70241-6

70241-6

NO. 70241-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

CITY OF BOTHELL,

Respondent,

v.

ERIC SCOTT LEVINE,

Appellant.

APPEAL FROM THE BOTHELL MUNICIPAL COURT
KING COUNTY

THE HONORABLE MICHELLE GEHLSEN

BRIEF OF RESPONDENT

JOSEPH BECK
CITY ATTORNEY
CITY OF BOTHELL

RHONDA GIGER
Assistant City Attorney
Attorneys for Respondent

City of Bothell Legal Department
18410 101st Avenue NE
Bothell, Washington 98011
(425) 487-5585

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Rules and Regulations

A. ISSUES PRESENTED

1. Whether the trial court correctly ruled that the victim's initial statements to the responding police officer were not testimonial, and thus, not subject to the Confrontation Clause.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Mr. Levine was found guilty by a jury of assault in the fourth degree, domestic violence on January 5, 2012. Ms. Bustos failed to appear for trial on January 4, 2012, despite being personally served a subpoena by the City of Bothell. CP 152: 16-17. Mr. Levine did not subpoena Ms. Bustos. CP 155: 10-12. The court issued a material witness warrant, and the City elected to proceed without the victim present. CP 155: 19-20; 148: 17-18. The City offered statements made by Ms. Bustos to Ms. Cornelius, and Officer Lawson. CP 164: 18-19; 1167: 22. The court held that hearsay statements made to Ms. Cornelius fell under the excited utterance exception to the hearsay rule, and there were no issues regarding the Confrontation Clause. CP 167: 11-15.

The court analyzed the statements made by Ms. Bustos to Officer Lawson. CP 167: 22. It held that these hearsay statements

fell under the excited utterance exception to the hearsay rule. CP 173: 10-17. Addressing the Confrontation Clause issue, the court held that the initial statements made to Officer Lawson were nontestimonial after applying the factors articulated in State v. Ohlson. 162 Wn.2d 1, 11-12, 168 P.3d 1273 (2007); CP 186: 24-25; 187: 1. The trial court ruled that these statements were non-testimonial for purposes of the Confrontation Clause, and that they were admissible as excited utterances under ER 803(a)(2). The court reasoned that the officer was there to determine what the emergency was, what the officers needed to do, and if there were arrests that needed to be made. CP 183: 1-4. Furthermore, the statements happened approximately six minutes after the alleged assault. CP 187: 5-7. Subsequent statements were ruled testimonial and thus were not admissible. CP 187: 7-8.

2. SUBSTANTIVE FACTS

On August 4, 2008, Carol Cornelius was at her home in the City of Bothell when she observed the victim in this case, Giovanna Bustos, running up to her front door, screaming, "Help me, help me." CP 206: 19-20. Prior to this contact, Ms. Cornelius did not know the victim. CP 206: 17. The victim kept repeating, "My ear,

my ear." CP 207: 2. Ms. Cornelius observed the victim had a little bit of blood in her ear, and a scratch or blood on her neck, and proceeded to call 911. CP 207: 3-4. The victim appeared very frightened, was crying, and shaking all over. CP 207: 7-8. When Ms. Cornelius asked what happened, the victim said, "...she either jumped out or was pushed out of the car, but she was hit in the ear." CP 207: 11-12. At this point, Ms. Cornelius called 911. CP 207: 20-22; 208: 1.

While speaking with the 911 call taker, Ms. Cornelius relayed that a girl had come to her door, she had either been thrown out or fell out of a car, that she had blood on her neck and ear, and that she was hysterical. Ms. Cornelius then put Ms. Bustos on the phone with the 911 operator. RP 207: 22-25; 60: 1.

When Ms. Cornelius was asked at trial whether she believed Ms. Bustos was faking her injuries and demeanor, she answered no. CP 208: 2-3. When asked what made her think that Ms. Bustos was not faking it, Ms. Cornelius responded, "Just the she was shaking and everything. I mean, uh, I don't think anybody could put that on. You know, she was shaking and crying and the tears were coming down her face, and she was definitely afraid."

CP 208: 9, 14-17. Ms. Cornelius was then asked if she believed Ms. Bustos, and she answered yes. CP 208: 18-19.

