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STATE OF NEBRASKA, APPELLEE, V. CHAD N. SORENSEN, APPELLANT.

814 N.W.2d 371

Filed May 25, 2012. No. S-11-597.

1. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error.
2. ____: ____: ____. The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her, and the main and essential purpose of confrontation is to secure the opportunity for cross-examination.
3. **Constitutional Law: Trial: Hearsay.** Where testimonial statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there has been a prior opportunity for cross-examination.
4. **Testimony: Words and Phrases.** Testimony is defined as a solemn declaration or affirmation made for the purpose of establishing or proving some fact.
5. **Constitutional Law: Hearsay.** Nontestimonial statements are not subject to Confrontation Clause protection or analysis.
6. **Constitutional Law: Trial: Appeal and Error.** Error of a constitutional magnitude need not automatically require reversal if that error was a trial error and not a structural one.
7. **Trial: Evidence: Appeal and Error.** The improper admission of evidence is a trial error and subject to harmless error review.
8. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
9. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Box Butte County, LEO DOBROVOLNY, Judge, on appeal thereto from the County Court for Box Butte County, CHARLES PLANTZ, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Chad N. Sorensen was convicted of driving under the influence of alcohol (DUI), second offense, with a blood alcohol content over .15. Sorensen was sentenced to probation, and his license was revoked for 1 year. He appeals.

At issue on appeal is whether Sorensen's confrontation rights were violated when the county court admitted into evidence the affidavit of the nurse who performed Sorensen's blood draw without also requiring that nurse to testify at trial. We find that the county court erred in admitting the affidavit and that this error was not harmless.

BACKGROUND

Sorensen was arrested on December 13, 2008, for DUI. He was transported to a hospital, where a sample of his blood was drawn for blood alcohol testing.

Following the collection of blood, the nurse who collected the sample completed a "Certificate of Blood Specimen Taken in a Medically Acceptable Manner" (Certificate). This Certificate indicated the name of the person who drew the blood; that the sample was taken at the request of law enforcement; the date, time, and name of the subject; that the sample was done in a medically acceptable manner; that the person drawing the sample was qualified under Nebraska law to do so; that the antiseptic solution was nonalcoholic; that the sample was collected in a clean container which contained an anticoagulant-preservative substance; that the container was labeled appropriately and otherwise initialed by the person collecting the sample; and that the container was sealed after collection.

Following this blood draw, the sample collected from Sorensen was tested and found to have a blood alcohol content

of .198. Sorensen was charged with DUI, as well as a violation of Nebraska's open container law.

At trial, the State offered into evidence the Certificate. Sorensen objected on the basis of confrontation and hearsay. These objections were overruled, and the Certificate was admitted into evidence. The nurse did not appear as a witness at trial. The arresting officer did testify, as did the analyst who performed the blood alcohol testing. In addition to objecting to the introduction of the Certificate, Sorensen objected to the admission of the testing results on the basis of confrontation, hearsay, and foundation. Those objections were also overruled, and the results were admitted into evidence.

Sorensen was convicted by jury of DUI with a blood alcohol content over .15 and of having an open container of alcohol in his vehicle. The county court later found the DUI to be a second offense. Sorensen was sentenced to 24 months' probation. His license was also revoked for 1 year, concurrent with any administrative license revocation, and he was fined $50 for the open container violation. Sorensen appealed to the district court, which affirmed.

ASSIGNMENT OF ERROR

Sorensen assigns that the county court's admission of the nurse's affidavit regarding the blood draw violated his confrontation rights under the Sixth Amendment.

STANDARD OF REVIEW

[1] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error.[1]

ANALYSIS

Confrontation.

On appeal, Sorensen assigns that his Sixth Amendment right to confrontation was violated when the court admitted the Certificate but did not require the nurse who

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[1] See *State v. Britt, ante* p. 600, 813 N.W.2d 434 (2012).

performed the blood draw to testify or otherwise be subject to cross-examination.

[2] The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her, and the main and essential purpose of confrontation is to secure the opportunity for cross-examination.[2] The U.S. Supreme Court, in *Crawford v. Washington*,[3] set forth a new standard for analyzing confrontation issues; we have recognized and applied *Crawford* on several occasions.[4]

[3-5] In *Crawford*, the court explained that where "testimonial" statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there has been a prior opportunity for cross-examination.[5] Under *Crawford*, testimony is typically a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[6] As to testimonial statements covered by the Confrontation Clause, the Court in *Crawford* stated:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," . . . "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," . . . "statements that were made under circumstances which would lead an objective witness reasonably to believe

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[2] See, e.g., *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[3] *Id.*

[4] *State v. Britt, supra* note 1; *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007); *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005); *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004).

[5] *Crawford, supra* note 2.

[6] *Id.*, 541 U.S. at 51.

