

## **CRIMINAL LAW: EVIDENCE**

### **Summary**

Defendant Martha Flores was found guilty of first-degree murder by child abuse of her five-year-old stepdaughter, Zoraida Flores. Postmortem examinations concluded that the child had been physically abused and her death was caused by a blunt-force trauma to the head.

Flores resided with her husband, Jose Flores, his five-year-old daughter Zoraida, Flores' daughters and mother and an infant. Flores was the primary caregiver of the family while Jose worked to support them.

On January 28, 2001, emergency medical personnel responded to the Flores' apartment and provided assistance to Zoraida. They were unable to resuscitate the child. The postmortem examination of Zoraida's body revealed numerous bruises and bite marks at different stages of healing. The coroner concluded that the death was caused by blunt trauma to the head.

Flores, in her statement to the police, stated that she found Zoraida that morning in her bedroom in distress and having trouble breathing. She picked up the child and found her to be limp and damp, as if she had "wet the bed." Flores claimed to have taken Zoraida into the bathroom and attempted to revive her with water from the shower and by waving rubbing alcohol under her nose. Flores further stated that she went to a neighbor for help as she did not understand what was wrong with the child and there was no phone in the apartment. Flores acknowledged that she had in the past tried to cover a bruise around Zoraida's eye with make up when out in public, in part to avoid questions from the police.

Police officers found wet, urine stained children's clothing and an open bottle of rubbing alcohol in the apartment. They also observed standing water in the shower and on the bathroom floor. There was no evidence of blood or physical damage to the shower or bathroom walls.

The only eyewitness to the incident was Flores' daughter, Sylvia. Sylvia told child abuse investigators and her foster mother, Yolanda Diaz, that Flores struck Zoraida during a struggle in the shower. She said that the blow caused Zoraida to strike her head and lose consciousness, and Zoraida never woke up.

There was a hearing conducted on the State's pretrial motion to admit Sylvia's out of court statements under N.R.S. 51.315(1).<sup>2</sup> At this hearing, Sylvia and Diaz both testified. The motion was granted with the court finding that Sylvia was unavailable as a witness based upon her emotional state; she did not wish to discuss the case and it was obvious that she would not talk about it. The court found strong assurances of the accuracy of Sylvia's statements, given their consistency and corroboration by medical experts. Sylvia did not testify at court.

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<sup>1</sup> By Patti Ross.

<sup>2</sup> This statute states: A statement is not excluded by the hearsay rule if: (a) its nature and the special circumstances under which it was made offer strong assurances of accuracy; and (b) the declarant is unavailable as a witness.

The state introduced Sylvia's hearsay statements through the testimony of LVMPD child abuse investigator Sandy Durgin, Child Protective Services investigator Carolyn Goldman, and Yolanda Diaz. Because Sylvia's statements were introduced through surrogates, Flores was not afforded the opportunity of cross examination of Sylvia.

Durgin testified to Sylvia's statements that she heard Zoraida crying in the bathroom and her mother trying to get Zoraida to take a shower. She further stated that Zoraida was struck by her mother and hit her head on the door. Durgin testified that she used open ended questions with Sylvia and tried not to influence Sylvia's statements.

Godman testified to Sylvia's statements that Zoraida hit Flores on the leg during an argument and that Flores struck Zoraida causing her to fall to the floor. When Zoraida did not respond, Flores and Sylvia carried her to a bed. Although the interview was not optimal, Sylvia did respond with specific information in response to several open ended inquiries.

Diaz testified to a later spontaneous statement by Sylvia that Zoraida peed in her pants, that Flores hit her and took her in the shower and hit her. She further stated that Zoraida slipped and hit her head and that Flores gave her some medicine and she never woke up.

Flores is seeking reversal of the conviction and a new trial. She is contending that the district court improperly admitted Sylvia's hearsay statements in violation of her Sixth Amendment right of confrontation.

Under *Crawford v. Washington*,<sup>3</sup> the U. S. Supreme Court held that testimonial hearsay statements of a witness who does not appear at trial are inadmissible under the Confrontation Clause of the Sixth Amendment unless the witness is unavailable to testify, and the defendant has had a prior opportunity to cross-examine the witness. This decision overruled *Ohio v. Roberts*,<sup>4</sup> which allowed the admission of hearsay statements without the benefit of actual confrontation. The Court did not expressly define "testimonial" but provided some guidelines. A statement is testimonial if it is (1) an *ex parte* in-court testimony or its functional equivalent such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, or similar pretrial statements, (2) extrajudicial statements contained in formalized testimonial material such as affidavits, depositions, prior testimony or confessions, and (3) 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.

