

NO. 38666-6

COURT OF APPEALS  
DIVISION II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON  
BY cm  
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

BRUCE TEMANAHA SAMUELA, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Thomas J. Felnagle

No. 07-1-05471-7

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly admitted a recording of a 911 call that was non-testimonial in nature and admissible under the hearsay exception?

B. STATEMENT OF THE CASE.

1. Procedure

On August 19, 2008, the Pierce County Prosecutor's Office charged BRUCE T. SAMUELA, herein after "defendant," by amended information with one count of felony harassment, one count of malicious mischief in the third degree, and two counts of bail jumping in Pierce County Cause No. 07-1-05471-7. CP 17-19. The case proceeded to trial on November 19, 2008, in front of the Honorable Thomas J. Felnagle. RP<sup>1</sup> 1.

The State moved in limine to admit the 911 tape recording of the victim's call under Evidence Rule 803(a)(2). RP 3- 24. The court listened to the 911 tape and arguments presented by counsel. RP 9-20. The court ruled that the victim's statements on the 911 call were admissible as an

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<sup>1</sup> The verbatim record of proceedings will be referred to as RP. The record of the verdict proceedings will be referred to as VRP. The record of the sentencing proceedings will be referred to as SRP.

excited utterance under the hearsay rule. RP 23-24. The court also ruled the statements were non-testimonial and met the *Crawford* test of confrontation. RP 23-24. The 911 tape was played to the jury during trial. RP 72.

The State filed a second amended information which clarified a scrivener's error regarding the dates of the bail jumping counts. RP 26; 84-85. The jury found defendant guilty of third degree malicious mischief and two counts of bail jumping. CP 79-83; VRP 4. Defendant was sentenced to the standard range for a total of 60 months in prison. CP 106-110; SRP 193. Defendant filed a timely notice of appeal. CP 111-124.

2. Facts relevant to the appeal

On July 22, 2007, Jan Thomson called 911 at 2:47 pm right after defendant had fled the scene. Exhibit 1. She told the dispatcher that "an ex-boyfriend of mine just ran up on me and tried to hurt me and I locked myself in my car." Exhibit 1. She said she was currently standing in the driveway of her friend's house. Exhibit 1. Ms. Thomson said that she was about to get into her car when her ex-boyfriend, Bruce Samuela, had tried to hit her with a pole. Exhibit 1. The dispatcher asked and Ms. Thomson answered questions about defendant's appearance and which direction he had fled in. Exhibit 1. She said he was "smacking" the windows and headlights with the pole. Exhibit 1. Ms. Thomson told the dispatcher that he "almost got [her]." Exhibit 1. She said that defendant

“popped” the windows several times hard, but they did not break. Exhibit 1. She said he “punctured” three of the tires on her car before leaving on his bicycle. Exhibit 1.

Ms. Thomson told the dispatcher there were messages on her phone from the previous night with defendant saying he was going to take an ax to her car. Exhibit 1. Ms. Thomson said she was not hurt but was “shook up.” Exhibit 1. The dispatcher suggested Ms. Thomson go into the house until the police came in case the defendant returned. Exhibit 1. Ms. Thompson said she was going to do that. Exhibit 1.

Officer Jason Catlett was dispatched by the 911 operator and arrived at the scene around 3 pm. RP 70-71. He testified Ms. Thomson appeared very anxious and nervous and was looking in both directions up and down the street while he spoke with her. RP 72. Officer Catlett noticed three out of four tires on the vehicle were flattened and something was stabbed in the side wall of one of the tires. RP 72-73. He testified that Ms. Thomson “identified Bruce Samuela as the person who popped the tires”. RP 73. He wrote in his report he estimated the property damage to be approximately \$300, or \$100 per deflated tire. RP 73-74. At trial, Officer Catlett could not recall whether any windows were smashed on the vehicle. RP 75-76.

Defendant testified at trial that he had known Jan Thomson for two or three years prior to the incident. RP 118. He testified that on July 21, 2007, Ms. Thomson came to his house for an hour and borrowed \$50 from

him before leaving. RP 119-120. On the morning of July 22, 2007, defendant went to pay his rent and noticed that money was missing. RP 119-120. Defendant testified he tried to call Ms. Thomson, could not reach her and then noticed his car was gone. RP 120. Defendant testified that he had paid for the car and was going to put it in Ms. Thomson's name, but had never transferred the title to either of them. RP 121.