Officer Lawson, a police officer for the City of Bothell Police Department, received a dispatch call at or around 1:34 p.m. regarding a domestic violence assault. CP 223: 1, 4-5. The reporting party, Ms. Bustos, was alleging her ex-boyfriend, Mr. Levine, who she resides with, had assaulted her by hitting her, choking her, and that he had threatened to kill her. CP 224: 12-14. The assault had occurred at 23409 39th Avenue Southeast in the City of Bothell, but Officer Lawson, along with another officer, were dispatched to the 3300 block of 234th Street Southeast, the current location of Ms. Bustos. CP 223: 4-6; 225: 19-21. Ms. Bustos did not know where Mr. Levine was, but provided an address near her location on 39th Avenue Southeast. CP 225: 12-16. Two additional officers were dispatched to the address on 39th Avenue Southeast. CP 226: 4-5.

Arriving about five to six minutes later, Officer Lawson contacted a woman who identified herself as Giovanna Bustos, and the officer observed redness, cuts or scratches, and abrasions around her neck. CP 226: 11; 81: 8-12. Ms. Bustos was very upset, crying, and having a difficult time catching her breath to

speak with Officer Lawson. CP 229: 25; 82: 1-3. Officer Lawson testified that it was clear Ms. Bustos had been through what appeared to be a traumatic event and was scared. CP 234: 13-14. Meanwhile, Bothell Fire Department medical personnel had responded to the area, and were notified by Officer Lawson they could enter the particular scene where Ms. Bustos was located only after it was determined that it was clear of any immediate danger. CP 230: 10-16.

Immediately upon his arrival at the Cornelius residence, Officer Lawson asked Ms. Bustos if she could explain what happened. CP 229: 21. Ms. Bustos stated she was at home that afternoon, and at about 1 p.m. Mr. Levine arrived at the residence. CP 230: 21-23. Mr. Levine proceeded to use the computer, and he became angry after Ms. Bustos inquired as to what he was doing. CP 230: 24-25. He stood up, started yelling at her, struck her, and placed his hands around her neck and choked her. CP 231: 1-2. Mr. Levine took his thumbs and put them over Ms. Bustos' eyes and pressed very hard, causing her a great deal of pain. CP 231: 2-5. Ms. Bustos confirmed that Mr. Levine was her ex-boyfriend, and he was the person who had assaulted her. CP 231: 5-7. Mr. Levine told Ms. Bustos that if she called the police, he would most

certainly kill her. CP 237: 17-20. These statements were gathered within moments of Officer Lawson's arrival. He conducted a more thorough interview after the location was made safe, and after medical providers were allowed on scene. CP 234: 22-25; 89: 3-10.

Later that afternoon, Mr. Levine was arrested and charged with assault in the fourth degree, domestic violence, and taken into custody. CP 236: 21; 237: 1.

C. ARGUMENT

THE TRIAL COURT CORRECTLY RULED THAT BUSTOS' INITIAL STATEMENTS TO THE RESPONDING OFFICER DID NOT IMPLICATE THE CONFRONTATION CLAUSE BECAUSE THEY WERE NOT TESTIMONIAL.

Levine argues that Bustos' initial statements to Officer Lawson were admitted in violation of the Confrontation Clause of the Sixth Amendment. Appellant's Opening Brief, at 6-22. This claim should be rejected. The trial court correctly concluded that Bustos' statements were made for the purpose of enabling a response from police to assist with an ongoing emergency. The ongoing emergency existed because Bustos had fled from Levine to an unknown person's home after Levine had threatened to kill her if she phoned the police. Accordingly, the statements at issue were not testimonial, and this Court should affirm.

The United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), fundamentally changed the focus of federal Confrontation Clause analysis. Whereas prior case law had focused on the reliability of out-of-court statements to determine admissibility, Crawford shifted the focus to the question of whether such statements are "testimonial" in nature. Accordingly, under Crawford, a witness's "testimonial" out-of-court statements are not admissible unless the defendant has been given an opportunity to cross-examine that witness. However, Crawford "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" Id. at 68.

