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Division II
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No. 52852-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GEORGE F. JONES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable James J. Dixon, Judge
Cause No. 16-1-01621-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a unanimity instruction is required when the State alleges only one incident of violation of a protection order and clearly articulates that the incident occurred at a particular residence from the start of the trial to the end of the trial.

2. Whether a statement not offered for the truth of the matter asserted was properly admitted by the trial court and whether the statement was testimonial where it did not contain any substantive evidence of the defendant's guilty.

3. Whether statements from a non-testifying victim, made at the scene of a no contact order violation and describing present events were properly admitted as present sense impressions and whether such statements are testimonial.

4. Whether any error in admitting statements of a non-testifying victim was harmless beyond a reasonable doubt where there was overwhelming untainted evidence of guilt.

B. STATEMENT OF THE CASE.

1. Substantive Facts.

On September 15, 2016, Thurston County Sheriff's Office Deputy Ryan Hoover responded to the appellant, George Jones's,

residence for a possible violation of protection order. RP 131-132.¹ Deputy Hoover was responding to a reported violation involving Jones and Virginia Norris. RP 133. When Deputy Hoover arrived, he did not see anybody around the house at first, but he did see Jones's vehicle. RP 133. Deputy Hoover walked around behind the shop building on the property and made contact with a female who was not Norris. RP 134.

After checking the perimeter of the property around the yard, Deputy Hoover was in the driveway discussing what to do next when Ms. Norris made contact with him. RP 135. Deputy Hoover identified Virginia Norris as the person who contacted him by comparing a certified copy of her driver's license. RP 136. Deputy Hoover noted that Norris appeared "somewhat apprehensive" when she approached him and "seemed a little bit scared to talk to" him. RP 139-140. When Deputy Hoover asked her "Where's Mr. Jones at?" Norris told him "that he had probably left to Olympia." RP 140.

Deputy Hoover then pointed out that Jones's car was there and asked which vehicle he had left in, to which Norris lowered her voice and told Deputy Hoover "he's actually under the house

¹ The jury trial that occurred December 21-22, 2016, is reported in two sequentially paginated volumes by court reporter Ralph Beswick and will be referred to herein collectively as RP. The sentencing hearing December 26, 2018, reported by court reporter Kathyn Beehler will be referred to as 2 RP.

watching us.” RP 140-141. Deputy Hoover noticed that Norris appear nervous to tell him. RP 141. Jones was detained by other deputies near the crawl space of the residence. RP 142. Deputy Hoover testified that Jones was “completely dirty across the front of him, his face. Very sweaty.” RP 142-143.

Deputy Hoover interviewed Jones, who acknowledged that he knew that there was a no contact order in effect where he was the respondent and Norris was the protected party. RP 143. Deputy Hoover testified:

. . . he had told me that – that he had actually been with her earlier in the day in a vehicle with her, and he made comments that she had gone to the Lewis County courts earlier in that day and had - - when she had returned had told him that the order had been dropped, and but he was suspicious that it had been dropped.

RP 143. Deputy Hoover testified that Jones “said he caused a little bit of a ruckus and things hit the fan.” RP 146. When asked about where he was when law enforcement arrived, Jones told Deputy Hoover, “that he had been under the house, but he had panicked when he saw” law enforcement. RP 146. Deputy Hoover later clarified that Jones “admitted that he was hiding under the house.” RP 155-156.

The State admitted the Lewis County Superior Court no contact order, in which Jones was the respondent and Norris was the protected party. RP 147, Ex. 1. The order prohibited contact with Norris and indicated that Jones and Norris had been intimate partners. RP 148-149.

Jones testified in his defense. RP 166. Jones testified that he saw movement in his backyard and Norris and another person were there without permission. RP 176-177. Jones indicated that he told Norris to leave, and she started yelling at him. RP 178. He stated that "there was a ruckus back and forth." RP 179. He then said that he attempted to leave in his car but he did not leave. RP 179-180. He testified that he did not leave because he believed the police were coming. RP 180. He testified that Norris tailed him around the house. RP 181.

Jones admitted that he was aware of the no contact order. RP 182. Jones eventually testified that he "panicked" and went out of the window to get away from Norris and she followed him out of the window. RP 184. He stated that he then went into the cellar underneath the house and she followed him "only part of the way." RP 185. Jones denied that he told law enforcement that he had been with Norris earlier in the day. RP 191-192; 205. He indicated

that Norris had informed him that she was calling the police. RP 192.

