

NO. 78238-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES OHLSON,

Petitioner.

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ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 32112-2-II
Kitsap County Superior Court No. 04-1-00628-5

SUPPLEMENTAL BRIEF OF RESPONDENT

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DATED November 9, 2006, Port Orchard, WA

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I. COUNTERSTATEMENT OF THE ISSUES

1. The State concedes that a per se rule that holds that excited utterances made to law enforcement officers are by definition nontestimonial is no longer tenable because the U.S. Supreme Court in *Davis v. Washington* announced that a new factor to be considered in such cases is the officer's purpose in asking questions of the declarant.

2. Whether the trial court abused its discretion in finding that D.L.'s statements to Officer Gray at the scene of the crime within minutes of nearly being hit by Ohlson's car were excited utterances?

3. Whether Ohlson's Sixth Amendment right to confrontation was violated by the admission of D.L.'s out of court statements when the statements were not testimonial pursuant to *Crawford* and *Davis*?

4. Whether, even assuming for the sake of argument that the trial court erred in admitting D.L.'s statements, any error was harmless?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

James Ohlson was charged by amended information filed in Kitsap County Superior Court with one count of malicious harassment and two counts of assault in the second degree. CP 1-3. After trial, the jury

unanimously found Ohlson guilty of two counts of assault in the second degree. CP 23. The jury acquitted Ohlson of malicious harassment. CP 23.

B. FACTS

At trial, L.F. testified that at approximately 6:00 pm on April 16, 2004, she and a male friend (D.L.) were leaving Lion's Field in Bremerton after a softball practice and were walking to the street to wait for their mothers to come and pick each of them up. RP 62-63, 70. L.F. and D.L. were high school students at Bremerton High School. RP 62-63. As L.F. and D.L. were walking to the street, a driver of a car (later determined to be Ohlson) drove past L.F. and D.L. and yelled, "F you, niggers." RP 63-64. Ohlson was yelling at L.F. and D.L., and was also, "flipping [them] off." RP 64. After driving past L.F. and D.L., Ohlson turned around and drove past them again. RP 65. Ohlson continued to yell "F you, niggers," and was, "speeding and braking." RP 65. Ohlson then drove out of sight and was gone for approximately five minutes. RP 66.

After several minutes, Ohlson returned, and L.F. and D.L. were still on the sidewalk. RP 66. Ohlson drove up onto the sidewalk towards L.F. and D.L., and D.L. and L.F. had to jump out of the way. RP 66-67. L.F. L.F. stated she was scared, and described Ohlson's actions as, "trying to run us over." RP 66, 68. L.F. stated that Ohlson was going "really fast," and estimated his speed at 45 miles per hour. RP 67.

Ohlson then again left the area, and was gone for a period of time while L.F. called the police. RP 67, 69. Ohlson, however, returned one final time after the police had apparently just arrived in the area, but drove away again (without any additional confrontation) before L.F. was able to point him out to the police. RP 67-68.

In addition to the description of the events presented in the testimony of L.F., Robert Klose, a witness who lived nearby, testified about his observations. Mr. Klose lives on a cul-de-sac near Lebo Boulevard and Lions Field. RP 109. At approximately 6:00 pm on April 16th, Mr. Klose was standing outside on his porch. RP 110-11. Mr. Klose saw a male and a female standing at the entrance to Lions Field, and saw a car drive by them. RP 111. Mr. Klose stated that the car came off the road and onto the shoulder and then onto the sidewalk, and the two people had to jump to get out of the way. RP 112. Klose described the driver's action as a "swerve," and stated that the driver had "cut" and went up on the curb. RP 113. He further stated,

He came up on the – yeah. He took a pretty good swipe at them. It was a cut. He just cut. You know what I mean? He had to cut off – the shoulder of the road is as wide as a car. He had to come off the shoulder of the road and then onto the sidewalk and back out. It was a pretty good (indicating), you know, and then gone, you know. It happened so fast, you know.

RP 113-14. Mr. Klose then yelled, "Hey that guy tried to hit you," and the female yelled back, "Did you see that?" RP 112. The car then kept driving for some distance and then turned around. RP 112. Klose then went across the street to talk the two pedestrians, and saw that one of them had a cell phone and were calling the police. RP 112, 114. The car then came back again, and the driver had his hand out of his window and was flipping the male and the female off and cursing at them. RP 112-13.

