IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARTIN SHON HIGH,	]	**NOT FOR PUBLICATION**
	]	
Appellant,	]	
	]	
v.	]	Case No. F-2015-208
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

OPINION

LEWIS, JUDGE:

Appellant, Martin Shon High, was tried by the court and found guilty of murder in the first degree, in violation of 21 O.S.2011, § 701.7(A), in the District Court of Garvin County, Case No. CF-2012-159. The Hon. Steven C. Kendall, Associate District Judge, sentenced Appellant to life imprisonment without the possibility of parole. Mr. High appeals.

FACTS

On September 29, 2011, Wynnewood police responding to a welfare check dispatch discovered Glen Woods Brownlee dead in his residence, the victim of an apparent break-in and fatal beating. The Brownlee murder was still unsolved when, almost three weeks later, police responded to a series of 911 calls from elderly Wynnewood resident Sim Hoffman. Hoffman stated to police that a man known to him as "Melvin High" had just broken into his house carrying a sledgehammer, roughed him up, and taken twenty dollars from him.

Appellant was known to Wynnewood police officers and roughly resembled the elderly Hoffman's description of "Melvin High." Police traveled to the house Appellant shared with his mother and brother. Police surrounded the house and watched as a back bedroom light was turned out. They found Appellant lying under the covers in his bed in that same room. When police called to him, he feigned sleep. When removed from the bed, Appellant was sweating and fully dressed in clothes still wet from the evening's rain. In a search of the premises near Appellant's house, investigators recovered a sledgehammer lying in the wet grass. The sledgehammer itself was dry, and had a visible transfer of green paint on the head, similar in color to the paint on Sim Hoffman's now splintered door jamb. Police also recovered $20 cash in the exact denomination of bills reportedly taken from Hoffman, including a $5 bill bearing a blood stain. A DNA profile obtained from this stain was later matched to Sim Hoffman's known DNA.

Investigators naturally came to suspect Appellant of involvement in the Brownlee break-in and murder of a few weeks earlier, as well as other break-ins. Their search of the bedroom where Appellant was found also produced a bloody shirt, from which they later developed a DNA profile matching the known DNA of the murder victim, Brownlee. After his arrest in the Hoffman crimes, investigators also compared Appellant's palm print to a print obtained from inside Brownlee's residence. The two prints matched.

In two interviews with investigators, Appellant repeatedly denied any involvement in the crimes or being present in either victim's home. He made inconsistent claims of his whereabouts on the night of the Hoffman burglary, gave a false story about the cash in his room, and could not explain the presence of his hand print found inside Brownlee's residence after the murder. Appellant did not testify at the non-jury trial.

ANALYSIS

In Proposition One, Appellant claims that the trial court's admission of testimonial hearsay denied his right to confront witnesses in violation of the Sixth and Fourteenth Amendments. The trial court's admission or exclusion of evidence over a timely objection or offer of proof is ordinarily discretionary and will not be reversed on appeal, unless clearly erroneous or manifestly unreasonable. *Hancock v. State*, 2007 OK CR 9, ¶ 72, 155 P.3d 796, 813. An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946.

The trial court here concluded that the 911 call and additional statements just after the break-in and robbery—in which Sim Hoffman had reported to police that "Melvin High" had robbed him—were not testimony excluded from evidence by the Confrontation Clause. On cross-examination of the prosecution's witness, defense counsel offered the 911 call itself in evidence and played it for the court, but then moved for its exclusion at the conclusion

of the examination. The court overruled the defense objection, and thus admitted both the 911 call and additional testimony about these extrajudicial statements. We find that counsel preserved an objection by moving to strike the testimony at trial. 12 O.S.2011, § 2104. The question is therefore whether the ruling admitting this evidence violated the constitutional right to confrontation.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court held that under the Confrontation Clause, testimonial hearsay statements may be admitted against the accused in a criminal trial only when the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. Id., 541 U.S. at 68, 124 S.Ct. at 1374. Because the right to confrontation in the constitutional text applies to "witnesses," the proper focus is whether the challenged statement is "testimony" against the defendant, triggering the constitutional requirement of an opportunity for cross-examination. *Id.*, 541 U.S. at 51, 124 S.Ct. at 1364.

The record here reflects that Hoffman, the hearsay declarant, was unavailable to testify by reason of his death before the trial, and that the Appellant was not afforded a prior opportunity to cross-examine Hoffman about these statements. The issue is whether these statements were testimonial.

Crawford identified at least three types of "testimonial" hearsay statements subject to confrontation: *ex parte* in-court testimony, extrajudicial statements contained in formalized testimonial materials, and statements made under circumstances which would lead an objective witness to reasonably believe that such statement would be available for use at a later trial. *Id.*, 541 U.S. at 51-52, 124 S.Ct. at 1364.

