Legal Letters by Andrew Agatston – The Legal List 12/21/12

Forensic Interviews and Crawford v. Washington

Case: Williams v. State, Mississippi Court of Appeals [970 So.2d 727 (2007)].

Facts: The Defendant was the victim's stepfather. "Jane" disclosed to her mother that the Defendant had been touching her inappropriately for some time.

The subsequent forensic interview was conducted at a CAC, and was recorded on audio and video equipment. Four people, including a social worker, a detective, and professionals with DHS and the CAC watched the interview from another room.

At trial, the forensic interviewer testified and the prosecutor submitted the taped interview during her testimony. A defense objection was made on the basis that the defense had not had an opportunity to confront Jane during the forensic interview.

The next day, the Defendant presented his case, calling Jane as the first witness. Following her testimony, the Defendant testified, and denied the allegations.

The jury deliberated for one hour, and convicted the Defendant on three counts of fondling a child and six counts of sexual battery. The Defendant appealed on several grounds, including a challenge to the introduction of the forensic interview tape based upon Crawford v. Washington, 541 U.S. 36 (2004).

Result: Convictions affirmed.

Discussion: It is always important to refresh our skills on U.S. Supreme Court authority that directly impacts CAC work. Crawford is such a case. As is often stated in the Legal Letter, it is

very important for Legal Eagles to understand the statutes and cases that directly impact their professional roles. So, for example, therapists, physicians, social workers, LPCs, and other similarly situated pros should have an advanced understanding of their state's statutes and leading cases related to client and patient confidentiality.

Today's case speaks to forensic interviewers, but the rules discussed are not limited to them.

Anyone who obtains information from a child who has alleged abuse may have a Crawford-type analysis applied to them. It may or may not be applied, but as we will see from today's case, it is very case-specific.

Crawford refresher: As with many rules of law that are applied to various cases we review, Crawford was not a child molestation case. Instead, Crawford involved a Defendant who stabbed a man who allegedly tried to rape the Defendant's wife.

The Defendant's wife gave a recorded statement to police that described the incident. Part of her statement was apparently inconsistent with her husband's self-defense claim. At trial, her tape was played to the jury without the opportunity for the defense to cross-examine her, because Washington state's marital privilege generally bars a spouse from testifying without the other spouse's consent.

What resulted was an opinion in Crawford that brings such terms as "non-testimonial" and "testimonial" statements," "confrontation," and "unavailability" to the forefront in many criminal trials, including child molestation trials.

In Crawford, the wife's statement to the police officer was "testimonial," because it was made "with an eye toward" using the statement at trial. Thus, a Constitutional right of confrontation may be triggered.

In the context of a child discussing her abuse with a therapist, or to a teacher, or to a parent, for example, the statements are likely to be considered non-testimonial because they may have to do with treatment, or emergency situations, or for reasons other than "an eye toward trial." Non-testimonial statements do not trigger Crawford concerns.

However, and I must stress this heavily, it appears to me that any child hearsay-type statement that discloses alleged abuse may be reviewed with a Crawford analysis so long as the issue is raised by the defense before the Court -- and even if it is not. A key is going to be determining the primary purpose of the child's statement.

For example, the dissenting opinion in the Mississippi Supreme Court case Jordan v. State (decided February 16, 2012), addressed the situation of a forensic interview being conducted in a private, non-profit CAC with no law enforcement present. The lower court apparently determined that in this context the child's statements during the forensic interview were non-testimonial, although it is not clear whether the lower court relied on other factors too.

The dissent wrote: *"[T]he lack of participation by members of law enforcement does not end the inquiry. The pertinent question is not whether law-enforcement officials were present, but whether, objectively considered, all relevant circumstances indicate that the primary purpose of the forensic interview was 'to establish or prove past events potentially relevant to later criminal prosecution.'"*

In sum, the Crawford opinion held that the Constitution's Confrontation Clause prohibits the admission of out-of-court testimonial hearsay statements against a criminal defendant, ***unless*** the person making the out-of-court statement (the "declarant") is *unavailable at trial* and the Defendant *had a prior opportunity for cross-examination* of the declarant.

So with that bit of lifting, let's turn to today's case that analyzes the introduction of a forensic interview in a Crawford context. The Mississippi Court of Appeals initially had to determine

whether the F.I. statements were hearsay. It turned to the Mississippi Rules of Evidence that defined hearsay as *"a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted."*

Here, during the playing of the DVD, "Jane" was not testifying at a hearing or trial, and the information described criminal activity that was at issue to be proven by the State. The F.I. DVD was clearly hearsay.

Next up was the "testimonial-non-testimonial" analysis. Yes, the F.I. was at a non-profit, non-governmental entity; however, the interview was scheduled after a report to police regarding alleged abuse. A police officer observed the interview.

"*Based on the fact that law enforcement was intimately involved in obtaining the interview and was present at the interview, we conclude that this videotaped forensic interview was testimonial in nature, as contemplated by Crawford."*

But the Court of Appeals' analysis did not end there. It looked to whether the testimonial hearsay was subjected to cross-examination before it was admitted. It found that while the Defendant did not cross-examine "Jane" before the DVD of the interview was played, she was cross-examined later in trial (and she was even called as a witness in Defendant's case-in-chief). Therefore the Defendant was not "unduly prejudiced" when the F.I. DVD was played to the jury because "Jane" was *available at trial* and he had an opportunity to question her statements on the videotape (and generally), according to the Court of Appeals.

Application of Crawford will vary by state. And there is more legal analysis that must be undertaken than what was described here, including an analysis of hearsay exception rules. This is an area ripe for legal research by the qualified attorney of your CAC's choice.

Best regards.

_____

Andrew H. Agatston
Andrew H. Agatston, P.C.
145 Church Street, Suite 230
Marietta, Georgia 30060
(770) 795-7770
ahalaw@bellsouth.net
www.AgatstonLaw.com