Bremerton Police Officer Crystal Gray responded to the 911 call from Lion's Field on Lebo, and was at the scene within five minutes of the call. RP 90. Officer Gray contacted L.F. and D.L. and noted that, "they were pretty upset." RP 91. Officer Gray indicated that the two had been waiting for a ride, "so they were pretty shaken up." RP 91. Officer Gray indicated that she spoke with L.F. and D.L., and they told her what happened. RP 91. After the trial court overruled a hearsay objection, Officer Gray was allowed to describe what L.F. and D.L. had told her. RP 91-92. Officer Gray's testimony in this regard consisted of the following,

They told me that they were standing on the sidewalk, they had been waiting for a ride because [L.F.] had just played a softball game.

While there were out there, a vehicle – I'm going to – I have a description. It was an orange Toyota—had gone by and flipped them off and, I quote, "called them fucking niggers" and sped off. The vehicle then came back around and actually swerved up on to the curb trying to hit them. At

least that's what they felt. They had to literally jump out of the way so that they were not hit. This continued, they said, at least four times, where the car went back and forth in front of them, calling them racial names.

RP 92-93.

While Officer Gray was contacting L.F. and D.L., another officer, Matthew Strombach, began looking in the area for the suspect vehicle. RP 96. Officer Strombach looked on Lebo and then began doing sweeps of side streets in the vicinity, but the suspect vehicle was not found. RP 97.

Later that night, at a 10:00 lineup meeting for the graveyard shift, Bremerton police officer Daniel Fatt was informed of the incident and of the existence of probable cause to arrest a suspect. RP 73. Fatt was also given a description of the vehicle and a possible name of the suspect. RP 73. Officer Fatt and Officer Mike Davis then contacted Ohlson at his home. RP 80-81.

When the officers arrived at Ohlson's residence, Officer Davis noticed the suspect vehicle parked in the driveway with a license plate matching the one given to the officers. RP 81. The officers knocked on the door, and eventually spoke with Ohlson. RP 82. The officers informed Ohlson that they were investigating an incident that occurred on Lebo Boulevard earlier in the evening, and asked Ohlson if he was in the area in

his car. RP 83. Ohlson admitted that he had had a problem with two people earlier in the day in that area. RP 76. Ohlson was then detained and advised of his Miranda warnings. RP 83. Ohlson stated he understood his rights and wished to speak with the officers. RP 84.

Ohlson stated that as he was driving by, a black male had flipped him off and Ohlson said he responded by returning the hand gesture and yelling a racial slur. RP 84. Ohlson admitted that he called the male “a nigger” several times, and drove past this person several times. RP 84. Additionally, he admitted he was driving “[k]ind of recklessly to scare them.” RP 84. Ohlson stated he drove past them initially about four times, and on one occasion came within about five feet of the male. RP 85.

After driving past the pedestrians the first several times, Ohlson left the area and went to a convenience store to buy cigarettes and calm down. RP 85. Ohlson then told Officer Davis that he returned to the area and found that the pedestrians were still there. RP 85. Ohlson then again began driving back and forth and yelling racial slurs. RP 85-86. Ohlson also admitted that his intention was “to scare them.” RP 86.

As Ohlson was being taken to jail, he asked Officer Daniel Fatt if he was being arrested for “a felony?” RP 77. When Officer Fatt told him he was, Ohlson responded, “[s]o I got in trouble for what I said?” RP 77.

Officer Fatt told Ohlson that was correct. RP 77. Ohlson then said “[w]ell, I should have made it worth my while. I should have beat them up.” RP 77. After Ohlson was taken out of the police car he reiterated, “I should have beat them up.” RP 77.

Ohlson also testified at trial, and stated that on April 16th he had left his house because he wanted to “go get high.” RP 120. This caused him to feel guilty and made him feel angry with himself. RP 120-21. As he drove by Lions Field, Ohlson saw somebody standing on the street corner, and Ohlson “Flipped them off because [he] was mad.” RP 122. Ohlson admitted that he flipped these people off first, and that he did so “just because they were standing there.” RP 122-23. As he was driving away, Ohlson claimed that he saw the people on the corner flip him off. RP 122. Ohlson then said that he kept looking in his rearview mirror, and it just became more than he could take, and he reached a “boiling point.” RP 122. Ohlson then turned around and drove past them approximately four times. RP 124. On one of these passes he admitted that his tire bumped up on the curb and he continued to drive down the curb with his tire on the sidewalk. RP 124. When asked if he was driving “towards them,” Ohlson stated, “Yeah, I was.” RP 124. When asked if he was intending to scare them, Ohlson stated,

No, I wasn't. I was – I really don't know what I was – I really didn't have any intentions. I was just, you know, just in a fit of rage.

