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Court of Appeals
Division I
State of Washington

NO. 73154-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

D'ANGELO CORDAY BROWN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

PATRICK C. LAVIN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES PRESENTED

1. Whether admission of statements on a 911 call violated the defendant's right to confront witnesses against him, where the statements were not testimonial.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

A jury found the defendant, D'Angelo Brown, guilty of one count of assault in the fourth degree and eight counts of misdemeanor violation of a court order. 12/10/14RP 5-11. The jury also found the defendant not guilty of one count of unlawful imprisonment. 12/10/14RP 6. The jury returned special verdict forms finding that the defendant and named victim, Bria Ruchelle Gomez, were members of the same family or household for each of the convicted counts. 12/10/14RP 7-8.

The defendant's convictions for misdemeanor violation of a court order were based on jail calls made by the defendant after he was arrested for the assault charge, and they are not challenged by the defendant on appeal. Br. of Appellant at 9.

The trial court held a pretrial hearing on the admissibility of a 911 call challenged on appeal. 12/1/14RP 29. The hearing was

held with the expectation that the 911 callers would not testify at the trial. 12/1/14RP 18. The court reviewed the audio of the 911 call along with a transcript of the call. 12/1/14RP 29, 34. The court also considered a digital patrol car video of the victim recorded a few minutes after the 911 call. 12/1/14RP 39.

The trial court ruled that portions of the 911 call were admissible and that other portions were not. 12/1/14RP 49-56. The single 911 call included three different voices that spoke to the 911 dispatcher successively during the call. 12/1/14RP 49-56, Pretrial Ex. 1. The first two voices were unidentified males, and the third voice was the victim, Bria Gomez. 12/1/14RP 49-56. The court denied admission of the first male speaker's statements because they were difficult to understand and thus lacked probative value. 12/1/14RP 50. The court admitted the statements of the second male speaker as present sense impressions that described an ongoing emergency. 12/1/14RP 51-54. The court also admitted Gomez's statements as excited utterances and present sense impressions describing an ongoing emergency. 12/1/14RP 53-56.

The court ruled that Gomez's statement to Officer Kartes captured by his digital in-car video was inadmissible because it was testimonial in nature. 12/2/14RP 5-6.

Subject to the trial court's pretrial rulings, the parties stipulated that the 911 call and Computer Aided Dispatch Log were business records of the Seattle Police Department, and that the testimony of a custodian of records was unnecessary for the purposes of authentication. 12/4/14RP 14.

On appeal, the defendant challenges the admission of portion of the 911 call that included the second male voice. Br. of Appellant at 3. The defendant conceded at trial that the victim's statements were not testimonial. 12/1/14RP 45-46, Br. of Appellant at 3. The defendant argues that the admission of the second male speaker's statements violated the defendant's right to confront witnesses against him because the second male speaker did not testify at trial. Br. of Appellant at 3.

2. SUBSTANTIVE FACTS.

On November 22, 2013, an unidentified male called 911. Pretrial Ex. 1 at 1-3. The call was reported at approximately 8:27 a.m. 12/4/14RP 55. The male stated that he needed police because his neighbors were quarreling with each other. Pretrial Ex. 1 at 1. The man said this was occurring inside his neighbor's apartment. Pretrial Ex. 1 at 2. The man stated his location was

5900 37th Ave S. Pretrial Ex. 1 at 2-3. He did not know the apartment number, but that "she broke the window." Pretrial Ex. 1 at 3. The caller struggled to answer some of the dispatcher's questions and indicated that he spoke the Amharic language. Pretrial Ex. 1 at 3. All of the first speaker's statements were excluded by the trial court in pretrial rulings. 12/1/14RP 50.

A second unidentified male voice then took over speaking for the first voice at pg. 3, line 14 of the transcript of the 911 call, which was admitted as Pretrial Ex. 1. The second male said that there was a guy attacking a lady inside of their apartment. Pretrial Ex. 1 at 3. The man said that he did not know the exact apartment number, but that it was "J something" and on the first floor. Pretrial Ex. 1 at 3. The man said that they were physically fighting inside of the apartment. Pretrial Ex. 1 at 4. The man was not able to see what was happening, but he could hear it. Pretrial Ex. 1 at 4. Then Gomez emerged from the apartment, and the man could see her. Pretrial Ex. 1 at 4. He said that she needed medical attention because she "got beat on." Pretrial Ex. 1 at 4. The dispatcher then asked the male to ask her where the suspect was. Pretrial Ex. 1 at 5. Gomez is heard telling the male that the suspect left. Pretrial Ex. 1 at 5. The man explained that Gomez was crying, and then

she took over speaking on the phone to the dispatcher. Pretrial Ex. 1 at 5-6.