Defendant testified he later rode his bicycle with his friend, Tom White<sup>2</sup>, over to another friend, Tom Browning's, house. RP 122. He saw Ms. Thomson putting bags in the back of the car when he was three or four houses away. RP 123. He testified that when she saw him, Ms. Thomson jumped in the car. RP 123. Defendant put his bike behind the car to stop her from leaving, but Ms. Thomson backed up and ran over part of the bike. RP 124. This caused the two rear tires to pop. RP 144. He testified he pointed his finger at her and said "give me my money and get out of my car and do it right now." RP 125. Defendant testified he never threatened to hurt Ms. Thomson. RP 125. After she left, defendant went home without getting his car or money back. RP 125-126. He testified he did not see Ms. Thomson again that day and was not contacted by police that day. RP 125.

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<sup>2</sup> Tom Browning and Tom White did not testify at trial.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S RIGHT TO CONFRONTATION WHEN IT PROPERLY ADMITTED A RECORDING OF THE 911 CALL THAT WAS NON-TESTIMONIAL IN NATURE AND ADMISSIBLE UNDER THE EXCITED UTTERANCE HEARSAY EXCEPTION.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162. Confrontation clause violations are subject to harmless error analysis. *State v. Saunders*, 132 Wn. App. 592, 604, 132 P.3d 743 (2006).

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that an out-of-court testimonial statement may not be admitted against a criminal defendant unless: 1) the declarant testifies at trial; or 2) is unavailable and the defendant had a prior opportunity to cross-examine the declarant.

*Crawford*, 124 S. Ct. at 1374. The decision in *Crawford* was restricted to the use of testimonial hearsay, but “left for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Crawford*, 124 S. Ct. at 1374. The Court, however, gave guidance on the issue by noting various formulations of the “core class” of testimonial statements at which the Confrontation Clause was directed. These include (1) “ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;” (2) “extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;” and (3) “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*, 124 S. Ct. at 1364.

Recently, in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), and its consolidated case, *Hammon v. Indiana*, the Supreme Court provided further guidance with regard to the parameters of statements deemed “testimonial.” First, in *Davis*, the Court held that a complainant's 911 telephone call was nontestimonial and, therefore, not subject to the Confrontation Clause of the Sixth Amendment. The court focused on several factors that made the substance of the 911 call of a different character than the testimonial statements at

issue in *Crawford*. These factors included: (1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation. *Id.*

Looking to these factors, the Court described how the 911 caller in *Davis* “was speaking about events as they were actually happening, rather than ‘describ[ing] past events.’” *Davis*, 547 U.S. at 827, citing, *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)(plurality opinion). The call in *Davis* was “a call for help against a bona fide physical threat” and a request for assistance in resolving a present emergency rather than a relation of past events, hours after the emergency was resolved. *Id.* The questions asked by the 911 operator in *Davis* to establish the identity of the assailant was to assist the officers dispatched to the scene so they might know, upon arrival “whether they were encountering a violent felon.” *Id.*

The Court also distinguished how there was a marked “difference in the level of formality between the two interviews.” *Id.* Whereas, *Crawford* was at the station house responding calmly to a series of questions with both a note taker and tape recorder documenting his responses, the 911 caller in *Davis* involved “frantic answers ... over the phone, in an environment that was not tranquil, or even ... safe. *Id.* In upholding the admissibility of the 911 call, the Court stated:

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.

The Court reached a different conclusion in the companion case, which also stemmed from a domestic dispute. At issue was Amy Hammon's statements to investigating police officers at her home after the police responded to a reported domestic disturbance. *Id.* at 819-821. The Court found the characterization of these statements was "much easier" to resolve because they "were not much different" from the statements in *Crawford*. *Id.* at 829. The interrogation arose from "an investigation into possibly criminal past conduct," "[t]here was no emergency in progress;" Hammon told the officers when they arrived that "things were fine;" when an officer eventually questioned Hammon a second time and elicited the challenged statements he was not seeking to determine "what is happening," but rather "what happened." *Id.* at 830.

In addition to providing further guidance on what constitutes a testimonial statement, the Court explained that it must decide whether the Confrontation Clause applies only to testimonial hearsay. 547 U.S. 823-

824. As noted above, this issue was raised but left undecided by the Court in *Crawford*. In *Davis*, the Court clarified that nontestimonial hearsay does not implicate the confrontation clause at all. Thus, any challenge to the admission of hearsay on the basis of the right to confront must assess whether the hearsay at issue is testimonial. *Id.* at 824-825.

In this case, defendant claims that his right of confrontation was abridged by the admission of “testimonial hearsay” in the form of a 911 tape. When the facts of the case are compared and the *Crawford* factors for consideration are evaluated, it is apparent that this situation is similar to the situation in *Davis*, and Ms. Thomson’s statements on the 911 tape are non-testimonial in nature.

