsay rule and that under *Walker*,⁴ *Crawford* was not applicable to this case. Detective William Shadwell testified that he personally served Jones with a subpoena November 10, 2005, and then spoke with her on the phone the day before trial. Shadwell said Jones indicated she did not want to testify, but told him she would show up to court when Shadwell told her she had to be present.⁵ The trial court allowed Davis to testify regarding his conversation with Jones at the apartment. When Jones' written statement was also admitted into evidence, defense counsel did not object.

Defendant moved for a directed verdict, arguing that there was no threat because defendant used the word "should" rather than "would," resulting in a conditional threat contingent upon the presence of the children. The prosecution argued that Jones was put in fear once defendant pulled out the knife and said he should stab her while he was standing only two feet away, and defendant walked back and forth occasionally threatening to kill her. The court denied the motion, and the jury convicted defendant.⁶

II. Analysis

On appeal, defendant argues that there was insufficient evidence to support his conviction for felonious assault; that his right of confrontation was violated when the trial court admitted Jones' oral and written out-of-court statements into evidence; and that he was denied the effective assistance of counsel where trial counsel failed to object to the admission of Jones' written statement. We disagree.

A. Defendant Waived His Right to Confront the Witness

1. Standard of Review

³ *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

⁴ Prior to remand.

⁵ Jones later sent a letter to the court indicating that the parties were attempting to reconcile. Subsequently, Jones sent a second letter stating that she wrote the first letter under defendant's influence and did not come to the trial because of defendant's influence. Jones testified at the preliminary examination and was cross-examined by defense counsel. She filed for divorce February 14, 2006.

⁶ Defendant then filed, and this Court granted, a motion to remand for an evidentiary hearing to develop his claim that he received ineffective assistance of counsel because his counsel did not object to the admission of Jones' statement to the police into evidence. *People v Jones*, unpublished order of the Court of Appeals, entered August 4, 2006 (Docket No. 267893).⁶ However, defendant did not pursue the remand.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court defers to the trial court's judgment when the trial court chooses an outcome that falls within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); however, the right to confrontation is a constitutional issue, which is reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

2. The Confrontation Clause and Testimonial Statements

The U.S. and Michigan constitutions guarantee a criminal defendant the right "to be confronted with the witnesses against him." US Const, Am VI; Const 1963, art 1, § 20. The right of confrontation applies to all witnesses against the defendant who bear testimony. *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Testimony is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford, supra*, p 51 (citation omitted). The protection of the Confrontation Clause applies to all testimonial statements regardless of the rules of evidence. *Crawford, supra*, p 61. Statements of a nontestimonial character are subject to the traditional limitations upon hearsay evidence but are not subject to the Confrontation Clause. *Davis, supra*, 126 S Ct at 2273. If a defendant's right to confrontation is violated, he is entitled to a new trial unless the error was harmless. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005) (citation omitted).

A testimonial statement of a witness who does not appear at trial is admissible only where the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *Crawford, supra*, p 59. Statements in response to police interrogation are considered testimonial if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis, supra*, 126 S Ct 2273. However, statements are non-testimonial when their primary purpose "is to enable police assistance to meet an ongoing emergency." *Davis, supra*, 126 S Ct 2273-2274. A conversation that begins as the assistance of an emergency may evolve into one of a testimonial nature after the emergency has ended. *Davis, supra*, 126 S Ct 2277.

3. Availability of Witnesses

It is the prosecution's burden to produce a witness at trial before any prior testimony or out-of-court statement of that witness may be admitted. *People v Bean*, 457 Mich 677, 683; 580 NW2d 390 (1998). A witness is considered unavailable when the proponent of the statement against the criminal defendant is unable to procure that witness' attendance after making a diligent, good faith effort. *Bean, supra*, p 684. "The test does not require a determination that more stringent efforts would not have procured the testimony." *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

4. Preservation of the Issue and Waiver

Defendant argues on appeal that the trial court improperly admitted Jones' oral and written out-of-court statements in violation of his right of confrontation.

