COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1776-CR **Cir. Ct. No. 2005CF494**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES M. PIETLUCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Brown, C.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Charles M. Pietluck appeals from the judgment of conviction entered against him. He argues that he was denied his right to confront a witness when the circuit court admitted statements made by the victim to various people after the victim had testified that she did not remember any of the events.

Because we conclude that Pietluck was not denied his Confrontation Clause rights, we affirm.

Background

¶2 Pietluck was convicted of physical abuse of a child. The incident occurred on April 24, 2005, when Pietluck punched his daughter, Jacqueline, in the face, bruising her eye. Jacqueline stated that Pietluck was drunk at the time. Her younger brother witnessed the incident. On April 27, 2005, Jacqueline went to talk to a school counselor, Mary Jensen, and told Jensen that her father had hit her. Jensen reported the incident to Social Services.

¶3 The next day, Charmayne Lewis, a crisis counselor from Kenosha Human Development Services, came to the school to talk to Jacqueline.[1] Lewis testified that when she met Jacqueline, she noticed that Jacqueline's left eye was bruised. The first time Lewis spoke to Jacqueline, Jacqueline said that she had injured her eye when she fell in a pothole the previous Sunday. In a subsequent conversation, with Jensen present, Jacqueline told Lewis that she had not been honest the first time. Jacqueline stated that she was talking to her father about a sleepover, her father did not respond initially and she got angry, and then her father hit her, breaking her glasses. She said that her father had been drinking at the time, and that her brother had seen the incident. She stated that the next day her mother took her to get her glasses repaired, and that the nose piece had to be replaced. Lewis reported the incident to the police.

[1] Someone other than Jensen had reported the incident to Lewis's office.

¶4 Deputy Eric Klinkhammer then came to the school to talk to Jacqueline and take photographs of her injury. Klinkhammer testified that when he met Jacqueline, he noticed the bruise to her left eye. Jacqueline also told him that her father, who was drunk at the time, had punched her in the eye, breaking her glasses and causing the bruise to her eye. Eventually, Pietluck was charged with physical abuse of a child.

¶5 Pietluck went to trial. The first witness called by the State was Jacqueline. When Jacqueline took the stand, she answered many of the questions asked by saying, "I don't remember," or "I don't know." She said that she did not remember the date of April 24, 2005, and she did not remember what happened to her eye or whether her eye had been injured. She said she did not remember getting into an argument with her father on that day, seeing her father on that day, her father hitting her on that day, or her glasses breaking on that day. She did testify that something had happened to her eye, but she answered that she did "not remember" when asked about the specific details. Further, Jacqueline testified that she did not remember talking to Jensen, Lewis, or Klinkhammer. She testified that she had new glasses because the lens had popped out of her old pair. She also testified that her father was not drinking on April 24, 2005. When asked if there was any reason why she did not remember any of these things, she answered "no."

¶6 When the State was finished, defense counsel declined to cross-examine Jacqueline. The trial court then "released" Jacqueline from the witness stand, but did not excuse her. The defense moved to exclude the testimony of Jensen, Lewis, and Klinkhammer about any statements Jacqueline made to them, arguing that Pietluck had been denied the right to confront the witness, and consequently the statements would not be admissible under ***Crawford v. Washington***, 541 U.S. 36 (2004). The court initially granted the motion, finding

that the statements were testimonial and that Pietluck had been denied his right to confrontation.

¶7 The next day, the State moved the court to reconsider its decision. The court decided to withdraw its previous decision. The court stated that because it had sustained the defense's objections to the State's questions, it had likely prevented the State from giving the witness the opportunity to explain or deny her prior statement. The court then allowed the State to recall the victim to question her about her statements to Jensen, Lewis, and Klinkhammer, and gave the defense the opportunity to cross-examine her about those statements.

¶8 The State asked Jacqueline many questions about her statements to Jensen, Lewis, and Klinkhammer. She responded that she did not remember or recall giving the statements or the content of those statements. When the defense cross-examined her, she responded the same way. The defense then renewed its motion to exclude the statements because there had not been any meaningful cross-examination. The trial court concluded that the defense had an opportunity to cross-examine Jacqueline, and that opportunity satisfied the right to confront. The court allowed the statements of Jensen, Lewis, and Klinkhammer to be admitted. The jury found Pietluck guilty, and Pietluck appeals.

Harmless Error

¶9 The State first argues that any error the trial court committed in admitting the victim's statements was harmless. Because we conclude that the court's decision to admit the statements did not violate the Confrontation Clause, we need not address the question of harmless error.

The Right to Confrontation

¶10 The first issue the court must address when determining whether there has been a Confrontation Clause violation is whether the statements were admissible under the rules of evidence. ***State v. Manuel***, 2005 WI 75, ¶23, 281 Wis. 2d 554, 697 N.W.2d 811. "A trial court's decision to admit evidence is discretionary, and this court will uphold that decision if there was a proper exercise of discretion." ***Id.***, ¶24 (citation omitted). This requirement is easily satisfied in this case because WIS. STAT. § 908.01(4) (2005-06), states that a witness's prior inconsistent statement is not hearsay if the witness is available for cross-examination. Further, when a witness denies recollection of a prior statement and the trial court has good reason to doubt the good faith of the denial, the court may in its discretion find the testimony inconsistent and admit the prior statement into evidence. ***State v. Lenarchick***, 74 Wis. 2d 425, 436, 247 N.W.2d 80 (1976).