2. Procedural History.

Jones was originally charged with assault in violation of a no contact order/domestic violence, and felony violation of a no contact order/domestic violence. CP 3. Prior to trial, the charges were amended to a single count of felony violation of a post conviction no contact order/domestic violence. CP 29. Jones, through his defense counsel, filed a motion in limine seeking to exclude statements made by Norris to law enforcement pursuant to the confrontation clause if Norris failed to appear for trial. CP 18-19. The State countered that Norris' statements were both present sense impressions and excited utterances. CP 13-16.

The trial court addressed the admissibility of Norris' statements to law enforcement at the start of the trial. RP 15. Defense counsel indicated, "my motion in limine addressed two circumstances, the 911 call and potential testimony of Deputy Hoover." RP 16. The prosecutor indicated:

There are two things that the state intends to get in as far as through Deputy Hoover, and as an offer of proof I'll tell the court I intend to explore with Deputy Hoover the fact that he goes to the residence based on calls from dispatch, and that's how he got address,

that's how he believed there was a potential violation of a no-contact order, and that he was looking for Virginia Norris and George Jones. That's the extent of what I expect to get in from him as far as what he received from dispatch.

RP 18-19. The prosecutor continued:

I then expect to ask him about his contact with Ms. Norris initially, where the evidence I believe will show that they were at the residence looking for Mr. Jones and Ms. Norris, that they were at the residence, Ms. Norris walks from a different residence than where he was, walks up to him. They ask – he asks her, "Are you Ms. Norris?" She says "Yes." He asks "Where is Mr. Jones?" She says "He's headed to Olympia." Then lowers her voice, appears scared to Deputy Hoover, and says, "He's hiding under the house watching us." Those are the extent of the statements from Ms. Norris that the state intends to get in - - to ask.

RP 19. The prosecutor then stated:

The first set through dispatch the state believes are non-testimonial in nature. While they are hearsay, they are not offered for the truth of the matter asserted, simply to explain why Deputy Hoover was at the residence at all, and the second set I do believe would fall under either the excited utterance or present sense impression.

RP 19-20.

With regard to the statements to dispatch, the trial court stated:

The court will find that the state may offer - - may allow Deputy Hoover to testify that he received information from dispatch that resulted in Deputy

Hoover responding to that location seeking Mr. Jones and/or Ms. Norris for a potential violation of a protection order or no contact order, whatever the order is at issue. The court makes that ruling because the court finds such statement is not hearsay. It is not offered to prove the truth of the matter asserted; rather, it is offered by the state to establish why Deputy Hoover acted the way he did.

RP 110.

With regard to the statements made by Norris directly to Deputy Hoover, the trial court stated:

The court has considered the rules of evidence, and this court is familiar with the rules of evidence. This court considers Evidence rule 803 dispositive. 803 subsection (a)(1), that rule provides in part that a present sense impression is not excluded by the hearsay rule, and a present sense impression is defined as a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

RP 114. The court continued:

The court is not at this point convinced that an excited utterance exception would be appropriate because the court hasn't heard any offer of proof with respect to how and under what circumstances Ms. Norris was making that statement to Deputy Hoover, in other words, under what mental condition or then existing state of mind she was in. However, it does appear to the court that the statement at issue from Ms. Norris was a statement describing or explaining an event or a condition, in this case the whereabouts allegedly of Mr. Jones, made while the declarant, in this case Ms. Norris, was perceiving the event or condition. It's this court's understanding that the state's offer of proof is

that Ms. Norris made those statements - - or that statement to Deputy Hoover while Mr. Jones was on the premises.

RP 114-115. The trial court allowed the state to elicit the limited testimony from Deputy Hoover. RP 115.

During opening statements, the prosecutor described the no contact order violation at issue in the case, stating:

[Deputy Hoover] was dispatched to a call arising out of an address in Rochester belonging to Mr. Jones. And you'll hear that Ms. Norris was at the residence and Mr. Jones was at the residence. And you'll hear - - and you'll see the no-contact order that's - - that was in place at that time, and you'll see that Mr. Jones having any contact direct or otherwise with Ms. Norris is prohibiting by that order.

RP 129.

During her closing argument, the prosecutor elaborated on the extent of the violation that occurred at the residence in Rochester, stating "This act occurred in the State of Washington. We've heard a lot of testimony from both Mr. Jones and Deputy Hoover that this occurred at Mr. Jones's residence on Guava Street in Rochester." RP 262. Later the prosecutor stated, "Mr. Jones has gotten on the stand and admitted that Virginia Norris was at his residence and they had contact." RP 264. After discussing the evidence that demonstrated that Jones knowingly contacted Ms.