She identified herself as Bria Gomez. Pretrial Ex. 1 at 10. Gomez said that her ex-boyfriend assaulted her. Pretrial Ex. 1 at 7. She said that she had to use her hand to break out her window because the defendant would not let her leave. Pretrial Ex. 1 at 8. She did not know where the defendant was while she was speaking with 911. Pretrial Ex. 1 at 8. She told the dispatcher her age, 18 years old, and that her one-year-old son was with her. Pretrial Ex. 1 at 8. She identified the defendant as D'Angelo Brown. Pretrial Ex. 1 at 8.

She then went on to explain the circumstances of the assault. Brown did not live with her, but had been staying with her because he was homeless. Pretrial Ex. 1 at 10. She let him stay in her home the previous night. Pretrial Ex. 1 at 10. That morning, he woke up and went through her phone. Pretrial Ex. 1 at 10. He saw that she was talking to someone else. Pretrial Ex. 1 at 10. Then he "went crazy on" her. Pretrial Ex. 1 at 10. She had to break out her own window so that someone could hear her. Pretrial Ex. 1 at 11. She thought Brown had taken her phone and wallet. Pretrial Ex. 1 at 10.

Seattle Police Officer Nicholas Kartes responded to the 911 call. 12/4/14RP 53. The 911 call came in at 8:27 a.m. and Officer Kartes arrived on scene at 8:31 a.m. 12/4/14RP 55. The address is a large apartment complex. 12/4/14RP 53. Officer Kartes contacted Gomez as she was being treated by emergency medical personnel at the northwest corner of the apartment complex. 12/4/14RP 56. Officer Kartes noticed that emergency personnel were inspecting one of Gomez's hands. 12/4/14RP 56.

Gomez was holding her one-year-old son in her arms. 12/4/14RP 58. Officer Kartes noticed that Gomez appeared distraught. 12/4/14RP 58. She was crying and trying to catch her breath. 12/4/14RP 58. She was physically and emotionally upset. 12/4/14RP 58. Gomez was tearing up and catching her breath throughout her entire contact with Officer Kartes. 12/4/14RP 66. This was upwards of 30 minutes. 12/4/14RP 67.

Gomez provided an extensive statement to Officer Kartes as to what happened in his patrol car, captured on the in-car video system. 12/4/14RP 65-66. This statement was ruled inadmissible in pretrial hearings as testimonial. 12/2/14RP 5-6.

Officer Kartes accompanied Gomez back to her apartment to secure the scene and check for any evidence. 12/4/14RP 74. The

bedroom exterior window was broken out with glass outside.

12/4/14RP 74-75. There was a broken picture frame in the hallway, just outside of the bedroom door. 12/4/14RP 74. Officer Kartes

was unable to locate, and did not speak to the other 911 callers.

12/4/14RP 78.

Five days later, Gomez sought medical treatment at Swedish

Medical Center, First Hill, where she was treated by Dr. Ian Doten.

12/4/14RP 97-98. Gomez complained of dizziness and feeling like

she was going to pass out at work. 12/4/14RP 98. Gomez

explained to Dr. Doten that she had been assaulted recently in a

domestic violence incident. 12/4/14RP 98. Dr. Doten diagnosed

her with post-concussive syndrome and near syncope. 12/4/14RP

99. Near syncope means to almost pass out, feeling woozy, or

lightheaded. 12/4/14RP 99.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING PORTIONS OF THE 911 CALL.

The defendant claims that the admission of statements of the second male voice on the 911 call violated his confrontation rights. This argument fails because the statements were not

testimonial and not prohibited by the Confrontation Clause. The primary purpose of the caller's statements was to seek aid for an ongoing emergency.

- a. The Primary Purpose Of The 911 Caller's Statements Was To Obtain Police Help For An Ongoing Emergency.

The court reviews Confrontation Clause challenges de novo. State v. Robinson, 189 Wn. App. 877, 882, 359 P.3d 874, 876 (2015).

Under the Sixth Amendment, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Id. (quoting U.S. CONST. amend. VI.). In Michigan v. Bryant, the U.S. Supreme Court made clear that the right to confrontation applies to testimonial statements: "procured with a primary purpose of creating an out-of-court substitute for trial testimony." 562 U.S. 344, 358, 131 S. Ct. 1143, 1155, 179 L. Ed. 2d 93 (2011). In ruling that statements made to police during an ongoing emergency are admissible, the Court discussed other situations where the Confrontation Clause would not apply:

When, as in Davis, the primary purpose of an interrogation is to respond to an "ongoing emergency," its purpose is not to create a record for

trial and thus is not within the scope of the [Confrontation Clause]. But there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.

Id. Thus, the Confrontation Clause only applies to those statements made where the "primary purpose" is to create an out-of-court substitute for trial testimony. Id.