RP 124. Ohlson also admitted that Officer Davis had asked him if he was trying to scare the people on the sidewalk, and Ohlson stated he responded to Davis' question at the time by shrugging his shoulders and stating, "Yeah, I guess." RP 124-25. Ohlson also admitted that he used the word "nigger" that day because he was mad, and admitted he used it more than once that day. RP 126, 128.

Ohlson also testified that after he drove past the pedestrians the first few times, he drove to a convenience store and bought cigarettes. RP 136-37. Ohlson then drove back to Lebo where the pedestrians were, and saw Mr. Klose on the street when he drove by. RP 142. He recalled calling Mr. Klose names and flipping him off. RP 142-43. After this final confrontation, Ohlson drove around for a little while and then finally went home. RP 148. Ohlson stated he was still pretty agitated when he was driving around. RP 148.

III. ARGUMENT

A. THE STATE CONCEDES THAT A PER SE RULE THAT HOLDS THAT EXCITED UTTERANCES MADE TO LAW ENFORCEMENT OFFICERS ARE BY DEFINITION NONTESTIMONIAL IS NO LONGER TENABLE BECAUSE THE U.S. SUPREME COURT IN DAVIS V. WASHINGTON ANNOUNCED THAT A NEW FACTOR TO BE CONSIDERED IN SUCH CASES IS THE OFFICER'S PURPOSE IN ASKING QUESTIONS OF THE DECLARANT.

Ohlson argues that the court of appeals erred in adopting a per se rule that excited utterances cannot be testimonial for purposes of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Petition for Review at 3. The State concedes that the recent decision of *Davis v. Washington*, --- U.S. ---, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), precludes a per se rule regarding excited utterances.

In *Crawford*, the court held that the Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.” *Crawford*, 541 U.S. at 53-54, 124 S. Ct. 1354. Although the court in *Crawford* noted that it was “leaving for another day any effort to spell out a comprehensive definition of ‘testimonial,’” it nevertheless described a core class of testimonial statements that included, inter alia, 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, and statements taken by police officers in the course of interrogations. *Crawford*, 541 U.S. at 51-52, 68, 124 S. Ct. 1354.

In the wake of *Crawford*, “courts across the country grappled with the meaning of testimonial hearsay.” *State v. Slater*, 98 Conn.App. 288, --- A.2d ---, 2006 WL 3025515 at *2 (Conn.App.Ct., Oct. 31, 2006). As the court in *Slater* pointed out, the United States Court of Appeals for the Second Circuit noted that the language of *Crawford* suggested that the determinative factor in determining whether a declarant “bears testimony” is the declarant’s awareness or expectation that his or her statements may later be used at a trial, and the Second Circuit thus reasoned that the Supreme Court would use the reasonable expectation of the declarant as “the anchor of a more concrete definition of testimony.” *Slater*, 98 Conn.App. 288, 2006 WL 3025515 at *2, quoting *United States v. Saget*, 377 F.3d 223, 228-29 (2d Cir 2004), cert denied, 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 821 (2005). As the court in *Slater* stated,

If the reasonable expectation of the declarant, namely, whether the declarant reasonably would expect that his or her responses might be used in future judicial proceedings, is the anchor of a more concrete definition of testimony it seems paradoxical that a statement made without the opportunity to reflect on the consequences of one’s exclamation could be testimonial. The very factors that qualify a declaration as a spontaneous utterance would disqualify it from being deemed testimonial under *Crawford*.

Slater, 98 Conn.App. 288, 2006 WL 3025515 at *4 (internal citations omitted).

In the present case, utilizing the limited framework provided in the *Crawford* opinion, the court of appeals noted that an appellate court analyzes whether excited utterances are testimonial in the same manner that it analyzes whether statements are truly excited utterances. *State v. Ohlson*, 131 Wn. App. 71, 83, 125 P.3d 990 (2005). The court went on to note that it was employing the “restrictive reasoning and definition of ‘excited utterances’ as set forth in *State v Brown*, 127 Wn.2d 749, 758, 903 P.2d 459 (1995):”

The excited utterance exception is based on the idea that:

“under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” The utterance of a person in such a state is believed to be “a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock,” rather than an expression based on reflection or self-interest.

Ohlson, 131 Wn. App. at 83, citing *Brown*, 127 Wn.2d at 758, 903 P.2d 459 (quoting *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992)). The court of appeals further noted that,

As a result, the “key determination is ‘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.’ ”

Ohlson, 131 Wn. App. at 83, citing *Brown*, 127 Wn.2d at 758-59, 903 P.2d 459(citations omitted). The court of appeals thus held that because of this restrictive definition, excited utterances should not be considered as statements that “bear witness,” and that it is not reasonable to regard an excited utterance as “bearing witness” such that the declarant would know that it would be used in a later prosecution. *Ohlson*, 131 Wn. App. at 82-83.

This holding was consistent with similar holdings in other jurisdictions. *See, for instance, United States v. Brun*, 416 F.3d 703,707 (8th Cir. 2005) (spontaneous utterances not testimonial because they are “emotional and spontaneous rather than deliberate and calculated”); *People v. Corella*, 122 Cal.App.4th 461, 469, 18 Cal.Rptr.3d 770 (Cal. Ct. App. 2004) (“it is difficult to identify any circumstances under which a ... spontaneous statement would be ‘testimonial.’ ... [The victim's] statements were ultimately used in a criminal prosecution, but statements made without reflection or deliberation are not made in contemplation of their ‘testimonial’ use in a future trial.”); *People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004) (spontaneous utterance is cry for help and not functionally equivalent to formal pretrial examination). On the other hand, as the *Slater* court pointed out, other jurisdictions required a case-by-case examination to determine whether or not a given spontaneous utterance should be deemed testimonial.

Slater, 98 Conn.App. 288, 2006 WL 3025515 at *4 n.7, citing: *United States v. Brito*, 427 F.3d 53, 61 (1st Cir.2005); *Stancil v. United States*, 866 A.2d 799, 809 (D.C.App.2005); *Lopez v. State*, 888 So.2d 693, 699-700 (Fla.App.2004); *People v. Victors*, 819 N.E.2d 311 (Ill. App. Ct. 2004); *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005); *People v. Diaz*, 798 N.Y.S.2d 21 (N.Y. App. Div. 2005).

After the court of appeals decided *Ohlson*, the United States Supreme Court issued its decision in *Davis v. Washington*, --- U.S. ---, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). In *Davis*, the Supreme Court revisited the Confrontation Clause and further elaborated on the distinction between testimonial and nontestimonial statements in the context of police interrogations. *Davis*, 126 S. Ct. at 2273-74. In *Davis*, the trial court had admitted into evidence a recording of a victim's exchange with a 911 operator. The Supreme Court affirmed, holding that:

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 prosecution.

Davis, 126 S. Ct. at 2273-74. The Court went on to draw distinctions between the interrogations in *Crawford* and *Davis*, noting that the nature of

the questions in *Davis* elicited answers that were necessary to be able to resolve the ongoing emergency. *Davis*, 126 S. Ct. at 2276. “That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon.” *Davis*, 126 S. Ct. at 2276.

In the underlying opinion of *Hammon v. State*, 829 N.E.2d 444, 453, 457 (Ind. 2005), the Indiana Supreme Court had held that an excited utterance by definition was not ‘testimonial’ because such a statement has not been made in contemplation of its use in a future trial, and that responses to initial inquiries by officers arriving at a scene are typically not testimonial. The Supreme Court in *Davis*, however, disagreed, stating,

Although we necessarily reject the Indiana Supreme Court's implication that virtually any “initial inquiries” at the crime scene will not be testimonial, see 829 N.E.2d, at 453, 457, we do not hold the opposite—that no questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that “[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.” Such exigencies may often mean that “initial inquiries” produce nontestimonial statements.

Davis, 126 S. Ct. at 2279 (citations omitted).

The opinion in *Davis*, therefore, appears to require an additional, “primary purpose” test which is, itself, largely a totality of the circumstances

analysis. For this reason, as the *Slater* court points out with regard to the previous debate regarding whether excited utterances were by definition nontestimonial, the United States Supreme Court in *Davis* “appears to have ended the debate by implicitly rejecting a per se rule that excited utterances cannot be testimonial.” *Slater*, 98 Conn.App. 288, 2006 WL 3025515 at *5.

Under the prior test outlined in *Crawford*, the State believes that excited utterances, under the restrictive definition used in Washington, would by definition be nontestimonial as the court of appeals held below. Given the additional factors outlined in *Davis*, however, and the new consideration given to the primary purpose of the law enforcement officers when an interrogation is at issue, the State would concede that a per se rule is no longer tenable in cases involving excited utterances made to law enforcement officers. The statements at issue in the present case, however, were still admissible because the statements were excited utterances and were not testimonial even under the new test announced in *Davis v. Washington*.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT D.L.’S STATEMENTS TO OFFICER GRAY AT THE SCENE OF THE CRIME WITHIN MINUTES OF NEARLY BEING HIT BY OHLSON’S CAR WERE EXCITED UTTERANCES.

Ohlson next claims that the trial court abused its discretion in finding that the statements at issue qualified as excited utterances. Petition for

Review at 5. This claim is without merit because the trial court acted within its discretion in concluding that D.L.'s statements were excited utterances.

The trial court's decision to admit a statement as an excited utterance is reviewed for an abuse of discretion. *State v. Davis*, 141 Wn.2d 798, 841, 10 P.3d 977 (2000). Thus, the ruling of the trial court will not be disturbed unless a reviewing court believes that no reasonable judge would have ruled in the same manner. *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970 (2004).

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). For a statement to qualify as an excited utterance, the following must be shown: "(1) a startling event or condition occurred, (2) the statement was made while the declarant was under the stress of excitement caused by the event or condition, and (3) the statement relates to the event or condition." *Davis*, 141 Wn.2d at 843. This is a factual determination. *State v. Williamson*, 100 Wn. App. at 258. Unavailability of the declarant is not a prerequisite to admission of an excited utterance. ER 803(a)(2).

Ohlson argues that the first and third of these requirements were not met because there was no testimony from D.L. himself to indicate that a startling event occurred from his perspective, and that no evidence was

presented indicating that D.L. was under the influence of the startling event at the time the statements were made. Petition for Review at 5.

The court of appeals below properly rejected these arguments, noting that while Ohlson was correct in asserting that the focus is on the declarant's perception in analyzing whether a startling event has occurred, "the declarant need not testify regarding his perception of the event in order to establish this requirement; indeed a declarant may even recant his statement about the event." *Ohlson*, 131 Wn. App. at 77, citing *State v. Williamson*, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000). As the court of appeals noted, in *Williamson*, the court looked to witness testimony to find that the declarant was upset, highly emotional, and in shock, and considered witness testimony that the declarant's statements were made shortly after the event took place. *Ohlson*, 131 Wn. App. at 77, citing *Williamson*, 100 Wn. App. at 259.

Turning to the facts of the present case, the court of appeals stated,

Likewise, the facts of the instant case amply support a finding that a startling event, the assault, occurred and that D.L.'s statements were made under the influence of the assault. L.F. testified that Ohlson began yelling racial epithets at her and D.L. and then drove up onto the sidewalk where she and D.L. were standing. L.F. testified that it was D.L. who said, "look out" before L.F. saw Ohlson's car very close to them. 1 RP at 68. She stated that they had to "jump out of the way" to avoid being hit and that had Ohlson continued driving on the sidewalk, he would have hit the pole D.L. was leaning against. 1 RP at 66.

Officer Gray testified that she spoke with L.F. and D.L. approximately five minutes after the incident occurred and

that L.F. and D.L. were “pretty upset” and “shaken up.” 1 RP at 91. Additionally, both L.F. and D.L.'s statements were a spontaneous recitation of the facts. The trial court acted within its discretion in concluding that D.L.'s statements were excited utterances.

Ohlson, 131 Wn. App. at 77-78. The above holding correctly applied the law and found that the trial court did not abuse its discretion.

C. OHLSON’S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS NOT VIOLATED BY THE ADMISSION OF D.L.’S OUT OF COURT STATEMENTS BECAUSE THE STATEMENTS WERE NOT TESTIMONIAL PURSUANT TO *CRAWFORD* AND *DAVIS*.

Ohlson next claims that the statements made by D.L. were testimonial and, therefore, the admission of these statements violated Ohlson’s Sixth Amendment right of confrontation because D.L. did not testify at trial. Petition for Review at 6. This claim is without merit because the statements made were not testimonial pursuant to *Crawford* and *Davis*.