Norris, the prosecutor stated, "He knew Ms. Norris was at his house. He knew that she was at his house when law enforcement came because he'd been with her all day. At that's what he told law enforcement." RP 268. The prosecutor concluded her rebuttal closing argument stating, "He knew Ms. Norris was there. He knew he was having direct contact with her, and he hid under the house trying to avoid being caught by law enforcement. The State asks that you return a verdict of guilty." RP 290.

At the defense's request, the trial court bifurcated the issue of whether Jones had two or more prior convictions, raising the no contact order violation to a felony. RP 14, 108. The jury found Jones guilty of the violation, and found that he had two or more prior convictions following the bifurcated portion of the trial. RP 297-298; 315; CP 45, 46, 52.

Between the two phases of the trial, Jones absented himself from the proceeding. RP 313-314. The trial court authorized a no-bail, no-walk warrant for Jones based on his voluntarily absenting himself from the proceedings. RP 319. Approximately two years later, on December 26, 2018, Jones was sentenced to a midrange sentence of 15 months. 2 RP 1, 22. This appeal follows. Additional facts will be included as necessary in the argument section below.

C. ARGUMENT.

1. A unanimity instruction was not required because the State only alleged one act of violation of a no contact order and clearly informed the jury of the act that it was relying on from the start to finish of the trial.

The Washington Constitution gives criminal defendants the right to a unanimous jury verdict. Wash. Const. art. I § 21. In cases where the State presents evidence of multiple acts and any one of these acts could constitute the crime charged, the jury must unanimously agree on the same act that constitutes the crime in order to convict the defendant. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); *overruled in part on other grounds by* State v. Kitchen, 110 Wn.2d 403, 405-406, 756 P.2d 105 (1988). To ensure jury unanimity in multiple acts cases, either (1) the State must elect the particular criminal act on which it will rely for conviction, or (2) the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proven beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411.

Jones argues that the State presented evidence of more than one violation because Deputy Hoover testified that Jones said that Norris had driven him to Centralia earlier that day. Brief of Appellant at 7-8. The statements made by Jones to Deputy Hoover

were offered to demonstrate that Jones knowingly violated the no contact order at his residence. RP 262. The prosecutor did not offer two incidents or argue that two incidents occurred. The prosecutor merely argued that Jones's own statements indicated that he knew he was having contact with Norris at his residence.

If the trial court had given a unanimity instruction, the jury may have been invited to consider only Jones's statements to law enforcement that he was with Norris in Centralia. In this case, a standard unanimity instruction would have read:

The State alleges that the defendant committed acts of violation of a no contact order on multiple occasions. To convict the defendant on count one of violation of a no contact order, one particular act or violation of a no contact order must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of violation of a no contact order.

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.25, at 110 (3rd ed. 2008). Such an instruction would clearly not have been proper here as the only evidence of contact in Lewis County that was presented came from the defendant. Such an instruction would have arguably violated the rule of corpus delicti. State v. Cardenas-Flores, 189 Wn.2d 243, 253, 401 P.3d 19 (2017); RCW 10.58.035.

When viewed in that context, it is clear that the State did not allege two incidents of conduct in this case. The prosecutor made it very clear from opening statements through rebuttal closing argument that the incident alleged was that viewed by Deputy Hoover at the residence in Rochester. RP 129, 262, 290. Only one act was alleged.

Even if it is arguable that the evidence involved multiple counts, the statements of Jones regarding this contact with Norris on the day in question merely described the continuous course of conduct leading to the charged act that occurred at his residence. An exception to the unanimity requirement exists when the acts constitute a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). "To determine whether there is a continuing course of conduct, we evaluate the facts in a commonsense manner considering (1) the time separating the criminal acts, and (2) whether the criminal acts involved the same parties, location, and ultimate purpose." State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010), *citing* State v. Lowe, 80 Wn. App. 357, 361, 908 P.2d 395 (1996).

In Brown, Division I of this Court determined that acts of contact which did not occur at the same time, where nevertheless

part of the same course of conduct because the time separating was close, the locations were at the victim's apartment and on her phone, and the same ultimate purpose of contacting and confronting the victim existed. 159 Wn. App. at 15.

If the statements of Jones to Deputy Hoover can be construed as evidence of multiple acts, the same rationale as Division I applied in Brown would apply here. Deputy Hoover testified that Jones stated:

. . . he had told me that – that he had actually been with her earlier in the day in a vehicle with her, and he made comments that she had gone to the Lewis County courts earlier in that day and had - - when she had returned had told him that the order had been dropped, and he was suspicious that it had been dropped.