¶11 Once we have determined that the statements were admissible under the rules of evidence, then the second issue we must consider is whether admitting the statement violated the defendant's right to confrontation. ***Manuel***, 281 Wis. 2d 554, ¶25. This presents a question of law that we review *de novo*. ***Id.***

¶12 The threshold issue when determining if there has been a Confrontation Clause violation is whether the prior statements were "testimonial." ***Crawford***, 541 U.S. at 68. When the statements are not testimonial, then the States have "flexibility in their development of hearsay law …." ***Id.*** When the statements are testimonial, however, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." ***Id.*** Statements are not testimonial when "made in the course of

police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." ***Davis v. Washington***, 126 S. Ct. 2266, 2268-69 (2006). 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." ***Id.*** at 2269.

¶13 The trial court in this case found that the statements sought to be introduced were testimonial.[2] We agree that the statements were testimonial.

¶14 The next issue, therefore, is whether the witness was available for cross-examination. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his [or her] prior testimonial statements." ***Crawford***, 541 U.S. at 59 n.9; ***State v. Nelis***, 2007 WI 58, ¶43, __ Wis. 2d __, 733 N.W.2d 619. Pietluck first argues that the trial court erred because it did not make a finding that the witness was available. Further, Pietluck argues that there was no meaningful cross-examination of the witness because Jacqueline responded to the questions by saying, "I don't know."

¶15 The Court in ***Crawford*** did not explain what it meant by the witness must "appear[] for cross-examination." ***State v. Rockette***, 2006 WI App 103, ¶21, 294 Wis. 2d 611, 718 N.W.2d 269, *review denied*, 2006 WI 113, 296 Wis. 2d 62, 721 N.W.2d 484. As we concluded in ***Rockette***, however, there are two prior

[2] As the State notes in its brief, it is arguable whether the statements Jacqueline made to Jensen, the school counselor, were testimonial. For the purposes of this decision, however, we will assume without deciding, that they were.

United State Supreme Court cases that resolve this issue. ***Id.*** In ***Delaware v. Fensterer***, 474 U.S. 15, 20 (1985) (per curiam), the Court stated that the Confrontation Clause "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." "The Confrontation Clause does not guarantee that a witness's testimony will not be 'marred by forgetfulness, confusion, or evasion.'" ***Rockette***, 294 Wis. 2d 611, ¶22 (quoting ***Fensterer***, 474 U.S. at 21-22).

¶16 And in ***United States v. Owens***, 484 U.S. 554, 556 (1988), the Supreme Court addressed the situation in which a witness who had previously identified an individual was not able to recall at trial the basis of that identification. While the defendant there argued that the declarant's memory loss precluded him from being cross-examined, the Supreme Court held that those circumstances do not create Confrontation Clause problems. ***Id.*** at 559-60; ***Rockette***, 294 Wis. 2d 611, ¶23.

> ***Fensterer*** and ***Owens*** teach us that the key inquiry for Confrontation Clause purposes is whether the declarant is present at trial for cross-examination, takes the oath to testify truthfully and answers questions asked of him or her by defense counsel. These cases also plainly inform us that the Confrontation Clause does not guarantee that the declarant's answers to those questions will not be tainted by claimed memory loss, real or feigned.

Rockette, 294 Wis. 2d 611, ¶24. Further, there is nothing in ***Crawford*** that suggests the Supreme Court intended to overrule these two cases. ***Rockette***, 294 Wis. 2d 611, ¶25.

¶17 We conclude in this case that the witness appeared for cross-examination as defined in these previous cases. She was present at trial for cross-examination, took the oath to answer truthfully, and answered the questions put to

her by defense counsel. The fact that she answered many, but not all, of the questions by saying she did not remember or recall does not change this conclusion. *See* ***Owens***, 484 U.S. at 561-62. The witness was available to Pietluck for purposes of the Confrontation Clause.

¶18 Pietluck also argues that the cross-examination was not "meaningful" because of the witness's claimed loss of memory. There is nothing to support, however, his claim that an "available" witness's loss of memory creates a Confrontation Clause issue. "The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion." ***Owens***, 484 U.S. at 558 (quoting ***Fensterer***, 474 U.S. at 21-22). Jacqueline appeared at trial and was cross-examined by Pietluck's counsel. Consequently, there was no Confrontation Clause violation.

¶19 Pietluck also argues that the trial court erred when it failed to find that the victim's statements were inconsistent with her prior statements. We are not convinced by this argument. While it is true that the trial court did not make an express finding that the victim's statements were inconsistent, the record shows that the finding was implicit. The trial court found that Jacqueline was "stonewalling" by saying "I don't remember." Further, the State sought to introduce the prior statements under ***Lenarchick***, which requires that the statements be inconsistent with the declarant's testimony. The court discussed the requirement that the statements be inconsistent, and identified some of the specific inconsistencies in her trial testimony. The trial court then expressly stated that it was admitting the statements under ***Lenarchick***. Based on this record, we conclude that the trial court properly exercised its discretion when it admitted

Jacqueline's prior inconsistent statements. For the reasons stated, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).