Some further guidance was provided by the Court's later decision in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). In Davis, the Court ruled that a 911 call made by a domestic violence victim was not testimonial because the statements were made to assist the police in responding to an emergency, not to assist in a later court proceeding:

> Statements 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. They 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.

Davis, 547 U.S. at 822. Accordingly, non-testimonial statements made during an ongoing emergency fall outside the scope of the Confrontation Clause entirely. Id.

The Washington Supreme Court then applied these principles in State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007). In further defining the test for determining whether the primary purpose of an interrogation is to meet an ongoing emergency, the Ohlson court identified four factors that courts should consider: 1) the timing of the statements; 2) the level of harm threatened; 3) the level of need for the information; and 4) the formality or lack of formality of the questioning. Ohlson, 162 Wn.2d at 15. Based on these factors, the court concluded that statements that the victim had made to the first officer on the scene following a serious assault with racial overtones were not testimonial; thus, they were admissible as excited utterances despite the victim's failure to testify at trial. Id. at 16-19. In so holding, the court found it significant that the assailant was still at large when the statements were made, and therefore, the threat posed was greater than it

would have been otherwise. Id.

The Washington Supreme Court again attempted to clarify what constitutes a testimonial statement for purposes of the federal Confrontation Clause in State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009). In Koslowski, the victim of a home-invasion robbery made statements in response to questioning by the police officers who responded to her home in response to her 911 call after the crime. She made some statements initially to the first officer who arrived, and then made far more detailed statements several minutes later when a second officer arrived. Koslowski, 166 Wn.2d at 414-15. The victim died prior to trial, so the issue was whether her statements were testimonial such that they were admitted in violation of the Confrontation Clause in the absence of cross-examination.

In considering the issue, the Koslowski court expanded on the factors from Davis, as utilized in Ohlson, that courts should consider in distinguishing testimonial statements from statements made for the primary purpose of enabling a response to an ongoing emergency:

> (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events?

> The amount of time that has elapsed (if any) is relevant. (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency. (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate that the elicited statements were nontestimonial. (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 418-19 (footnote and citation omitted). In summary, the timing of the statements, the nature of the questions and answers, the formality of the questioning (or lack thereof), and whether an objective listener would interpret the statements as requests for immediate assistance are all relevant in determining whether statements are testimonial under Crawford and Davis. In Koslowski, the court ultimately determined that the victim's statements were testimonial, because they were made in response to police questioning after the danger had passed and there was no longer an ongoing emergency or a need for immediate assistance.

Koslowski, 166 Wn.2d at 421-22. Noteworthy is that in Koslowski, the suspect tied the victim and left her in her home. The victim did not flee from Koslowski. Id.

More recently, the Washington Supreme Court considered whether a recording of a 911 call was admissible under both the federal and state confrontation clauses in State v. Pugh, 167 Wn.2d 825, 255 P.3d 892 (2009). In Pugh, the victim called 911 to report that the defendant had just assaulted her, that he was no longer in the house, and, in response to the operator's questions, she provided a description of the defendant. Pugh, 167 Wn.2d at 829. After a brief analysis of the "ongoing emergency" analysis from Davis, the Pugh court concluded that the 911 call was clearly not testimonial because it was a request for immediate assistance, and thus, that the call was properly admitted under the federal Confrontation Clause. Pugh, 167 Wn.2d at 831-34.

In addition, the Pugh court considered whether the victim's 911 call was admissible under article I, section 22 of the Washington Constitution.[1] In conducting this analysis, the court discussed the historical underpinnings of the "res gestae" exception

[1] Although Levine's claim on appeal is made solely under the Sixth Amendment of the federal constitution, the court's state constitutional analysis in Pugh is instructive.

to the requirement for cross-examination, which existed when the state constitution was ratified, and held that the admission of "res gestae" statements without cross-examination or a showing that the declarant was unavailable did not violate the state Confrontation Clause. Id. at 834-43.

As the court explained, "res gestae" statements relate to the main event at issue, are natural declarations growing out of the event, are statements of fact rather than opinion, are spontaneous or instinctive rather than premeditated, and are made by a participant or witness to the event. Id. at 839 (citing Beck v. Dye, 200 Wn. 1, 9-10, 92 P.2d 1113 (1939)). As such, the "res gestae" doctrine "evolved into several present day hearsay exceptions," including present sense impressions and excited utterances. Pugh, 167 Wn.2d at 839. Ultimately, the court held that the victim's 911 call was properly admitted against the defendant at trial because it consisted of traditional res gestae statements. Id. at 843.