RP 143. Deputy Hoover later clarified, "When he arrived home after being dropped off in Centralia by her, he came home and they got into an argument there are the residence." RP 145. The contact described by Jones to Deputy Hoover was on the same day as the allegation, while contact, according to Jones, occurred in two locations (his residence and her car), the locations were closely linked, and the contact appeared to be for the same ultimate purpose.

Despite the fact that multiple acts in this case, if they can be construed as multiple acts, constitute a continuous course of conduct, this Court does not need to consider the argument because the State clearly elected the conduct that it was alleging violated the no contact order. The trial court is not required to give the unanimity instruction where the State elects a specific act. Petrich, 101 Wn.2d at 572. As noted above, the State repeatedly noted that the incident in question was that which was observed by Deputy Hoover at the Rochester residence. RP 129, 262, 290. The statements in the prosecutor's closing argument regarding Jones's statement to Deputy Hoover that he had been with Norris earlier in the day were given in the context of whether Jones was knowingly contacting Norris at the residence. RP 268.

The State did not allege multiple acts at any part of the trial in this case. From the opening statements to the rebuttal closing argument, it was clear that the charged act occurred at Jones's residence. No unanimity instruction was required.

2. The statements of Norris which the trial court allowed to be admitted at trial were non-testimonial and properly admitted pursuant to the rules of evidence, therefore they did not violate the Confrontation Clause.

The confrontation clause bars admission of testimonial statements of a witness who does not appear at trial unless he or she is unavailable to testify, and the defendant had a prior opportunity for cross examination. U.S. Const. amend VI; Wash. Const. art. I, § 22; Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed 2d 224 (2006). An alleged confrontation clause challenge is reviewed de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). Jones assigns error to the admission of two distinct sets of testimony.

- a. The statements that were relayed to Deputy Hoover from dispatch, which he was allowed to testify regarding, were not offered for the truth of the matter asserted, and were nontestimonial for the purposes of the Confrontation Clause.

First, Jones argues that the trial court erroneously admitted Deputy Hoover's testimony that dispatch told him that he needed to go to Jones's residence to address a protection order violation. Brief of Appellant at 12. The parties litigated this issue at trial, and the trial court concluded that the statements were not offered for the truth of the matter asserted. RP 110.

"The confrontation clause does not bar the use of testimonial statements for purposes other than establishing the truth of the

matter asserted.” Crawford v. Washington, 541 U.S. 36, 59 n.9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). That rule was referenced by our State Supreme Court in State v. Davis, 154 Wn.2d 291, 301, 111 P.3d 844 (2005) (“further, even testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted”).

The United States Supreme Court later clarified that the Confrontation Clause does not bar the admission of statements that are not offered for the truth of the matter asserted. Williams v. Illinois, 567 U.S. 50, 57, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012) (plurality opinion). The Williams plurality opinion, written by Justice Alito, held that “out of court statements that are related by [an] expert solely for the purpose of explaining the assumptions on which [his expert] opinion rests are not offered for their truth and thus fall outside of the scope of the confrontation clause.” Id. at 57, 77-78.

Prior to the Williams decision, the Washington State Supreme Court noted that:

. . . deciding which statements are testimonial, and which are not, may be difficult until the Supreme Court develops the definition of testimonial further. However, we are not convinced a trial court’s ruling that a statement is offered for a purpose other than to

prove the truth of the matter asserted immunizes the statement from confrontation clause analysis. To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge.

State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). The Mason court noted that the admission of hearsay is reviewed for abuse of discretion. Id. at 922, *citing*, State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Discretion is abused only if the trial court's decision is manifestly unreasonable or is based on untenable grounds. Stenson, 132 Wn.2d at 701. Thus, the Mason court concluded that a decision that a hearsay ruling was reasonable does not preclude deciding the statement was intended to establish a fact and that it was reasonable to expect it would be used in a prosecution or investigation. Mason, 160 Wn.2d at 922. The Court did not further analyze whether the admission of testimony that the Court of Appeals had ruled the trial court did not abuse its discretion by admitting, rather the Court relied on the doctrines of forfeiture and harmless error to uphold Mason's conviction without providing further guidance. Id.