In post-*Crawford* companion cases, *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Supreme Court held that hearsay statements contained in a 911 call in which the victim was seeking immediate police assistance were non-testimonial, and their admission at a subsequent trial did not abridge the right to confrontation. *Id.*, 547 U.S. at 822, 126 S.Ct. at 2273. The Court reasoned that hearsay statements to police are non-testimonial when "made under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency." Id.

In the *Hammon* case, the Supreme Court found that hearsay statements related during a police interview by a victim of domestic violence, later admitted against the husband when the victim refused to testify at trial, were testimonial and thus subject to confrontation under *Crawford*. *Hammon*, 547 U.S. at 830, 126 S.Ct. at 2278-79. The Court reasoned that such statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to

establish or prove past events potentially relevant to later criminal prosecution." *Hammon*, 547 U.S. at 822, 126 S.Ct. at 2274. This Court followed *Davis/Hammon* in *Hunt v. State*, 2009 OK CR 21, 218 P.3d 516, finding that the declarant's statements on a 911 call, relating past acts of abuse by the defendant, "would be the same as live testimony" in a prosecution for those acts, and were thus "inherently testimonial and subject to the confrontation requirement." *Id.*, 2009 OK CR 21, ¶ 11, 218 P.3d at 519.

The circumstances rendering the statement in *Davis* non-testimonial included that the declarant "was speaking about events as they were actually happening, rather than describing past events;" that any reasonable listener would recognize that the declarant "was facing an ongoing emergency;" that the statement "was plainly a call for help against a bona fide physical threat" to the declarant; that the statement was "necessary to be able to resolve the present emergency, rather than simply to learn what had happened in the past;" and that the declarant's "frantic answers" were given "in an environment that was not tranquil, or even safe for the declarant. *Id.*, 547 U.S. at 827, 126 S.Ct. at 2276-77. By contrast, the Supreme Court emphasized how the testimonial statements in both *Crawford* and *Hammon* "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed," and "both took place some time after the events described were over." *Hammon*, 547 U.S. at 830, 126 S.Ct. at 2278 (emphasis added). Such statements "under official interrogation are an obvious substitute for live

testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial." *Id.*

We conclude that the trial court's decision to admit these statements was not an abuse of discretion and did not violate Appellant's confrontation rights. Hoffman called 911 just after the break-in and robbery. His first two or three calls to 911 ended without resolution (perhaps because of Hoffman's belief that he was not in touch with police). The 911 operator called him back seeking further information. Hoffman then identified "Melvin High," who "rides a bicycle," as the person who had just broken in, "roughed him up," and robbed him. He indicated the robber was carrying a sledge hammer and had just left his residence. We find the primary purpose of these statements was to assist police in responding to burglary and violent robbery on a somewhat disoriented and frightened elderly citizen. The alleged perpetrator was armed, still in the general area, and apparently capable of returning to the home or hurting someone else. Hoffman's hearsay responses were not testimony under the analysis in *Davis/Hammon.* Admission of this evidence did not violate Appellant's constitutional rights.

Even if the challenged statements were admitted in error, they had no unfairly prejudicial effect on the outcome of the trial. Evidence of DNA comparisons matching the two victims on items found in Appellant's room, his false and misleading statements, and the hand print connecting him to the

scene of the Brownlee murder, render any error in admitting hearsay harmless beyond a reasonable doubt. Proposition One is therefore denied.

In Proposition Two, Appellant argues the failure to present controlling case law on the hearsay issue in Proposition One resulted in ineffective assistance of counsel. Claims of ineffective assistance of counsel are reviewed under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, a petitioner must show both (1) deficient performance, by demonstrating that counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.*, 466 U.S. at 687-89, 104 S.Ct. at 2064-66. As is evident from our analysis of Proposition One, testimonial hearsay was not admitted in violation of Appellant's right to confrontation; and even if it was, any error was harmless because of other overwhelming evidence of guilt. Counsel's failure to present additional case law, if deficient, creates no reasonable probability of a different outcome at trial, and requires no relief. Proposition Two is denied.

Proposition Three argues that the cumulative effect of errors in Appellant's trial warrants reversal of the convictions or modification of the sentences. We found any error in the admission of hearsay was harmless beyond a reasonable doubt. Appellant has not shown any other errors, or that

the accumulation of errors in this case had a prejudicial effect on his conviction or sentence. *Sanchez v. State*, 2009 OK CR 31, ¶ 105, 223 P.3d 980, 1013. Proposition Three is denied.

DECISION

The Judgment and Sentence of the District Court of Garvin County is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARVIN COUNTY
THE HONORABLE STEVEN C. KENDALL, ASSOCIATE DISTRICT JUDGE

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OPINION BY LEWIS, J.
SMITH, P.J.: Concurs
LUMPKIN, V.P.J.: Concurs in Results
JOHNSON, J.: Concurs
HUDSON, J.: Concurs