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IN THE
COURT OF APPEALS OF INDIANA

ROBERT JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-1101-CR-18
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland Chamblee, Jr., Judge
Cause No. 71D08-1009-FC-220

September 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Robert Johnson appeals his conviction and sentence for Class C felony battery. We conclude that (I) the trial court erred by admitting a testimonial hearsay statement made by the victim to police, but the error was harmless, and (II) Johnson waived any alleged error in the computation of his credit time, as he has submitted insufficient materials for our review of the issue on appeal. We affirm.

Facts and Procedural History

Johnson and Tonya Towne had a son together. Tonya was also pregnant with their second child. The two had previously dated but were separated. They conducted child-visitation exchanges at Johnson's mother's house.

One night Tonya drove to Johnson's mother's house to pick up their son. Tonya's friend Sonya Brook was in the car with her. They arrived at the house and Tonya went inside. Robert came out to the car and became involved in a verbal altercation with Sonya. Tonya came back outside. Robert approached Tonya. They began to argue. Robert swung at Tonya but missed. He then kicked her three or four times. At least one kick made contact with Tonya's stomach. Johnson fled shortly thereafter. Sonya told Tonya to get in the car so they could get help. Tonya called the police and drove Sonya home. At some point Johnson sent a text message to Tonya stating that "he hoped it died," referring to their unborn child.

Later that evening, Tonya met up with Police Officer Anthony Bradburn at a gas station. Tonya told Officer Bradburn what happened and said that she was in pain as a result of the incident.

Tonya developed a bruise on the back of her calf which Sonya saw several days later.

The State charged Johnson with Class C felony battery, Ind. Code § 35-42-2-1. The State alleged that Johnson "did knowingly touch Tonya Towne in a rude, insolent, or angry manner, to wit: by kicking her about the body, causing bodily injury, to-wit: pain, and ROBERT JOHNSON knew that Tonya Towne is pregnant." Appellant's App p. 12.

Tonya did not appear at trial, but Sonya and Officer Bradburn did. Sonya recounted the events in question. She testified to seeing Johnson kick Tonya and observing the bruise on Tonya's leg.

Officer Bradburn testified to Tonya's out-of-court statement that she was in pain as a result of the physical altercation. Johnson objected, arguing that the admission of Tonya's statement violated his Sixth Amendment right to confrontation. The trial court admitted the statement over objection.

Johnson moved for judgment on the evidence at the close of the State's case. The trial court denied Johnson's motion.

The jury found Johnson guilty as charged, and the trial court sentenced him to seven years with three years suspended to probation. The court awarded Johnson fifty-seven days of credit for time served.

Johnson later filed a "request for recomputation of credit time." Johnson averred that he "was sentenced on January 6, 2011, in this cause," that "at the time of this sentencing, [he] had been in custody in the St. Joseph County Jail and serving time on this cause and three other felony cases," and that he "believe[d] that an error in crediting

the time served has occurred." Appellant's App. p. 10. Johnson's request was referred to the probation department and ultimately denied by the trial court.

Johnson appeals.

Discussion and Decision

Johnson raises several issues which we restate as: (I) whether the trial court erred by admitting Tonya's out-of-court statement to Officer Bradburn and (II) whether the court incorrectly calculated Johnson's credit time at sentencing.

I. Admission of Tonya's Hearsay Statement

Johnson first claims that the trial court erred in admitting Tonya's out-of-court statement to Officer Bradburn. Johnson argues that the admission of the statement violated his Sixth Amendment right to confrontation.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The right to confrontation guaranteed by the Sixth Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause prohibits admission of testimonial hearsay in criminal trials unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. 541 U.S. 36, 68 (2004).

Crawford declined to set forth a comprehensive definition of "testimonial," but it identified "various formulations" of the "core class of 'testimonial' statements": (1) 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; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *Id.* at 51-52.

In *Davis v. Washington*, the Supreme Court refined the meaning of "testimonial" in the context of police interrogation. 547 U.S. 813, 822 (2006). The Court concluded that "[s]tatements are nontestimonial 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." *Id.* On the other hand, "[s]tatements 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.* Determining the primary purpose of an interrogation requires an objective evaluation of the circumstances in which the encounter occurs and the statements and actions of the parties. *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011).

We conclude, and the State concedes, that the admission of Tonya's statement to Officer Bradburn constituted a violation of Johnson's right to confrontation. Tonya met with Officer Bradburn well after the incident in question, when there was no apparent ongoing emergency, and under circumstances objectively indicating that the purpose of

Tonya's statements was to establish past facts relevant to later prosecution. Tonya told Officer Bradburn what had happened to her and said that she was in pain due to the assault. We conclude that Tonya's statement was testimonial hearsay which, in the absence of any opportunity for cross-examination, was inadmissible under *Crawford*, *Davis*, and *Bryant*.

Nonetheless, confrontation violations are subject to harmless error analysis. *McGaha v. State*, 926 N.E.2d 1050, 1056 (Ind. Ct. App. 2010). "[A] denial of the right of confrontation is harmless error where the evidence supporting the conviction is so convincing that a jury could not have found otherwise." *D.G.B. v. State*, 833 N.E.2d 519, 528 (Ind. Ct. App. 2005).

We conclude that any error in the admission of Tonya's statement was harmless, as we find the remaining evidence of Johnson's guilt sufficient and convincing. Sonya witnessed the altercation firsthand and testified that Johnson kicked Tonya in the stomach. Johnson sent a text message to Tonya stating that "he hoped it died." And Sonya identified a bruise on Tonya's leg several days after the incident. A factfinder could reasonably conclude from this evidence that Johnson knowingly touched Tonya in a rude, insolent, or angry manner, aware that she was pregnant, and causing her bodily injury and pain. We thus find sufficient and ample independent evidence sustaining Johnson's Class C felony battery conviction, and we find the erroneous admission of Tonya's hearsay statements harmless beyond a reasonable doubt. We further note that, for the same reasons, the trial court properly denied Johnson's motion for judgment on the evidence.

II. Credit Time

Johnson next argues that the trial court erred in computing his credit for time served. He claims he is entitled to a total of 113 days as a result of pretrial detention.

"It is Appellant's duty to present an adequate record clearly showing the alleged error. Where he fails to do so, the issue is deemed waived." *Jackson v. State*, 496 N.E.2d 32, 33 (Ind. 1986)

Where a defendant asserts error in the amount of credit time received at sentencing, the failure to present relevant documentation establishing entitlement to additional credit will result in waiver of the issue. *See Brattain v. State*, 777 N.E.2d 774, 776 (Ind. Ct. App. 2002); *Thompson v. State*, 761 N.E.2d 467, 471 (Ind. Ct. App. 2002); *Gardner v. State*, 678 N.E.2d 398, 401 (Ind. Ct. App. 1997).

Here Johnson has submitted no materials establishing his entitlement to additional credit time. His request for recomputation alleges only that he "was sentenced on January 6, 2011, in this cause," "at the time of this sentencing, [he] had been in custody in the St. Joseph County Jail and serving time on this cause and three other felony cases," and he "believe[d] that an error in crediting the time served has occurred." Johnson offers no additional documentation confirming the dates of his pretrial confinement for purposes of credit-time calculation. We therefore find this issue waived on appeal.

For the reasons stated, we affirm Johnson's conviction and sentence.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.