To determine whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency, the court must objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties. Id. at 359. The court is free to consider a vast array of information, including, but not limited to: the statements and actions of the declarant and the interrogators, the nature of the emergency, the weapons involved, the medical condition of the victim, and the scope of the danger posed to the victim, the police, and the public. Id. at 359-72.

The Supreme Court considered the primary purpose test last year within the context of statements made between private citizens in Ohio v. Clark, 135 S. Ct. 2173, 2182, 192 L. Ed. 2d 306 (2015). The Court ruled that reports of abuse made by young children to their teachers were not testimonial. Id. at 2181. The Supreme Court held that the child's statements "were not made with the primary purpose of creating evidence for Clark's prosecution." Id. Instead, the primary purpose of L.P.'s teachers' conversations with him was to protect him from further abuse. Id. Thus, the statements were not testimonial. Id.

In State v. Koslowski, the Washington State Supreme Court adopted a four factor test to determine whether the primary purpose of police interrogation is to enable assistance to meet 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 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?

State v. Koslowski, 166 Wn.2d 409, 418-19, 209 P.3d 479, 484 (2009) (citing Davis, 547 U.S. at 827) (citations omitted). This Court recently considered the primary purpose of a 911 call in State v. Robinson, 189 Wn. App. 877, 888-89, 359 P.3d 874, 879-80 (2015). This Court recognized that the United States Supreme Court had not yet decided Bryant or Clark at the time of the Koslowski decision. Id. at 888. Nonetheless, this Court applied the Koslowski factors to find the 911 call admissible. Id. at 892.

Applying the four factors from Kozlowski to the present case demonstrates that the primary purpose of the statements made by the second caller at issue here was to obtain police help for an ongoing emergency.

- i. The statements were made describing events that were currently happening or had happened immediately prior to the statement.

There were three voices on the single 911 call. The entire un-redacted call is only a few minutes long. The initial male voice used present tense or present participle to describe that he needed police because "my neighbor quarreling eh, each other." Pretrial Ex. 1 at 1. The man said this was occurring inside their apartment. Pretrial Ex. 1 at 2. The first male voice struggled to communicate in English, but attempted to communicate that an assault was occurring: "Uh, she...she assault...assaulting uh..." Pretrial Ex. 1 at 2. The first voice was aware that the woman broke a window as he attempted to describe which apartment the assault was occurring in: "I don't know the apartment number, but she broke the window on..." Pretrial Ex. 1 at 3.

The second male voice took over immediately from the first male voice in the same call. The second voice appeared to speak the English language with much more proficiency than the first speaker. The second male voice also used present tense and present participle to describe what he was observing as it occurred. His response to the dispatcher's first question as to what was going

on there was: "There's a guy attacking a lady." Pretrial Ex. 1 at 3.
The male stated that they were in their apartment as he was
speaking to 911:

OPERATOR: Okay, are they out in the street or are
they in a...

MALE: No, they're in their apartment they're in
their apartment.

Pretrial Ex. 1 at 3. The male speaker spent a few moments
attempting to describe where the apartment was located within the
apartment complex. Pretrial Ex. 1 at 3-4. At that point, the second
male speaker continued to believe that the defendant and victim
were located inside their apartment:

OPERATOR: And they're inside the apartment now?

MALE: Yes, they are.

Pretrial Ex. 1 at 3-4. In the immediate following exchange,
the second male speaker indicated that there was physical
violence involved:

OPERATOR: Okay, and it's a male and a female
physically fighting?

MALE: Yes.

Pretrial Ex. 1 at 4. The male speaker explained that, while he could
not see the attack, he could hear it, as the female emerged from
the apartment:

OPERATOR: And do you see them or are you hearing them?

MALE: No, I heard her and she's outside now.

Pretrial Ex. 1 at 4. The male speaker was able to observe Gomez after the attack he heard, and he requested medical aid for her:

OPERATOR: Does she need medical attention?

MALE: Yes, she does.

OPERATOR: Okay, does she look injured how do you know she needs medical attention?

MALE: Cause, she got beat on.

Pretrial Ex. 1 at 4. At that point, the male voice continued to believe that the male was inside the building:

RADIO: Where's the male at?

OPERATOR: He's still inside the...

MALE: Inside.

Pretrial Ex. 1 at 5. In fact, the second male speaker believed that the defendant was still in the apartment until he asked Gomez immediately before she took over speaking on the call:

OPERATOR: Okay, can you ask her where the suspect is?

MALE: Where's the suspect at in the...in the...in the apartment?

FEMALE: He...he left.

MALE: No, he left.

Pretrial Ex. 1 at 5.