In its analysis of Sylvia's out of court statements the Nevada Supreme court found that two of the statements were in fact testimonial under the third illustration; the statements testify to by Durgin and Godman. These statements were made to either police operatives or someone tasked with reporting instances of child abuse for prosecution. These circumstances would cause an objective witness reasonably to believe that the statement would be available for use at a later trial.

The third, spontaneous, statement made to Diaz, Sylvia's foster mother, however, was found not to be one which an objective witness would reasonably anticipate would be sued for prosecution of a crime.

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<sup>3</sup> 541 U.S. 36 (2004).

<sup>4</sup> 380 U.S. 400 (1965).

## **Issue and Disposition**

### **Issue**

Whether the trial court's admission of a child's out of court testimony a violation of Flores' Sixth Amendment right to confrontation under the 2004 Supreme Court decision *Crawford*.

### **Disposition**

Yes. Due to the nature of the child's out of court statements being *testimonial*, the statements' admissibility violated Flores' right of confrontation under *Crawford*. The Court further found that admission of this evidence was not harmless and therefore reversed the conviction and remanded for a new trial.

## **Commentary**

### **State of the Law before *Flores v. State of Nevada***

Prior to the *Crawford* decision, *Ohio v. Roberts*<sup>5</sup> was the controlling law. *Crawford* was decided during the pendency of the appeal in this case. Under *Roberts*, the prosecution must demonstrate that the declarant is unavailable. The district court may then admit the hearsay statement if it either falls within a firmly rooted hearsay exception or it reflects particularized guarantees of trustworthiness.<sup>6</sup> The Nevada Supreme Court states that under the *Roberts* test, they would affirm the district court's decision to allow admission of the statements.

The concept of "victimless prosecutions" in cases involving child witnesses has developed nationwide. The United States Supreme Court has addressed this prosecutorial approach under *Roberts* wherein surrogates are allowed to testify to out of court statements made by child witnesses who, because of age or immaturity, might be too intimidated to testify in court. The Court further advocated this approach when it set factors to guide the consideration of the trustworthiness of a child witness's hearsay statements.<sup>7</sup>

The Nevada statute, NRS 51.385, is similar to the language under *Wright* and the Nevada Supreme Court had previously held the statute constitutional under *Roberts* and *Wright*.<sup>8</sup>

### **Other Jurisdictions**

Until the *Crawford* decision in 2004, *Roberts* had been the controlling case on this issue of hearsay statements made by child witnesses.

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<sup>5</sup> 448 U.S. 56 (1980), *overruled in part by Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>6</sup> *Id.* at 66.

<sup>7</sup> *Idaho v. Wright*, 497 U.S. 805, 821-22 (1990). When assessing the trustworthiness of a child witness's hearsay statement, the court should consider (1) "spontaneity and consistent repetition, (2) the mental state of the declarant, (3) use of terminology unexpected of a child of a similar age, and (4) lack of motive to fabricate."

<sup>8</sup> *Bockting v. State of Nevada*, 847 P.2d 1364, 1367-68 (1993).

### **Effect of *Flores v. State of Nevada***

Under *Crawford* and now this decision, NRS 51.385 is placed into doubt. This statute deals with statements by underage children concerning sexual or physical abuse of the child. Additionally, several other Nevada statutes are in doubt to the extent that it allows testimonial statements to be admitted without affording the defendant the opportunity to cross examine: NRS 51.325 that deals with former testimony; NRS 51.335 that deals with statements under belief of impending death; NRS 51.345, that deals with statements against interest; and NRS 513.095 that deals with excited utterances, and NRS 51.385.

### **Unanswered Questions**

The remaining question in this decision, as well as in *Crawford*, is what constitutes “testimonial” statements. The Court in *Crawford* outlines several “formulations of [a] core class of ‘testimonial’ hearsay,”<sup>9</sup> however, it expressly declined to spell out a comprehensive definition of testimonial.<sup>10</sup> Trial and appellate courts are left to make this determination on a case by case basis.

Moreover, these decisions beg the question of whether such strict exclusion of such statements strikes enough of a balance between a defendant’s right of confrontation and society’s interest, desire and need to protect children who find themselves in these horrible situations. *Crawford* seems to take away the balance that *Roberts* attempted to reach between these two tensions and makes the rule very one sided in defendants’ favor.

### **Conclusion**

Under this decision and *Crawford*, hearsay statements under NRS 51.315 (1) are not admissible if the statements are testimonial in nature as it is a violation of a defendant’s Sixth Amendment right to confrontation. There is no concrete definition of what constitutes a “testimonial” statement. *Crawford*, however, sets out guidelines for making this determination.

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<sup>9</sup> *Crawford*, 541 U.S. at 51-52.

<sup>10</sup> *Id.* at 68.