Following the decision in Williams, our State Supreme Court held that Article I, section 22, of the Washington State Constitution does not provide greater protection than the Federal confrontation

clause. State v. Lui, 179 Wn.2d 457, 469, 315 P.3d 493 (2012). In its decision in Lui, our Supreme Court noted that it had stayed the case pending the Williams decision, and later specifically discussed the reasoning of the plurality in Williams, stating, “first, the expert’s reliance on the previous steps in the DNA analysis was not offered to prove the truth of the matter asserted.” Lui, 179 Wn.2d at 467, 477. While the holding of Lui did not specifically adopt the statement in Williams that a statement not made for the truth of the matter asserted does not implicate the confrontation clause, the Court utilized the rationale from Williams to announce a “witness against” test for determining whether statements relied upon by an expert in forming their opinion are testimonial. Lui, at 481-482.

Here, it is clear that the trial court did not abuse its discretion by finding that the statements relayed to Deputy Hoover from dispatch were not offered for the truth of the matter asserted, but rather for the purposes of demonstrating why Deputy Hoover took the actions that he did. RP 110. Jones argued that even under hearsay rules, the statement should not have been admitted relying on State v. Aaron, 57 Wn. App. 277, 279-81, 787 P.2d 949 (1990). In Aaron, an officer testified that dispatch told him the defendant was using a blue jeans jacket to push his way through the bushes.

Id. at 279. Division I of this Court noted the ER 801(c) permits admission of statements that would otherwise be excludable as hearsay when they are not offered for the truth of their contents but for another relevant purpose, but found that the “officer’s state of mind in reacting to information he learned from the dispatcher is not an issue and” was, therefore, not relevant. Id. at 280.

Division I stated, “it seems clear that the State introduced Officer Gough’s testimony solely to suggest to the jury that the jacket containing the watch and jewelry stolen” belong to the defendant. Id. at 281. The Court later stated, “if necessary at trial for the officer to relate historical facts about the case, it would be sufficient for him to report he acted upon information received.” Id. at 281. In this case, the testimony offered at trial did not amount to more than a recitation that the Deputy was responding to information received. Deputy Hoover testified that he was dispatched to 18444 Guava Street Southwest in Rochester and the call was dispatched as a protection order violation. RP 132. Deputy Hoover added that he was told he should be looking for Virginia Norris and George Jones. RP 133. Nothing in the statement relayed through Deputy Hoover suggested who might be violating the protection order. The testimony was not more than relaying that

the Deputy was responding to information received and certainly did not rise to the level of providing detail linking Jones to a crime like the statement in Aaron. The trial court did not abuse its discretion by finding that the statement was not offered for the truth of the matter asserted.

It is also clear that the statement offered was not offered against Jones. The statement from dispatch did not incriminate anyone, it merely informed the jury that Deputy Hoover was looking to speak with Norris and Jones. In considering whether such a statement is testimonial in nature, it is important to remember the purpose of the confrontation clause. The purpose of the Confrontation Clause is to bar “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross examination.” Crawford v. Washington, 541 U.S. at 51.

Only testimonial statements cause the declarant to be a witness within the meaning of the Confrontation Clause. Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); *citing* Crawford, 541 U.S. at 51.

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 to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such 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. Again citing Crawford, the Davis Court defined testimony stating, “testimony, in turn is typically a solemn declaration or affirmation made for the purpose of establishing or proving a fact. Id. at 823, Crawford, 541 U.S. at 51.

The Davis Court adopted four factors for considering whether a statement to law enforcement is testimonial:

(1) was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he 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 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 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.

State v. Koslowski, 166 Wn.2d 409, 418-419, 209 P.3d 479 (2009);
citing, Davis, 547 U.S. at 827.

When viewed in the context of the purpose of the confrontation clause and the test announced in Davis, it is clear the statements which were relayed by Deputy Hoover from dispatch were nontestimonial. The statements stopped short of providing substantive facts against anyone. They simply allowed Deputy Hoover to respond to a possible protection order violation.

“Domestic violence is a serious crime against society” and it is important “to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.” RCW 10.99.010. A report of a possible violation of a no contact order that is presently occurring is relaying an ongoing emergency.² Moreover, the statements allowed to be introduced at trial, viewed objectively, were only those which allowed Deputy Hoover to respond to the ongoing events. There were no statements admitted regarding past events. The nature of the statements relayed from the 911 dispatcher were also not similar to a formal interrogation.

² The Appellant argues the State conceded that there was no ongoing emergency at trial, however, the prosecutor merely acknowledged that she did not believe the 911 call in its entirety was admissible. Brief of Appellant at 12. RP 9.