Brown argues that the second male speaker described only events that had occurred in the past because the defendant had

already left. Br. of Appellant at 7. However, as noted above, both male speakers described their observations as occurring contemporaneously with their statements. Both speakers believed the defendant to be inside the apartment as they spoke with the dispatcher. The second male affirmatively asserted his belief that the defendant was inside the apartment until Gomez emerged from the apartment and told him that the defendant had left. Pretrial Ex. 1 at 5.

The two male speakers used present tense to describe what they observed as they observed it. They described where it was happening and how they heard it. Their observations occurred concurrently with their statements to the 911 dispatcher.

- ii. A reasonable listener would conclude that the second male speaker was facing an ongoing emergency that required help.

The second male speaker heard a man attacking a woman inside an apartment. Pretrial Ex. 1 at 3. He heard them physically fighting. Pretrial Ex. 1 at 4. Then, after he began speaking with the 911 dispatcher, he saw the woman emerge and believed that she needed medical attention because she had been "beat on." Pretrial

Ex. 1 at 4. The male speaker believed the defendant was inside the building. Pretrial Ex. 1 at 5. A reasonable listener with this information would conclude that this speaker faced an ongoing emergency that required help.

- iii. The nature of what was asked and answered objectively shows that the elicited statements were necessary to resolve the present emergency.

The entire conversation between the dispatcher and the second male voice was relatively short. The questions were limited to determining the very basics of who, what, when, where, and how. The interaction was so brief that the focus was limited to where and what was happening.

The dispatcher began the interaction by asking what was going on and the second male voice responded that a man was attacking a lady. Pretrial Ex. 1 at 3. The dispatcher asked where this is taking place, and the second male caller indicated it was happening inside an apartment. Pretrial Ex. 1 at 3. The next few questions went to determining where the apartment was within the larger building, presumably to direct law enforcement response. Pretrial Ex. 1 at 3-4. The dispatcher then asked if the fight was

physical, and the second male caller said it was. Pretrial Ex. 1 at 4. The dispatcher attempted to determine how the male speaker made that determination, and he replied that he heard it. Pretrial Ex. 1 at 4. Then the dispatcher attempted to determine whether or not the victim required medical aid and the location of the suspect. Pretrial Ex. 1 at 4-5.

The discourse between the dispatcher and the second male speaker involved the most basic information: the reason for the call, the location of the call, whether the altercation was physical, the need for any medical attention, and the location of the assailant. There was not much additional detail requested or provided, and notably no identifying information as to the suspect. The dispatcher pushed the caller to quickly provide urgent information, and the caller quickly provided no more than what was necessary. The nature of the interaction evidenced that the primary purpose of the call was to obtain immediate help for an ongoing present emergency.

- iv. The conversation between the 911 dispatcher and the second male voice was extremely informal.

In this case, the defense brief must concede that "the level of questioning by the 911 operator was very informal." Br. of Appellant at 7. As previously noted, the dispatcher's questions requested only the most basic information, and that was all that was provided. The conversation was hurried and tense. As the court in Koslowski noted: "the greater the formality, the more likely the statement was testimonial." Koslowski, 166 Wn.2d at 419. Here, the minimal level of formality demonstrates that the primary purpose of the call was to obtain aid for the ongoing emergency.

The primary purpose of the second male voice's statements was to obtain help for an ongoing emergency. The male described the events as he heard and observed them. He heard the sounds of a man physically attacking a woman inside an apartment. He believed the man to be inside the apartment. He believed the woman would need medical attention based on what he heard. When the victim emerged from the apartment, he observed that she was crying, and that she needed medical attention because she appeared to have been beaten. The second male speaker's statements occurred between the statements of the initial male

speaker and Gomez in a call that is only a few minutes long. The initial male caller similarly described an attack that he could hear in his neighbor's apartment. Gomez described that Brown actually attacked her, and that she had to break out a window to obtain help. A reasonable listener would objectively find that the second male speaker's purpose was to obtain help for an ongoing emergency. The statements were not testimonial, and the trial court reasonably concluded that their admission at trial did not violate the defendant's right to confront witnesses against him.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Brown's convictions.

DATED this 12th day of January, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

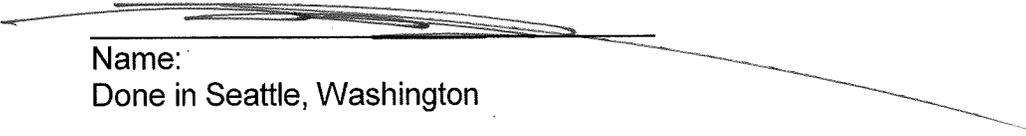
PATRICK C. LAVIN, WSBA #44774
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Thomas Kummerow, the attorney for the appellant, at Tom@washapp.org, containing a copy of the Brief of Respondent, in State v. Dangelo Corday Brown, Cause No. 73154-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of January, 2016.


Name:
Done in Seattle, Washington