With regard to the first factor which considers the timing of the events, Ms. Thomson makes the 911 call shortly after the event takes place. Exhibit 1. The timing of this case was identical to that in *Davis*. There, a 911 dispatcher spoke to a victim of a domestic disturbance just after the suspect “just r[un] out the door”. *Davis*, 547 U.S. at 818.

The court reasoned that the victim/caller in *Davis* was speaking of the events as they actually happened and distinguished this from the testimonial statements given by the victim in the *Crawford* case which took place hours after the fact. *Davis*, 547 U.S. at 813.

In the present case, Ms. Thomson describes the events to the operator and states how an ex-boyfriend had “just run up on her” so she locked herself in the car. Exhibit 1. She places the call while she is

standing in the driveway of the home. Exhibit 1. Had a significant period of time passed since the incident occurred, it is likely Ms. Thomson would have gone into the home. Instead, she places the call while she is standing in the driveway, indicating that the incident has just taken place. The 911 operator is the one who tells Ms. Thomson to go into the house to ensure that the incident is over and Ms. Thomson will be in a safe place until the police arrive, again indicative of the fact that the incident has just occurred. Exhibit 1. This is almost identical to what occurred in *Davis* where the court found the statements were non-testimonial.

The second factor to be considered is the threat of the harm posed by the situation, or alternatively, whether a listener would recognize that the caller was facing an ongoing emergency. In the present case, although Ms. Thomson is not in the presence of the defendant when she calls 911, he is still at large and the police have not arrived to secure the location. Exhibit 1. She describes in a frantic manner to the dispatcher what has just occurred, a description of the defendant and which direction he fled. Exhibit 1. The 911 dispatcher requests Ms. Thomson go inside the house in case the defendant returns. Exhibit 1. Ms. Thomson was still facing an ongoing emergency in this situation as she was unsure whether the defendant would return and whether he would do so armed. Ms. Thomson called 911 to receive help from the fear of a bona fide threat, just as the caller in *Davis* did.

The third factor concerns what was being asked, in essence, whether the questions posed were to resolve an ongoing emergency or resolve what had happened in the past. Ms. Thomson describes the defendant to the 911 dispatcher in a disorganized fashion while she remains concerned the defendant might return. Exhibit 1. This is not a detailed description of what occurred hours before; it is a call for help. The information gathered from Ms. Thomson was not ascertained to determine the sequence of previous events. Rather, the information was gathered to relay to dispatchers who was at large and assess the potential future threat he may pose, again, similar to the call in *Davis*.

The fourth factor requires the court to consider the level of formality of the call. In this case, Ms. Thomson makes the statements on the phone with the dispatcher while standing in the driveway of a friend's home. Exhibit 1. She describes her emotional state as "shook up." Exhibit 1. She describes the events out of order and is breathing heavily into the phone indicating stress and panic. Exhibit 1.

This is blatantly different than the informational interview that took place in *Hammon* and *Crawford*. There, the victims were interviewed in their home and at the station house while surrounded with police taking notes. *Davis*, 547 U.S. at 827. The victim in *Hammon* stated that "nothing was the matter" when the police came to speak with her. *Davis*, 547 U.S. at 819. Instead, Ms. Thomson's call resembles the non-testimonial call for help in *Davis* which also took place over the

phone. *Davis*, 547 U.S. at 827, citing, *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)(plurality opinion).

The trial court properly understood these statements were non-testimonial when it described:

While there is a question and answer session between the alleged victim and the 911 operator, the questions asked by the 911 operator are mostly clarifying and oftentimes cutting off Ms. Thomson, so it's not like the 911 operator is going through a formal question-and-answer session or trying to take a formalized statement. Ms. Thomson is going on about this, and the 911 operator, at appropriate times, is intervening to get clarification of what is being said.

... I am likewise convinced that it meets the *Crawford* test because it's not interrogation. Its purpose is primarily to meet the emergency as opposed to make a report.

RP 23-24.

Based on the analysis above, it is clear that the statements are non-testimonial in nature. They mirror the situation that occurred in *Davis* and differ significantly from the situations in *Crawford* and *Hammon*. Ms. Thomson made the call shortly after the incident occurred out of an effort to resolve the ongoing emergency. As such, they are similar to those statements in *Hammon* and non-testimonial in nature, and the trial court properly admitted the 911 tape.

The 911 tape recording contains the vast majority of evidence that was presented at trial on these elements. The State agrees with appellant that if the court finds these statements were testimonial in nature, the

remedy would be to remand and grant defendant a new trial only on the malicious mischief charge.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: December 21, 2009.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below

12-21-09 *Chelsey Mclean*  
Date Signature

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