

Predicting One's Own Death

By: Wayne C. Fricke; Dec 2007

I just returned from a murder case in Alaska and faced a relatively novel issue in defending the case. Specifically, a letter written by a future victim set forth his suspicions that a defendant (my client) and her alleged paramours might kill him. We, of course, objected to the hearsay quality of the letter and the violation of her constitutional rights to cross examine the author pursuant to Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The court in this case, allowed the admission of the letter based on the victim's state of mind as evidence in spite Crawford and its progeny.

Not surprisingly, a search of all the cases in the country indicates that only a couple of appellate courts have faced this situation when a soon to be murder victim accuses one of his murder. Commonwealth v. Levanduski, 901 A.2d 3, (Pennsylvania 2006); People v. Wlasiuk, 32 A.D. 3d 674, 821 N.Y.S. 2d 285 (2006). However, in both of these cases, the courts held that the evidence was not admissible., although Levanduski held that it was harmless error to admit the letter set forth.

In Levanduski, the letter contained the future victim's suspicions about who was going to kill him and how he was going to die. 907 A.2d at 9-10. The state argued that it was admissible under the state of mind exception to the hearsay rule because the letter informed the jury of the appellant's intent and motive through the victim's state of mind. The Court agreed that it was hearsay, and found that the state of mind exception did not apply because typically the exception involves the declarant's state of mind as to emotion, sensation, or physical condition such as intent, plan, motive, design, mental feeling, pain and bodily health. It traditionally is not used to establish the appellant's state of mind and moreover the victim's state of mind was not an issue in the case. The court also addressed other exceptions including "excited utterance", "dying declaration" and "present sense impression". The court found that the letter did not fall within any of these exceptions. As a consequence it violated the confrontation clause of the U.S. Constitution. Because of the overwhelming evidence in Levanduski, the court found that it was harmless error and this case is currently pending cert in the United States Supreme Court.

Conversely, in Wlasiuk, the court held it was reversible error to admit a similar letter, as well as diary entries, in a murder case. As in Levanduski, the court held it was clear hearsay; the victim's state of mind was only relevant if it would be shown that the defendant was aware

of its contents. 32 A.D. 3d at 290-91. Because the state could not, the state of mind exception did not apply.

In our Alaska trial, a murder case where the soon to be victim wrote an eerily similar letter to that in Levanduski, the court admitted it notwithstanding the cases to the contrary and no case supporting the admission of the letter. Unfortunately, our client was convicted. We anticipate this will be a significant issue on appeal as the case was circumstantial. Again, there appears to be four cases involving this scenario, although several address diary entries. If anyone should be faced with an issue like this, the Levanduski and Wlasiuk cases are good cases to begin as they address the exceptions to the hearsay rule and why none are applicable in a situation like this. We are hopeful the Alaskan appellate courts will agree and find that it was reversible error under Crawford to allow for its admission.

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