Even more recently, the United States Supreme Court performed further analysis regarding the Confrontation Clause in Michigan v. Bryant, ___ U.S. ___, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). Unlike Crawford, which involved a formal police interrogation, and unlike Davis, which involved a 911 call, Bryant

concerned statements made by a shooting victim to the first officers to arrive on the scene where the victim was found bleeding in a parking lot. In response to questioning by the officers, the victim identified the shooter and told them where and how the shooting had occurred. The victim later died, and his statements were admitted at the defendant's murder trial. Bryant, 131 S. Ct. at 1150.

The Court observed that in resolving the question of whether statements to police are testimonial, the "primary purpose of the interrogation" must be objectively ascertained, and that the existence of an ongoing emergency "is among the most important circumstances" in making that determination. Bryant, 131 S. Ct. at 1156-57. The Court further observed that "the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished," and that "[t]his logic is not unlike that justifying the excited utterance exception in hearsay law." Id. at 1157. The Court recognized that the question of whether an emergency exists "is a highly context-dependent inquiry," and that factors such as whether the suspect is still at large, whether the victim is injured, whether weapons are involved, and whether there may be a threat to the public or the officers themselves must all be taken into consideration. Id. at

1158-59.

Further, the Court emphasized that the level of formality of the questioning is an important consideration, and that a lack of formality often signals that the statements at issue are not testimonial. Id. at 1160. Significantly, the Court recognized that the officers' questioning of the shooting victim "occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion." Id. After examining all relevant factors, the Court concluded that there was an emergency, and that the victim's statements were the product of questioning designed to assist the officers in responding to that emergency. As such, the statements were not testimonial, and their admission did not violate the Sixth Amendment. Id. at 1166-67.

Finally, in State v. Reed, 168 Wn.App. 533, 278 P.3d 203 (2012), a Division 1 case, this court ruled that a victim's statements made during 911 calls, as well as her initial statements to the responding officer, were not testimonial, and did not violate the confrontation clause. Id.

In Reed, the victim made two different calls to 911. During the second call, the court acknowledged that the victim, Ta, was describing Reed's actions, which had occurred in the recent past.

Reed at 566. The court pointed out that when statements are made "within minutes of the assault," these statements are to be considered as "contemporaneous with the events described." Reed, quoting Ohlson, 162 Wn.2d at 17.

Reed argued that because Ta had told the 911 operator that Reed had left the area, no possible ongoing emergency existed. This argument was rejected and this court specifically noted the presence of an ongoing emergency should be assessed "from the perspective of whether there was a continuing threat to [the victim]." Id at 567. A critical part of the holding is this court's recognition that the **departure** of a domestic violence assailant does not eliminate a potential threat. Reed at 567, quoting Bryant, 131 S.Ct. at 1158. (Emphasis mine).

The court specifically emphasized that Ta's assailant was still at large, that Reed was in a vehicle and highly mobile, and could have returned to the scene at any time. Even though Reed may not have posed a public threat, he still posed a legitimate threat to Ta. Reed at 568.

The responding officer arrived approximately 6 minutes after Ta's 911 call. Ta ran to the officer and told him that she had been attacked. The initial statements were not subject to the

confrontation clause and were admissible as they were made to secure police protection. This court held that the Officer's arrival may have "*temporarily* eliminated the threat that Reed might return and do further harm to Ta, this protection was contingent upon his *continued* presence at the scene." Reed at 570.

After an objective evaluation of the situation and circumstances, the court conducted a thorough analysis involving the four relevant factors set forth in Koslowski and determined the statements were admissible. [2]

A final important factor in Reed, is that Ta's statements to the arriving officer were spontaneous, and not in response to any question put forth. The State argued that a spontaneous statement could not be testimonial. This court appears to have rejected that assertion, noting that interrogation is not a prerequisite for testimonial hearsay. Reed at 570, footnote 9.