> that the statement would be available for use at a later trial . . . ."[7]

Conversely, nontestimonial statements are not subject to Confrontation Clause protection or analysis.[8]

The Court subsequently clarified the meaning of "testimonial" in *Melendez-Diaz v. Massachusetts*[9] and *Bullcoming v. New Mexico*.[10] *Melendez-Diaz* involved the admission of a certificate stating that the tested substances were cocaine. The analyst who performed the analysis did not testify. The Court found that the admission of the certificate without subjecting the analyst to cross-examination was a violation of the defendant's confrontation rights. The Court first found that there was "little doubt" that the certificate at issue fell within the "'core class of testimonial statements'" described in *Crawford*.[11] The Court further held that the certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,'"[12] and that the circumstances surrounding the creation of the certificate, as well as the express purpose for the certificates as stated by law, left no doubt that the certificates were testimonial.[13]

The Court further expanded its confrontation jurisprudence in *Bullcoming*. In that case, the lower court admitted a blood alcohol content report despite the fact that the analyst who prepared the report had been placed on unpaid leave and did not testify. Though the certifying analyst did not testify, the State did present the testimony of another analyst who was familiar with the laboratory's testing procedures.

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[7] *Id.*, 541 U.S. at 51-52 (citations omitted).

[8] See *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

[9] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

[10] *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011).

[11] *Melendez-Diaz, supra* note 9, 129 S. Ct. at 2532.

[12] *Id.*

[13] *Melendez-Dias, supra* note 9.

The Court in *Bullcoming* first concluded that as in *Melendez-Diaz*, the report in question was clearly testimonial. The Court then turned to the question of whether the testimony of the second analyst was sufficient to protect the defendant's confrontation rights and concluded that it was not. The Court reasoned that the "surrogate testimony . . . could not convey what [the certifying analyst] knew or observed about the events his certification concerned . . . . Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part."[14]

This court has also recently opined on the issue of testimonial versus nontestimonial evidence. In *State v. Britt*,[15] we recognized the validity of our pre-*Melendez-Diaz* holding[16] that a certificate signed by the licensed supplier of a solution used in the maintenance and checking of breath testing devices was not testimonial. In *Britt*, we noted that the same type of certificate

> was not created in preparation for a trial and did not pertain to any particular pending matter. Instead, it related to the maintenance process and accuracy of the testing device to ensure that the solution used to calibrate and test the breath testing device was of the proper concentration, and the certificate would have been prepared regardless of whether or not it would later be used in a criminal proceeding. The preparation of the certificate was too attenuated from the prosecution of charges against [the defendant] to be considered testimonial.[17]

Unlike the certificate in *Britt*, the nurse's Certificate in this case was clearly testimonial. To begin, it is, at its essence, an affidavit. It was admitted to prove the facts in it, namely that the blood draw was performed in a medically acceptable manner, including the averments as set forth above. In the words of the U.S. Supreme Court: this affidavit was "functionally

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[14] *Bullcoming*, *supra* note 10, 131 S. Ct. at 2715.

[15] *Britt, supra* note 1.

[16] See *Fischer, supra* note 4.

[17] *Britt, supra* note 1, *ante* at 606-07, 813 N.W.2d at 439.

identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"[18]

Moreover, this situation is easily distinguishable from *Britt*. Here, the Certificate was the statement of the nurse who actually performed Sorensen's blood draw. This blood was then tested, and those results were used against Sorensen to convict him of DUI. The Certificate itself was filled out at the request of law enforcement under authority of Neb. Rev. Stat. § 60-6,202 (Reissue 2010), which expressly provides that either law enforcement or the defendant may request such a certificate when a blood draw is performed in connection with an arrest under Neb. Rev. Stat. § 60-6,197 (Reissue 2010)—one of the charged violations in this case. Section 60-6,202(2) further provides that the certificate "shall be admissible in any proceeding as evidence of the statements contained in the certificate." Given this, unlike *Britt*,[19] it cannot be said that this Certificate and its statements were too attenuated to be testimonial.

We therefore conclude that the nurse's Certificate was testimonial and that Sorensen's right to confrontation was violated when the State was not required to call the nurse as a witness at trial.

Harmless Error and Double Jeopardy.

[6,7] Our review does not end with our conclusion that the county court erred. Error of a constitutional magnitude need not automatically require reversal if that error was a "trial" error and not a "structural" one.[20] We have held that the improper admission of evidence is a "trial" error and subject to harmless error review.[21]

[8] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the

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[18] *Melendez-Diaz, supra* note 9, 129 S. Ct. at 2532.

[19] See *Britt, supra* note 1.

[20] See *State v. Bauldwin, ante* p. 678, 811 N.W.2d 267 (2012).

[21] See *id.*

actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[22]

We cannot find in this case that the jury's guilty verdicts were surely unattributable to the error in admitting the nurse's affidavit. The affidavit in this case opined that Sorensen's blood draw was performed in a medically acceptable manner and detailed the procedures followed by the nurse in collecting that sample. But the averments in the affidavit were the only evidence in the record as to the procedures required to be followed when collecting a blood specimen. Without this affidavit, the evidence in this case was insufficient to establish foundation for the blood draw.

[9] Having concluded that reversible error has occurred, we must also determine whether the totality of the evidence admitted by the district court was sufficient to sustain Sorensen's convictions. If it was not, then the principles of double jeopardy will not allow a remand for a new trial.[23] But the Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.[24]

And we conclude that when the affidavit is considered together with the other evidence against Sorensen, there was sufficient evidence to sustain Sorensen's guilty verdicts. We therefore reverse the convictions and remand the cause for a new trial.

CONCLUSION

The decision of the district court affirming Sorensen's convictions is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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[22] *State v. Reinhart, ante* p. 710, 811 N.W.2d 258 (2012); *Bauldwin, supra* note 20; *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009); *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[23] See *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

[24] *Id.*