Analysis of Evidence under Crawford vs. Washington

The issue of admissibility of evidence is a Peliminary Question under Utah Rule of Evidence 104 to be determined by the court by a preponderance of evidence shown by evidence admissible under the evidence rules. *State v. Poole, 232 P3d 519 (2010). Therefore, pretrial motions are encouraged to resolve admissibility issues.*

1. Is the statement hearsay?

The general rule is that statements made outside the courtroom offered in court to prove the truth of the matter asserted are hearsay.

So, a statement offered for something other than the truth of the matter asserted is not hearsay, and *Crawford* does not apply. (Note: Defendant may be entitled to a limiting instruction if a statement is admitted for a limited purpose.)

Also, the following such statements are specified as non-hearsay statements by URE 801 (d):

Prior inconsistent statement of a witness;
Prior consistent statement of a witness offered to rebut a claim of fabrication;
Statement of a party when offered by the opponent; and
Statement of a co-conspirator.

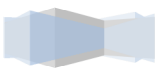
Statements that are not hearsay are not excluded by *Crawford*.

2. Is the statement offered at trial?

The Confrontation Clause rights of a Defendant apply only at trial. At any other court hearing, including preliminary hearings, the Defendant cannot invoke his confrontation rights. *State vs. Timmerman, 218 P3d 590 (2009).*

3. Is the statement testimonial?

According to *Crawford*, the confrontation clause only excludes statements that are "testimonial" in nature.



Statements made to police made for the "primary purpose" of helping to establish or to prove events relevant to later prosecution are testimonial. *Davis vs. Washington, 547 US 813 (2006).*

The "primary purpose test" is an objective test in which a court must determine the purpose that declarants had in speaking with police. Factors to be considered are:

Location in which statement was made;

Timing of statement;

Existence of an ongoing emergency;

Victim's medical condition; and

Informality of the setting.

Note that there can be *several* purposes of witnesses in making statements, but the key is determining what the primary purpose is.

Courts should watch for the situation where the primary purpose of a statement changes. For example, when an ongoing emergency ends and police continue to question a witness, then the court should rule that those later statements are excluded by the confrontation clause. "[Where] a conversation which begins as an interrogation to determine the need for emergency assistance evolves into testimonial statements once that purpose has been achieved, courts should redact or exclude the portions of any statements that have become testimonial." *Davis v. Washington, 547 US 813 (2006).*

One Utah case*, Salt Lake City v. Williams, 128 P3d 47 (2005),* applies the "primary purpose" doctrine. *Williams* upheld the admission of two different hearsay statements: (1) a statement by a victim to a friend of "Oh My God, there's [Williams]!" was not testimonial because it was made without any awareness that it may be used for a criminal prosecution; and (2) a statement to a 9-1-1 operator while the crime was in progress was made "for the purpose of seeking protection from immediate danger," and was therefore admissible. The *Williams* court opined that the "primary purpose" finding should be made on a case-by-case basis.

4. Has declarant been subject to cross exam?

Where a witness actually testifies at trial and is subject to cross exam, there is no confrontation clause issue. The case law on this issue attempts to sort out various permutations of this scenario.

1) Witness present in court but not called to testify.

   The confrontation clause is not satisfied when the witness is present but does not testify. *Melendez-Diaz v. Massachusetts, 129 S Ct 2527.*

2) Witness present but refuses to testify.

   A witness who refuses to testify, whether asserting a privilege or not, is not considered "subject to cross exam" and the confrontation clause applies. *Douglas v. Alabama, 380 US 415 (1965).*

3) Witness testifies via closed circuit television.

   Confrontation clause is satisfied, so long as Defendant may question witness even though witness is in another room. *Maryland v. Craig, 497 US 397 (1990)*

4) Witness testifies, but has "loss of memory."

   The confrontation clause is satisfied, even though witness claims a loss of memory. "The confrontation clause guarantees only an "opportunity for effective cross examination, not cross examination that is effective in a particular way and to whatever extend the defense might wish." *US v. Owens, 484 US 554 (1988).*

5) Witness is uncooperative or evasive.

   Similar to the above analysis, the confrontation clause is satisfied even though it does not meet all of the Defendant's expectations.

6) Witness with mental impairment or other incapacity to testify.

   Physical incapacity which does not amount to a total incompetence to testify does not violate the confrontation clause. *Vasquez v. Kirkland, 572 F3d 1029 (2009).*

5. Has the Defendant forfeited his confrontation clause rights?

Forfeiture by wrongdoing is a long-standing exception to the Defendant's ability to exercise confrontation clause rights. *Reynolds v. US.* This means that if a Defendant causes a witness to be unavailable at trial through his own wrongful acts, he cannot invoke his confrontation clause rights.

In a domestic violence setting, an "ongoing pattern of abuse" can be inferred as intent to silence the witness in some cases. *Giles v. California, 128 S Ct 2678 (2008).* "The element of intent [to prevent a witness from testifying] would normally be satisfied by the intent of the domestic abuser in a classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process."

Utah law supports the doctrine of forfeiture by wrongdoing. *In State vs. Poole, 232 P3d 519 (2010),* "Utah law recognizes that a Defendant may forgo the right to confrontation through conduct designed to make a witness unavailable at trial."

Poole requires that a court determination of this issue be done close to trial, and requires a three-prong test. NOTE: *Poole* requires that the rules of evidence must be followed by the court in receiving evidence to make this decision on a preliminary matter.

The three factors the court must consider are:

1) The witness must be unavailable;
2) The unavailability must have been caused by the wrongful acts of the Defendant; and
3) The acts must have been done with an intent to make the witness unavailable.

6. Does an exception to *Crawford* apply?

A dying declaration has been found to be an exception to the Crawford decision, although a black-letter rule was not announced by Crawford. In Crawford, dicta acknowledged that despite the testimonial character of many such statements, the dying declaration might qualify as a *sui generis* exception to confrontation rights. *Crawford, 541 Us at 56, note 6.*