With regard to the written statement, we determine that defendant did not properly preserve this issue for appellate review. "In order to preserve the issue of the improper

admission of evidence for appeal, a party generally must object at the time of admission.” *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). In addition, the objection at trial must be on the same ground as that asserted on appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Here, when the prosecutor moved to admit Jones’ written statement, defense counsel stated: “No objection.” It is well settled that “waiver is the ‘intentional relinquishment or abandonment of a known right.’” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Further, the “most basic rights of criminal defendants are . . . subject to waiver.” *New York v Hill*, 528 US 110, 114; 120 S Ct 659; 145 L Ed 2d 560 (2000), quoting *Peretz v United States*, 501 US 923, 936, 111 S Ct 2661 115 L Ed 2d 808 (1991). Certain decisions by counsel including which evidentiary objections to raise are given effect absent a showing of ineffective assistance, and they do not require the defendant’s acquiescence. *Hill*, supra, 114-115. If a defendant waives his rights, that waiver extinguishes any error and precludes the issue from appellate review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). In this case, counsel’s expression that he had no objection to the admission of the statement waived defendant’s right to confront the witness (Jones) about the statement.

Because we determine that defendant’s lack of objection to the admission of the written statement waived his right to confront the witness, we do not need to address whether he forfeited his right to confront the witness with regard to her oral statements to police.

B. Sufficiency of Evidence

A claim of insufficient evidence is reviewed de novo to determine whether a rational fact finder could have concluded that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Direct and circumstantial evidence is viewed in the light most favorable to the prosecution. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

The elements of felonious assault are: “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), citing *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996); MCL 750.82. The defendant must have “present ability or apparent present ability to commit a battery.” *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). A defendant’s intent to commit the assault may be inferred from his actions. *People v Wardlaw*, 190 Mich App 318, 320; 475 NW2d 387 (1991).

In this case, the jury heard evidence – in the form of the written statement alone – that defendant became agitated upon learning his estranged wife had been seeing another man, started turning over furniture, and grabbed Jones by the arm and threw her to the floor. Defendant made her get up and sit in a chair and started cursing her. Defendant pulled out a pocket knife, opened it, and held it by his side. Defendant said he should stab Jones but for the presence of their children. Defendant continued to curse at Jones and threaten to kill her until police arrived. The

jury also heard evidence⁷ that Jones was visibly upset and had trouble talking to the police at first because she was crying, that she was injured and that the apartment was in disarray.

There was sufficient evidence presented for the jury to conclude that defendant intended to cause Jones to believe he might use the knife to hurt her. Defendant's language, that he "should" stab Jones but for the children's presence, does not negate Jones' reasonable belief that she was in immediate danger. Defendant had already displayed his anger by overturning furniture and throwing Jones to the floor with no regard for the children's presence. In addition, defendant continually threatened to kill Jones while he was holding a knife in her presence, so he had the present ability to commit a battery on her. *Jones, supra*, p 100. Defendant's actions only ceased because the police arrived.

C. Effective Assistance of Counsel

Finally, defendant claims that he was denied the effective assistance of counsel where trial counsel waived objection to the admission of Jones' written statement. We disagree. To preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989), citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Defendant filed a motion with this Court to remand for an evidentiary hearing for factual development of this claim. This motion was granted. *People v Jones*, unpublished order of the Court of Appeals, entered August 4, 2006 (Docket No. 267893). However, defendant did not pursue the remand. Therefore, this Court must review this issue on the basis of the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The determination whether defendant received ineffective assistance of counsel is a question of both fact and constitutional law. The trial court's findings of fact are reviewed for clear error, while questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The right to effective assistance of counsel is guaranteed by the U.S. and Michigan constitutions, in order to protect a criminal defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984). There is a strong presumption that defendant received effective assistance of counsel, and the burden is on defendant to prove counsel's actions were not sound trial strategy. *Strickland, supra*, p 689; *LeBlanc, supra*, p 578.

To prevail on a claim of ineffectiveness of counsel, defendant must show: (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland, supra*, p 687; *LeBlanc, supra*, p 578; *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994). A defendant must show that, but for trial counsel's errors, there would have been a different outcome. *Strickland, supra*, p 694; *Pickens, supra*, p 314.

⁷ Jones' appearance to Davis, the condition of the apartment and the fact that police found a knife in defendant's pocket is testimony by police and was subject to cross-examination by defendant.

Defense counsel's failure to object to the written statement was likely because he thought it was a sound trial strategy. Defense counsel's line of questioning and closing argument centered around the word "should" in Jones' written statement to show that defendant's actions and words did not establish the specific intent, apprehension, and the immediacy necessary to prove felonious assault. This Court will not substitute its judgment for that of counsel in matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant did not overcome his burden of proving defense counsel's actions fell below an objective standard of reasonableness or that there would have been a different outcome. *Strickland, supra*, pp 689, 694; *LeBlanc, supra*, p 578.

Affirmed.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra