Supreme Court No. 93962-4
COA No. 73740-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JASON GARCIA,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable George F. Appel

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# PETITION FOR REVIEW

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OLIVER R. DAVIS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES



CONSTITUTIONAL PROVISIONS



STATUTES AND COURT RULES

## A. IDENTITY OF PETITIONER

Jason "J.T." Garcia was the appellant in Court of Appeals No. 73740-6-I.

## B. COURT OF APPEALS DECISION

Mr. Garcia seeks review of the decision that affirmed his convictions, issued November 21, 2016. **Appendix A** (Decision).

## C. ISSUES PRESENTED ON REVIEW

**1. Confrontation clause – 911 call.** Under the Sixth Amendment and this Court's primary purpose doctrine in State v. Kozlowski,[1] does the absence of a call for help, and the absence of any ongoing emergency to either the victim or the public, render a 911 conversation testimonial where the declarant expresses awareness that he is "snitching" – i.e., "bearing witness" against the accused?

In J.T. Garcia's trial on a charge of robbery, was the 911 recording of victim Mr. Losey's questioning by a 911 operator proved by the prosecution to not be "testimonial," where the call was made by the motel clerk in the motel office, where Losey was summoned to the phone by the operator, who then questioned him, where the robber had departed from the room of the motel where

[1] State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009).

the robbery occurred, where there was no public danger because this was a personal property crime, and where Losey was not frantic, injured or in any way calling for help for himself or anyone else, and he recognized that he was bearing witness against the accused, under Crawford v. Washington and its progeny?[2]

**2. Proper Remedy for State's Concession of Error under Milanovich and Melick.** The State conceded that Mr. Garcia's convictions for both robbery and possession of stolen property cannot stand under Washington's statutory scheme in Title 9A Chapter 56, under State v. Melick.[3] Instead of the remedy provided by the Court of Appeals, which was vacation of the possession conviction, should both convictions be reversed under the reasoning of Milanovich v. United States?[4]

## D. STATEMENT OF THE CASE

J.T. Garcia was charged with allegedly being a person who robbed Bret Losey and Shana Morcom in a room at a Motel 6 in Snohomish County. CP 84-85. Shortly after the incident, J.T. Harrison was apprehended by police with the gun used, and

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[2] Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[3] State v. Melick, 131 Wn. App. 835, 837-41, 129 P.3d 816 (2006).

[4] Milanovich v. United States, 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961).

proceeds of the robbery; he was later found guilty at a jury trial in April, 2015. CP 86-90; 5/6/15RP at 211, 238; 5/6/15RP at 272-73, 313-15, 324-27. Amber Mark, the homeowner, was familiar with J.T. Harrison; she told the police that he frequently carried a .38 handgun on his person. 5/6/15RP at 239, 243-44.

The appellant, Jason Garcia, was contacted by police on an unrelated matter some days after the incident, and was found to have debit cards in Shana Morcom's name. CP 84-90. Mr. Garcia admitted that around the time of the reported robbery, he had been drug socializing with various acquaintances in a room or rooms at the Motel 6; however, he was not involved in any robbery. He had found the cards at the Extended Stay, or a motel in Lynnwood, some days afterwards. CP 84-90; CP 78; 5/6/15RP at 333, 349-50.

The two alleged victims recanted before J.T. Garcia's May, 2015 trial, and Morcom repeated her recantation in testimony at the trial, explaining that her heavy drug usage caused her to not realize what the actual events of that evening were. State's Trial Memorandum, May 4, 2015; 5/5/15RP at 99-109, 152-59, 165; 5/6/15RP at 277, 348-49; see also 5/5/15RP at 107-09. She stopped accusing Mr. Garcia as being involved, after she

completed a drug sobriety program; she confirmed her naming of J.T. Harrison. 5/5/15RP at 166-68.[5]

Bret Losey did not testify at either Harrison's trial or Garcia's trial, because he had been hospitalized. 5/7/15RP at 371-74.

However, Mr. Losey's conversation with the 911 operator, in which Losey had named an acquaintance at the motel, J.T., who had long brown hair, as being the robber, was admitted. 5/4/15RP at 12, 16-17;[6] 5/6/15RP at 244-48, 257-58.

Mr. Garcia was convicted by the jury on charges of first degree robbery with a firearm enhancement, unlawful possession of a firearm, and possession of stolen property (the debit cards stolen from Ms. Morcom), and was sentenced to standard range

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[5] For his part, Mr. Losey had also told defense investigators, before trial, that it was J.T. Harrison, but not J.T. Garcia, who perpetrated the robbery of him and Ms. Morcom. State's Trial Memorandum, at pp. 8-9. Mr. Garcia had been in the motel room during drug socializing at some point, but was not the robber; Losey stated that Ms. Morcom had forced him to say it was J.T. Garcia, which was what she was claiming. When the investigating detective had threatened him in order to obtain a statement, Losey simply wrote down the same accusation that Ms. Morcom was writing. State's Trial Memorandum, at pp. 8-9.

[6] In admitting the 911 recording, the trial court relied in part, on its prior hearsay and confrontation clause reasoning from the earlier trial of J.T. Harrison with the same prosecutor (albeit different defense counsel). See 5/4/15RP at 12, 17-19; see Harrison VRP of 4/20/15RP at 771-822. At that trial, the court stated with apparent dissatisfaction with Harrison's defense counsel that another basis for allowing the recording without confrontation was that counsel had agreed to its admission, but then suddenly withdrew that agreement when it was learned that Mr. Losey would be unable to testify. Harrison VRP of 4/20/15RP at 770-822.

terms of imprisonment including 29 months on the possession count. CP 3-14.

Mr. Garcia timely appealed from his judgment and sentence. CP 1-2. The Court of Appeals affirmed, holding, *inter alia*, that the 911 recording was proved to be non-testimonial. Appendix A.

**E. ARGUMENT**

**1. Confrontation clause – the victim's answers to questioning by the 911 operator was not proved to be non-testimonial.**

**a. Review is warranted under RAP 13.4(b)(1).** The Court of Appeals doctrine is in conflict with the Primary Purpose doctrine as stated by this Court in State v. Kozlowski, infra. This Court should hold, on *de novo* review, that the 911 conversation was testimonial because there was no primary purpose to call for help or report an ongoing emergency and the declarant, although speaking on the telephone with 911 authorities, was doing so at 911's request, he was answering questions similar to making a formal narrative statement, and the trial court found that Losey understood he was "snitching" – circumstances that show a person would reasonably understand his statements would be used prosecutorially. Review is warranted under RAP 13.4(b)(1).

**b. Losey was summoned to the telephone and did not cry for help and there was no ongoing emergency.** The Court of Appeals affirmed the admission of Brett Losey's recorded 911 conversation was admitted as an excited utterance, and over the confrontation objection made under Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The evidence indicated that Losey and Morcom had showed up at the Motel 6 office. The motel clerk dialed 911 and told the operator that occupants of one of the motel's rooms had told her that they had been robbed at gunpoint "five minutes ago."

After obtaining initial details from the clerk regarding the incident and learning that no one was injured, the operator asks to speak with Mr. Losey. The clerk was at first asking Losey for answers to the operator's questions, and then relaying them. Unredacted 911 CD; see also Garcia exhibit 44 (911 recording, as redacted and played for Garcia's jury at 5/6/15RP at 201).[7]

While speaking with the operator and answering her questions about what had happened, Mr. Losey calmly asserts that "yup," he knew "the person" who had robbed them. Unredacted

[7] The court assessed the hearsay and confrontation issues by listening to the Unredacted 911 CD recording, which was made a part of the record in this appeal, and includes the initial portion of the call, in which the Motel 6 clerk is speaking with the operator before the operator asks to speak with Mr. Losey.

911 CD. In the recording, he says that the person was named "J.T." with long brown hair, although Losey stated at that time that he did not know the person's last name. Losey continues to provide answers to the operator's several questions, including stating he does not know where the persons went, and waits while the operator types information that he provides, including his statement that there are no injuries. Unredacted 911 CD.

In the recording, Losey answers further questions regarding the gun allegedly used. Asked where the person went, Losey states he does not know because "they" told him and his girlfriend to go in the bathroom after the robbery and wait (they only then went to the motel office). Losey annoyedly complains that his car keys were stolen and that he did not know how he would get into his vehicle, which was locked. Unredacted 911 CD.

Losey then gives more details describing the person he is accusing, and tells the operator that they will therefore be able to apprehend him; he makes sounds as if he is chortling. Unredacted 911 CD, at time point 3:28 to 3:30.

After being asked what make of getaway car or cars might have been involved (Losey did not know one way or the other), Mr. Losey states, "I'm afraid he's going to shoot me though, I'm

snitching." Unredacted 911 call, at time point 3:38 to 3:44. The operator then continues to obtain further details, and then when she asks Mr. Losey if he will wait in the motel office for the police to contact him there, he seems to glumly respond that he will. Undredacted 911 CD. The court factually found, for purposes of its evidence-rules hearsay ruling, that Mr. Losey made an excited utterance because he was agitated by his awareness he was snitching and might face consequences from reporting the event. 5/4/15RP at 12, 16-17.

**c. Losey's recorded statement was not proved non-testimonial.** Admission of the call violated the Sixth Amendment confrontation clause. U.S. Const. amend. 6. The trial court said it was adhering to its confrontation ruling in Mr. Garrison's prior trial that the 911 call rendered the case similar to Davis v. Washington. 5/4/15RP at 20-21. At that trial, the court held that under Davis, an excited utterance is not "testimonial." Harrison VRP of 4/20/15RP at 788, 795. The court did allow the Garcia parties to provide further legal argument. 5/4/15RP at 67. The prosecutor contended that under Davis v. Washington, a statement that is admissible as an excited utterance "does not invoke a confrontation issue," that Mr. Losey was still under the excitement of the event (as per the

court's *hearsay* ruling), and that there was an ongoing emergency "because" the robbers had fled. 5/4/15/RP at 68-72; see Harrison VRP of 4/20/15RP at 788. Defense counsel argued that the hearsay question does not decide the Crawford confrontation analysis, and urged the court that the call was testimonial because there was no ongoing emergency, such as a person dialing 911 and seeking help for events currently occurring, such as a beating. 5/4/15RP at 74-75. The following day, the trial court announced that the circumstances were akin to Davis, and stated it would not reconsider its confrontation ruling. 5/5/15RP at 83.

This was error. First, there is no rule that excited utterances cannot be testimonial. In actuality, the reasoning of Davis and its focus on the primary purpose for which statements were obtained forecloses any per se rule that excited utterances cannot be testimonial. State v. Bird, 136 Wn. App. 127, 136, 148 P.3d 1058 (2006); State v. Ohlson, 162 Wn. 2d 1, 16, 168 P.3d 1273 (2007).

In confrontation analysis, the State bears the burden of proving that challenged statements are non-testimonial. State v. Koslowski, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009). Even if the speaker is frightened, or excited, that emotional state does not establish an ongoing emergency. Koslowski, 166 Wn.2d at 423.

The general rule under Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), is that "testimonial" statements are those that primarily report the defendant's conduct, rather than seek help for an ongoing emergency, and they are inadmissible at trial against a defendant unless the accuser appears and testifies. Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

In Koslowski, the Court adopted four factors from Davis in determining when a statement is testimonial rather than a call for help, specifically whether the speaker is speaking about past events or an ongoing emergency, whether a "reasonable listener" would conclude that the speaker was facing an ongoing emergency that required help, whether the questions asked and answered are for resolving an emergency or simply relate past events, and whether the interaction was frantic, or more formal. Koslowski, at 418-19 (citing Davis, 547 U.S. at 827).

Here the person who called 911 and gave the address for police to respond to was the (also non-testifying) motel clerk. Unredacted 911 CD. As the defense argued, Losey's subsequent conversation was not a summoning of help, rather, it involved the

operator asking Mr. Losey questions about what had occurred, and about the description of who was involved. 5/4/15RP at 19-20.

The United States Supreme Court has stated that "testimonial" statements will always include that class of

> statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51–52. This Court is in accord that statements of that character – even though they are far less formal than prior testimony or affidavits (the other two typical classes of testimonial statements) -- are nonetheless testimonial. State v. Hudlow, 182 Wn. App. 266, 282-83, 331 P.3d 90 (2014) (citing State v. Chambers, 134 Wn. App. 853, 860, 142 P.3d 668 (2006)).

Where this type of statement is at issue, in order to distinguish cries for help to meet an ongoing emergency, from circumstances that would lead the speaker to believe his statements would be available to inculpate the accused in the future, the court will look to the "primary purpose" of the statements.

The purpose of the parties to the call must be objectively evaluated, assessing the purpose that reasonable participants would have had, as ascertained from the individuals' statements,

actions and circumstances. See Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 1156, 179 L.Ed.2d 93 (2011).

Under the primary purpose doctrine, the question is whether the purpose was to summon help for an ongoing emergency, or the person was simply making statements of past fact, describing the criminal allegations. State v. Koslowski, 166 Wn.2d at 418-19; Davis, 547 U.S. at 830 (when a questioner seeks to determine from the person, not what is happening, "but rather what happened," the statements are testimonial). When the person is relating past events potentially relevant to a criminal prosecution, the statements are testimonial. State v. Houston-Sconiers, ___ Wn. App. ___, 365 P.3d 177, 182 (Wash. Ct. App. 2015) (quoting Davis, at 822).

Under these standards, Mr. Losey's 911 conversation was testimonial. The motel clerk made the call to 911, and thereafter, Mr. Losey is asked to describe events occurring in the past. There were no injuries, something that was confirmed twice during the call. Unredacted 911 CD. Instead of calling for help, Losey demonstrates his express calculation that his physical description of the perpetrator will be successful to apprehend him, when he then tells the operator, "So, he's uh duh, definitely you can get him." Unredacted 911 CD, at time point 338-42.

Significantly, Losey affirmatively is aware that he is snitching – i.e., bearing witness against a person. See Davis, 547 U.S. at 830; United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004). Unredacted 911 CD, at time point 3:28 to 3:30. Losey is making a series of statements to the 911 operator that demonstrate his knowledge that they will result in the alleged suspect being apprehended, and prosecuted on criminal charges. Objectively viewed, a listener could only conclude Losey was making statements he "would reasonably expect to be used prosecutorially." Crawford, at 51-52; State v. Powers, 124 Wn. App. 92, 99 P.3d 1262 (2004) (911 caller reporting defendant's violation of no-contact order was testimonial).

The ongoing emergency in Davis involved a 911 call made while there was an immediate threat in the form of the defendant's presence in the home, and a risk of assault to the caller who needed help now. The primary purpose of the caller was to seek help from the police to meet the threat. Davis, 547 U.S. at 828.

Here, compared to the 911 call in Davis, there is no presence or proximity of the robber. Davis, 547 U.S. at 822; see also People v. Trevizo, 181 P.3d 375, 379 (Colo. Ct. App. 2007) (holding that statements made in a 911 call were testimonial where

"there was no immediate threat to the victim, [and] defendant had left the scene"). The Court of Appeals relied on Ohio v. Clark, ___ U.S. ___, 135 S. Ct. 2173, 192 L. Ed.2d 306 (2015) for the proposition that an ongoing emergency is not the sole determinant of a lack of testimoniality in statements made. Appendix A, at p. 8.

But Clark involved the non-testimoniality of a small child's allegations of a defendant's sexual molestation to a school official, which was deemed to be "an ongoing emergency involving suspected child abuse." See Clark, 135 S. Ct. at 2181.

Here, there was no ongoing emergency. Although it is true that the caller Losey desired that the perpetrator be apprehended and that the operator was going to use the information to help police do so, here, the danger at the scene had dissipated. Unredacted 911 CD. There was simply no "bona fide physical threat." Davis, 547 U.S. at 822.

The Koslowski Court made clear that "the mere fact that the suspects were at large and that [a sergeant] relayed [that] information . . . to officers in the field" did not show there was still an ongoing emergency. Koslowski, 166 Wn.2d at 421, 428 (victim's statements were testimonial, because they were made after the danger had passed and there was no longer an ongoing

emergency or a need for immediate assistance). See also State v. Williams, 136 Wn. App. 486, 503, 150 P.3d 111 (2007) (911 call was proved non-testimonial including because caller stated they were in actual danger, and gang assailants roved neighborhood); State v. Pugh, 167 Wn.2d 825, 832, 225 P.3d 892 (2009) (911 call was non-testimonial because caller needed medical help moments after assault by husband, who was outside the apartment).

And, this is not a case in which the defendant committed an inexplicable shooting, and then ran off armed, presenting an apparent danger to the public, like in Michigan v. Bryant, 562 U.S. 344, supra. There, the Court stated that whether an ongoing emergency actually existed is among the most important circumstances informing the primary purpose question. Id. (citing Davis, 547 U.S. at 828-30, and Crawford, 541 U.S. at 65). An emergency existed in Bryant because the shooter, although he had fled, appeared to be shooting another for no reason, and needed to be caught for public safety reasons. Bryant, 131 S. Ct. at 1157. That is not the case here, following a routine robbery between persons using the Motel 6 as a drug repose. Even Bryant recognized that in the usual situation, an ongoing emergency

*dissipates* when the suspect "flees with little prospect of posing a threat to the public." Bryant, 562 U.S. at 365.

Notably too, in Bryant, the accuser's answers to the officers' questions were punctuated with inquiries about when emergency medical services would arrive to stop his bleeding; this showed the victim did not have a primary purpose "to establish or prove past events potentially relevant to later prosecution" when he spoke with police. Bryant, 131 S. Ct. at 1157.

In this case, Mr. Losey objectively showed his primary purpose by naming someone he hoped would be arrested, and by further expressly realizing that he was bearing witness -- against the person he named as the robber. The trial court erred, because the State did not meet its burden to prove that Losey's 911 conversation was not testimonial. This Court should accept review.

**2. The proper remedy for the *Milanovich/Melick* error is reversal of both the robbery, and the possession convictions.**

**a. Review is warranted under RAP 13.4(b)(2) and (4).**

In this case, the Court of Appeals reversed the possession count under the Melick doctrine precluding charges of robbery and possession of the same stolen property. However, the proper remedy, considering Melick's endorsement of Milanovich's

reasoning under its facts, is reversal of both convictions. The case of United States v. Gaddis is distinguishable from Milanovich, and did not involve the unique facts which are present here.

In the circumstances of this particular case, which is more like Milanovich than it is like the later case of Gaddis, the proper remedy is reversal of both convictions. In State v. Melick, the Court of Appeals held that under Washington's statutory scheme, a taker of a motor vehicle could not also be convicted for an additional count of possession of stolen property, based on the same vehicle. State v. Melick, 131 Wn. App. at 837-41 (citing State v. Hancock, 44 Wn. App. 297, 298-99, 721 P.2d 1006 (1986)). In Melick, the defendant was charged with taking a motor vehicle without permission under RCW 9A.56.070(2)(a), and possessing that same vehicle as stolen property under RCW 9A.56.140(1) and .150.

The Melick Court concluded that both convictions could not stand, under Washington's statutory scheme. Melick, 131 Wn. App. at 841. The question was deemed one of Legislative intent. Melick, 131 Wn. App. at 841 (citing Milanovich v. United States, supra, 365 U.S. 551; United States v. Gaddis, 424 U.S. 544, 547, 96 S. Ct. 1023, 1026, 47 L. Ed. 2d 222 (1976)); State v.

Shcherenkov, 146 Wn. App. 619, 624, 191 P.3d 99 (2008) (robbery is theft by force).

**b. The proper remedy is reversal of both convictions.** As remedy, both of Mr. Garcia's convictions, for second degree possession of stolen property under RCW 9A.56.160(1)(c) (possession of a stolen access device), and for first degree robbery under RCW 9A.56.200, must be reversed. The defense did not concede guilt on any of the substantive counts, rather it merely acknowledged that Mr. Garcia did not deny being in the motel room at some point during the ongoing drug activity throughout the Motel 6, and he later was in physical possession of debit cards from a motel. CP 78 (Defendant's Trial Brief); Defense Memorandum of Authorities on Severance, March 31, 2015 (at pp. 1, 5). Where the evidence is such that it is highly difficult to say which count, if either, a factfinder, unallowed to convict on both counts, would convict upon, both convictions should be set aside and the case remanded for a new trial. Milanovich v. United States, 365 U.S. at 554-55. In Milanovich, there was some evidence that the defendant had been involved in the burglary and theft of currency from a United States Navy commissary building, and there was also some evidence that showed she may have come into possession of

property stolen from the commissary without having been physically involved in the burglary. Milanovich, at 554-55. Further, this case involves multiple recantations by the robbery accusers, and highly tenable defenses that Mr. Garcia had no involvement in the robbery, but may simply have come into possession of the debit cards. Both convictions should be reversed because a jury could believe the primary defense theory which was that J.T. *Harrison* committed the robbery and that Mr. Garcia was not involved even at that stage. 5/7/15RP at 418-9 (defense closing argument); see CP 33-63 (Jury Instructions - instruction no. 15, defining knowledge; instruction no. 18, 'to-convict' instruction for possession). This is similar to Milanovich. Mr. Garcia's case is unlike Gaddis, which involved the remedy of vacating the possession count, and only the possession count, because there was little to no evidence that the defendant had come into possession of proceeds of the robbery at all. Gaddis, at 549.

Nothing in Melick precludes this remedy. That case compared its facts, where there was abundant evidence of taking a motor vehicle and a further, plainly duplicative charge of possessing the car by the act of driving it, to the facts of Milanovich and Gaddis, and approved the lesser remedy of vacating the

possession count by comparison to Milanovich and distinguishing Gaddis. Melick, 131 Wn. App. at 839-42. In this case, because it cannot be said which count -- if either -- the defendant would have been convicted of, he should have the remedy of reversing both convictions rather than merely vacating the possession judgment.

Reversal for a new trial is required. Milanovich v. United States, 365 U.S. at 554-55.

**F. CONCLUSION**

Based on the foregoing, Mr. Garcia respectfully requests that this Court accept review, and reverse his convictions.

DATED this 20th day of December, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS
Washington State Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
e-mail: oliver@washapp.org

# Appendix A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JASON TYLER GARCIA,<br><br>Appellant. | DIVISION ONE<br><br>No. 73740-6-I<br><br>UNPUBLISHED OPINION<br><br>FILED: November 21, 2016 |

DWYER, J. — Jason "J.T." Garcia appeals from the judgment entered on a jury's verdict finding him guilty of robbery in the first degree committed while armed with a firearm and while on community custody, unlawful possession of a firearm in the second degree, and possession of stolen property in the second degree. He contends that the trial court erred by ruling that a victim's utterances recorded during a 911 conversation were both admissible as excited utterances and as nontestimonial statements. We conclude that there was no error.

Garcia also contends, and the State concedes, that both of his convictions for robbery and possession of stolen property cannot stand. We remand for vacation of the possession of stolen property conviction, a result required by controlling authority.

I

On October 12, 2014, an employee of a Motel 6 in Everett telephoned 911 to report that Brett Losey and Shana Morcom had just been robbed. The 911 operator asked the employee several questions regarding the location of the

robbery and whether medical assistance was required, and then asked to speak directly to Losey. Losey explained, in response to the 911 operator's questions, that he and Morcom had been robbed at gunpoint in their motel room five minutes earlier. Losey referenced more than one robber during the 911 call, stating that "they" made him and Morcom wait in the bathroom until the robbers had left. Losey stated that he knew the individual who held the gun—who he called "J.T." and described as a 26-year-old white male with long, brown hair, wearing jeans, a light-colored jersey, and a red hat. Losey did not know J.T.'s last name.

After police arrived at the motel, Losey and Morcom described the second robber as a 30-year-old male, bald, wearing a black T-shirt, with a teardrop tattoo near his left eye. The police were able to track Morcom's stolen cell phone to a residential location where they apprehended Jacob T. Harrison.[1] Losey and Morcom each personally identified Harrison as the second robber.

On October 16, 2014, Lynnwood Police Officer Zachariah Olesen arrested Garcia on an outstanding warrant. Olesen discovered that Garcia was holding two debit cards that had been stolen from Losey and Morcom during the robbery four days earlier. Olesen contacted Losey and Morcom and told them that their property had been found in the possession of Garcia. Morcom responded that she knew Garcia as "J.T." and that he had robbed her and Losey. Several days

[1] Although both Garcia and Harrison share the initials "J.T.," only Garcia matched Losey's description of the robber who was holding the gun.

after Garcia's arrest, Morcom positively identified Garcia during a police photomontage, stating that she was 100 percent certain of her identification.

Prior to trial, the trial court granted the State's motion in limine to admit the 911 conversation into evidence as an excited utterance. In so ruling, the trial court stated that Losey spoke with "a degree of agitation" in his voice during the 911 call, although he also sounded "fairly measured" at the beginning of the call. The trial court concluded that Losey "didn't sound as though he considered himself to be safe." The trial court also denied Garcia's motion to suppress evidence of the 911 call for violating the confrontation clause of the United States Constitution, concluding that the call was nontestimonial. Losey was unable to testify at trial, as he was then hospitalized.

The jury found Garcia guilty of robbery in the first degree while armed with a firearm and while on community custody, unlawful possession of a firearm in the second degree, and possession of stolen property in the second degree. The trial court imposed concurrent prison sentences of 231 months for the robbery conviction, 60 months for the possession of a firearm conviction, and 29 months for the possession of stolen property conviction. Garcia timely appealed.

II

A

Garcia contends that the trial court erred by admitting Losey's statements during the 911 conversation as excited utterances. This is so, he asserts, because when Losey spoke to the 911 operator he was no longer under the stress of excitement caused by the robbery.

We review a trial court's ruling on the admissibility of evidence for abuse of discretion. State v. Rodriguez, 187 Wn. App. 922, 939, 352 P.3d 200, review denied, 184 Wn.2d 1011 (2015). Abuse of discretion occurs when the trial court's ruling is manifestly unreasonable or based on untenable grounds or reasons. State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

An "excited utterance" is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). Our Supreme Court has recognized three closely connected requirements for analyzing an excited utterance: (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). "Washington courts have found statements admissible under this exception despite significant lapses of time between the startling or exciting event and the statement concerning it." ROBERT H. ARONSON & MAUREEN A. HOWARD, THE LAW OF EVIDENCE IN WASHINGTON § 10.07(2)(b)(i), at 10-31 (5th ed. 2016).

The first and third elements are not in dispute in this matter. The second element can be established by circumstantial evidence, such as "the declarant's behavior, appearance, and condition; . . . and the circumstances under which the statement is made." Young, 160 Wn.2d at 810. "The key determination is often 'whether the statement was made while the declarant was still under the influence of the event to the extent that the statement could not be the result of

fabrication, intervening actions, or the exercise of choice or judgment.'" Rodriquez, 187 Wn. App. at 939 (quoting State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001)).

Immediately after the robbers had left the hotel room, Losey and Morcom went to the front desk of the motel and asked the employee to call 911 on their behalf. After confirming the location of the robbery and that no one was injured, the 911 operator spoke directly to Losey and asked him a series of questions. These questions were intended to determine (1) whether medical assistance was required, and (2) the description and possible location of the robbers who were actively fleeing the scene of the crime. Losey could not answer some of the questions that he was asked by the 911 operator, explaining that, at the time of the incident, he was "star[ing] down the barrel of a gun" and thus could not remember all of the details. Near the end of the call Losey expressed, "I'm afraid he's gonna shoot me now. I'm snitchin'. It's crazy."

The trial court listened to the 911 conversation and stated, "there wasn't a great deal of agitation in it at the beginning, but it seemed to me the stress in his voice built as he was speaking. And it appeared – it sounded to me as though there was a degree of agitation in his voice." The trial court noted that "it didn't sound as though [Losey] considered himself to be safe" and that Losey "was contemplating the possibility that he might pay a rather high price for making the phone call that he was making."[2]

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[2] The trial court made the same determination in the State's case against Harrison, where it noted that Losey spoke with "what sounds like a heightened level of agitation in his voice, and it sounds as though it rises to a peak where he blurts out something about being afraid that he's

The evidence establishes that the 911 conversation took place shortly after an armed robbery in which Losey had a gun pointed at his head. Because of the fear that this event caused, Losey was at times unable to remember details regarding the robbery or understand and respond to the 911 operator's questions. Moreover, Losey's revelation at the end of the phone call—that he was "snitchin'" and afraid he may be shot—further supports that Losey caused the 911 call to be made before he had time to reflect and consider the consequences of making his statements.

The trial court properly considered the evidence before it and ruled that Losey was still under the stress of the excitement of the robbery at the time he talked with the 911 operator. Such a determination was not manifestly unreasonable or based on untenable grounds or reasons. Garcia, 179 Wn.2d at 844. There was no error.

B

Garcia next contends that the trial court violated the confrontation clause of the Sixth Amendment of the United States Constitution by ruling that the 911 conversation was nontestimonial and thus admissible. This is so, he asserts, because the primary purpose of the 911 conversation was not to respond to an ongoing emergency but, rather, to relate information regarding past events. We disagree.

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going to be shot, which is something that is perhaps consistent with a person having a gun put to their head."

We review de novo an alleged violation of the confrontation clause. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). The confrontation clause bars the admission of "testimonial" hearsay in criminal trials unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "Testimony" has been defined as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Crawford, 541 U.S. at 51 (alteration in original) (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

The Court in Crawford expressly declined to expand on what statements are considered "testimonial." 541 U.S. at 68. In light of the uncertainty created by this omission, the Court later announced the "primary purpose" test to distinguish between testimonial and nontestimonial witness utterances:

> 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 v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).[3]

[3] "Our inquiry is also guided by (1) whether the speaker was speaking about past events or current ones as they were occurring, requiring police assistance, (2) whether a reasonable listener would conclude that the speaker was facing an ongoing emergency, (3) the nature of the information elicited by police, and (4) the formality of the interrogation." State v. Perez, 184 Wn.

Whether an ongoing emergency exists is determined by an objective evaluation of "the circumstances in which the encounter occurs and the statements and actions of the parties." Michigan v. Bryant, 562 U.S. 344, 359, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). "[T]he relevant inquiry *is not the subjective or actual purpose of the individuals involved* in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." Bryant, 562 U.S. at 360 (emphasis added). Moreover, whether there is an ongoing emergency is not the sole, determining factor in deriving the primary purpose of the utterances. Rather, admissibility depends on whether "in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" Ohio v. Clark, __ U.S. __, 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (2015) (alteration in original) (quoting Bryant, 562 U.S. at 358).

Neither party disputes that Losey was unavailable to testify or that Garcia had no prior opportunity to cross-examine him. Thus, the sole issue is whether his utterances in the 911 conversation were testimonial.

"[T]he initial interrogation conducted in connection with a 911 call[] is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." Davis, 547 U.S. at 827 (some alterations in original) (quoting Crawford, 541 U.S. at 51). Indeed,

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App. 321, 339, 337 P.3d 352 (2014) (citing Koslowski, 166 Wn.2d at 418-19), review denied, 182 Wn.2d 1017 (2015).

although an armed robber may have fled the scene of the crime, the emergency may still be ongoing. A fleeing robber may pose a continuing threat to the public, and the information that a person provides to a 911 operator regarding the robber's name, physical description, and whereabouts is necessary for the police to promptly evaluate the danger and respond appropriately. Similarly, an attempt by the 911 operator to establish the identity of the robber is necessary "so that the dispatched officers might know whether they would be encountering a violent felon." Davis, 547 U.S. at 827. Whether either participant harbors a secondary purpose in making such utterances—such as an intention to have the robber prosecuted—is not significant so long as it is not the primary purpose a reasonable person would have had in making the utterances. Clark, 135 S. Ct. at 2180; accord Bryant, 562 U.S. at 368; Davis, 547 U.S. at 827.

Here, the 911 operator first spoke to the motel employee who placed the call. The employee confirmed the location of the robbery and that no one was hurt. The employee then transferred the telephone to Losey. The 911 operator again confirmed that no one was injured and asked Losey details about the incident. The 911 conversation principally established that (1) at least one of the robbers was armed, (2) the robbers were actively fleeing the scene of the crime, and (3) the current location and final destination of the robbers was unknown.

Losey's conversation with the 911 operator was the type of question-and-answer conversation that reasonable participants would have engaged in when their primary purpose was to ask for police assistance in resolving an ongoing emergency. Moreover, Garcia's contention that the "summoning for help" ended

upon the transfer of the telephone from the employee to Losey ignores the reason for the transfer entirely—namely, to allow the emergency operator to more quickly and effectively respond to the emergency by speaking directly to the victim.[4]

Viewed properly, the primary purpose of the 911 conversation was not to create an out-of-court substitute for trial testimony. Clark, 135 S. Ct. at 2180. Thus, it was not testimonial. Accordingly, no confrontation clause violation is established.

III

Garcia contends, and the State concedes, that both his conviction for robbery and his conviction for possession of stolen property cannot stand. We agree.

It is well established that "one cannot be both the principal thief and the receiver of stolen goods." State v. Hancock, 44 Wn. App. 297, 301, 721 P.2d 1006 (1986). Indeed, the taker of the property "does not at the same time give himself the property he has taken." Milanovich v. United States, 365 U.S. 551, 558, 81 S. Ct. 728, 5 L. Ed. 2d 773 (1961) (Frankfurter, J., dissenting). In cases where the defendant is charged with both robbery and possession of the same stolen property, the trial court must instruct the jury to first consider the robbery charge and then consider the possession charge only if it finds insufficient proof

[4] Garcia also contends that the 911 conversation presented a degree of formality, evidencing that it was testimonial in nature. This is so, he asserts, because making false statements to a 911 operator is prohibited by law. However, the Court has already addressed this line of argument in Davis, which itself involved a 911 conversation. 547 U.S. at 817-18. The applicable standard remains an objective determination of the primary purpose that reasonable participants would have had in making the statements under the circumstances then extant.

that the defendant was the robber. United States v. Gaddis, 424 U.S. 544, 550, 96 S. Ct. 1023, 47 L. Ed. 2d 222 (1976). If the jury was not so instructed, and the defendant was convicted of both charges, the conviction for possession of stolen property must be vacated. State v. Melick, 131 Wn. App. 835, 844, 129 P.3d 816 (2006).

Garcia was charged and convicted of robbery in the first degree and possession of stolen property. The two convictions cannot both stand. Melick, 131 Wn. App. at 844. The State concedes this point and requests that we remand this matter to the trial court to vacate Garcia's conviction for possession of stolen property.[5]

We remand for vacation of the conviction for possession of stolen property. We affirm in all other respects.

Affirmed in part, and reversed in part.

We concur:

[5] Garcia contends that *both* his conviction for robbery and his conviction for possession of stolen property must be vacated. He is wrong. Gaddis makes clear that the jury must be instructed to first consider the robbery charge and only proceed to consideration of the possession charge should it determine that there is insufficient evidence on the robbery charge. 424 U.S. at 550. Washington cases are in accord, holding that the proper remedy is to vacate the possession charge. Melick, 131 Wn. App. at 844; Hancock, 44 Wn. App. at 304.

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[aalsdorf@snoco.org]
Snohomish County Prosecutor's Office-Appellate Unit

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 20, 2016

# WASHINGTON APPELLATE PROJECT

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