The statements relayed from Deputy Hoover from dispatch provided no substantive evidence of Jones's guilt. It is clear that this type of testimony is the type of statement that is not offered for the truth of the matter asserted which does not rise to the level of being testimonial, even under a de novo review.

- b. The statements that Norris provided to Deputy Hoover when he responded to Jones's residence were properly admitted as a present sense impression and were nontestimonial in nature for the purposes of the confrontation clause.

The second set of statements elicited at trial that Jones assigns error to involved statements that were made directly to Deputy Hoover by Norris. Those statements were admitted by the trial court as present sense impressions under ER 803(1). RP 114-115. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not hearsay. ER 803(1).

The statement at issue here was clearly made while the events were ongoing. Deputy Hoover noted that Norris appeared "somewhat apprehensive" when she approached him and "seemed a little bit scared to talk to" him. RP 139-140. When Deputy Hoover asked her "Where's Mr. Jones at?" Norris told him "that he had

probably left to Olympia.” RP 140. Deputy Hoover then pointed out that Jones’s car was there and asked which vehicle he had left in, to which Norris lowered her voice and told Deputy Hoover “he’s actually under the house watching us.” RP 140-141. Deputy Hoover noticed that Norris appear nervous to tell him. RP 141. The statements were clearly regarding the events as they occurred and no statements about past events were elicited. The trial court did not abuse its discretion in finding that ER 803(1) applied.

Likewise, applying the test announced in Davis, it is clear that the statement made by Norris to Deputy Hoover was nontestimonial. The speaker was relaying events that were actually occurring, not past events. Given that she appeared nervous, a reasonable listener could conclude that she needed help; it was clear that she was discussing the exigencies of the event, not past facts designed to incriminate Jones. The nature of the questions and the answers were indicative of a desire to address the potential ongoing emergency. The Deputy simply asked about where Jones was. Finally, the statement was relatively informal. Applying the factors in Davis, there was no violation of the confrontation clause of the Sixth Amendment of the Washington State Constitution. The statements were properly admitted.

3. Even if the statements that Deputy Hoover testified regarding were erroneously admitted, the admission of those statements was harmless.

Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error test. Lilly v. Virginia, 527 U.S. 116, 139-140, 119 S.Ct. 1887, 144 L.Ed.2d. 117 (1999); State v. Mason, 160 Wn.2d at 927; State v. Koslowski, 166 Wn.2d at 431. If the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. Koslowski, at 431.

Our State Supreme Court described the test for harmless error in similar circumstances stating, "before a constitutional error can be harmless, the State must show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Wilcoxon, 185 Wn.2d 324, 336, 373 P.3d 224 (2016). In that case, the Court noted that the complained of statements were unimportant to the State's case when compared with the defendant's own admission. Id.

Similarly, in this case, none of the testimony which Jones assigns error to affected an element of the offense that he was convicted of. Starting with the statements made by Norris to Deputy Hoover, the State presented other evidence of Norris' identity in the

form of a certified driver's license, and it was clear that Jones was in fact found under the house by law enforcement. RP 136, 142-143, 146. There was overwhelming untainted evidence, including Jones's own statements that covered the substance of the statements at issue.

As noted above, the statements relayed by Deputy Hoover from dispatch did not contain any substantive facts. Deputy Hoover testified as to the existence of a protection order, which was admitted as an exhibit. RP 147, Ex. 1. Moreover, Deputy Hoover contacted both Norris and Jones at the residence. RP 135, 143-146. There was nothing contained in the statements at issue that addressed any element of the offense, or any issue that was not thoroughly covered by other evidence or testimony.

The statements that Jones assigns error to were unimportant to the verdict in light of the evidence presented and Jones's statements to Deputy Hoover. Beyond a reasonable doubt, any error in the admission of the statements was harmless.

D. CONCLUSION.

The State alleged only one incident of violation of a no contact order. There was no requirement for a unanimity instruction. Even if there were two incidents discussed during the

trial, the prosecutor clearly elected to rely upon the incident at the Rochester residence. The trial court properly admitted statements from dispatch and Norris through Deputy Hoover's testimony. The trial court did not abuse its discretion in deciding that the statements were not inadmissible hearsay, and the statements were nontestimonial. Even if this Court finds the statements were testimonial, the admission of the statements was harmless beyond a reasonable doubt when viewed along side the overwhelming untainted evidence and Jones's admissions to Deputy Hoover.

Respectfully submitted this 18th day of September, 2019.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: September 18, 2019

Signature: Linda H. Olsen

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

September 18, 2019 - 11:20 AM

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