Here, Officer Lawson arrived within 5 to 6 minutes of the 911 call. Ms. Cornelius had told 911 that a girl had come running to her door and had either been thrown or had fallen from a vehicle. Ms. Cornelius also described injuries to Bustos. Bustos reported that

[2] Ta made statements to two different officers after the emergency had been resolved and these statements were properly determined to be testimonial and were inadmissible.

she had been hit, choked, and that the assailant had threatened to kill her.

Upon arrival, Officer Lawson noted that Bustos had visible injuries consistent with the 911 call. Bustos was hysterical and crying, had a difficult time catching her breath, and was quite upset and scared. At this time, not knowing what the situation was, or whether it was safe at the location, Officer Lawson kept aid from entering the location. CP 229: 25; 230: 1-3; 10-16.

Officer Lawson asked Bustos what happened, and immediately was told of the assault and the identity of the assailant. Part of Bustos initial statement was that Levine had threatened to kill her, and that if she called the police, he would most certainly do so. CP 230: 19-25; 231: 1-12; 237: 11-21.

The present facts are on point with the facts this court considered in Reed. In both cases the victims had left from a vehicle and were in areas that were not inherently safe. Both victims were extremely fearful and both had injuries visible to the responding officers. In both cases, the assailant had fled in a vehicle, was highly mobile, and was still at large. In both cases, subsequent statements to officers were found to be testimonial and were ruled inadmissible. Add to the Reed facts that Bustos was

afraid Levine was going to follow her down the drive and that he had threatened to kill Bustos if she called police. Under the Reed analysis, Bustos' statements to Officer Lawson are non-testimonial because they are an effort to inform police of an emergency and ensure a continued police presence to provide assistance. Reed at 570.

Levine places a great amount of weight on the Koslowski holding. Petitioner's Brief at 13, 20-24. Koslowski can easily be distinguished. In that case, one of the main issues the court considered is that the assailants had left the scene of their own accord after restraining the victim with plastic restraints. Further, it is unclear how much time had passed from the assailant's departure and the 911 call. Koslowski, 166 Wn.2d 409

The facts here are the opposite – Bustos fled from her assailant, he didn't leave her. Bustos either fell from or was thrown from a vehicle. Bustos ran from Levine to a nearby home whose occupants were unknown to her. Bustos told Ms. Cornelius she was afraid "he" was going to come up the driveway, referring to her assailant. Bustos was so adamant about this Ms. Cornelius posted somebody at the end of the road. CP 206: 23-25; 207: 1.

Nonetheless, Levine argues that Bustos was speaking about past events for the purpose of prosecution, that there was no emergency, and that a statement about a past event made to a police officer conducting a criminal investigation must be a testimonial statement. Appellant's Opening Brief, at 9, 13 - 22. To the contrary, there was neither formality nor solemnity when Officer Lawson contacted bleeding and hysterical Bustos, who had fled Levine to the property of a person unknown to her, with her assailant still at large, in a vehicle, and in the area. This argument is without merit.

Considering that Crawford, Davis, Ohlson, Koslowski, Pugh, and Bryant all concern statements given in response to some form of interrogation, they are obviously applicable. Even though the statements in Reed were spontaneous, the court applied the same analysis, and it too should be considered. Here, Bustos' frantic state, her obvious fear, her fresh injuries, and the immediate nature and content of her initial statements to Officer Lawson demonstrate that these statements were made for the purpose of obtaining immediate assistance, and thus, they were not testimonial. The trial court's ruling in this regard was correct, and should be affirmed. CP 167 - 190.

In sum, the trial court ruled correctly that Bustos' initial and preliminary statements to Officer Lawson were not testimonial, and hence, admissible as excited utterances despite Bustos' failure to testify at trial. This Court should affirm.

D. CONCLUSION

The trial court properly admitted non-testimonial statements as excited utterances, and thus, the victim's unavailability was immaterial. Levine's conviction for assault in the fourth degree should be affirmed.

DATED this 23rd day of ~~June~~ July, 2014.

Respectfully submitted,

JOSEPH BECK
City Attorney
City of Bothell

By: _____
RHONDA GIGER, WSBA #28322
Assistant City Attorney
Attorneys for Respondent