As outlined above, although the court in *Crawford* noted that it was “leaving for another day any effort to spell out a comprehensive definition of ‘testimonial,’” it did describe a core class of testimonial statements that included, inter alia, 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, and statements taken by police officers in the course of interrogations. *Crawford*, 541 U.S. at 51-52, 68.

Although not entirely clear, the Court in *Davis* appears to have added an additional layer to the ‘expectation of the declarant’ analysis outlined in *Crawford*, by requiring an examination of the ‘purpose’ behind an interrogation. See, *State v. Alvarez*, 143 P.3d 668, 672 (Ariz. Ct. App. 2006), citing *Davis*, 126 S. Ct. at 2273-74, 2274 n. 1 (Court’s holding in *Davis* emphasized “the primary purpose of the interrogation” as the lynchpin differentiating testimonial from nontestimonial statements, but Court also stated, “even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate”).

Davis was a consolidated decision in two cases: *Davis v. Washington*; and, *Hammon v. Indiana*. *Davis*, 126 S. Ct. at 2270, 2272. *Davis* proper concerned a victim’s out-of-court declarations to a 911 operator. *Davis*, 126 S. Ct. at 2270-2271. The victim told the operator that her former boyfriend, whom she identified in the call, was “here jumpin’ on me again.” *Davis*, 126 S. Ct. at 2271. “As the conversation continued, the operator learned that Davis had ‘just r[un] out the door’ after hitting [the victim], and that he was leaving in a car with someone else.” *Davis*, 126 S. Ct. at 2271. (first set of brackets by *Davis*). The victim’s statements to the operator were both volunteered and in response to the operator’s questions. *Davis*, 126 S. Ct. at 2271.

In *Hammon*, police went to a house on a domestic-disturbance call, where they found Hershel Hammon's wife "alone on the front porch, appearing somewhat frightened, but she told them that nothing was the matter." *Davis*, 126 S. Ct. at 2272. The officers took Hammon's wife back into the house, where they saw Hammon and signs of a fight. Hammon attempted to assure the officers that although "he and his wife had been in an argument," everything was all right. *Davis*, 126 S. Ct. at 2272. The officers then took Hammon's wife aside and, without Hammon being permitted to be present, asked her to tell them what had happened. *Davis*, 126 S. Ct. at 2272. "After hearing [Hammon's wife's] account, the officer 'had her fill out and sign a battery affidavit,' " in which she further described the assault. *Davis*, 126 S. Ct. at 2272.

The Court in *Davis* reiterated that the Confrontation Clause "bars '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,' " and that the critical focus is on whether the out-of-court declarations are " 'testimonial statements'" because "[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis*, 126 S. Ct. at 2273 (*quoting Crawford*, 541 U.S. at 51). Resolving some of the ambiguity left by

Crawford, Davis set out the following factors to be considered in cases involving interrogation:

Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present case to hold as follows: 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, 126 S. Ct. at 2273-2274. Applying that rule to the two cases before it, *Davis* held that the nature of the declarations made by the victim in *Davis* to the 911 operator, and the nature questions that were asked of the victim, when viewed objectively, were necessary to resolve the present emergency rather than to simply learn what had happened in the past. *Davis*, 126 S. Ct. at 2276. In addition, the court held that this was “true even of the operator’s effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon.” *Davis*, 126 S. Ct. at 2276. The Court thus held that the circumstances objectively indicated that that the primary purpose was to enable police assistance to meet an ongoing emergency; the victim simply was not “acting as a witness” and was not “testifying,” and what she said was not a “weaker substitute for

live testimony” at trial. *Davis*, 126 S. Ct. at 2276-2277 (citations omitted). The Court concluded that the witness’s emergency statement was not analogous to courtroom testimony because, “No ‘witness’ goes into court to proclaim an emergency and seek help.” *Davis*, 126 S. Ct. at 2277.

In *Hammon*, however, the situation was different. There, the out-of-court declarations given to the police officers were made after the emergency had passed and were a recording of past events rather than information pertinent to an assessment of a potential ongoing emergency, and the testifying officer expressly acknowledged this fact. *Davis*, 126 S. Ct. at 2278. In addition the victim herself indicated that things were fine and that there was no immediate threat to her person. *Davis*, 126 S. Ct. at 2278. The officer, therefore, was not seeking to determine “what is happening” (as was the case in *Davis*), but rather “what happened.” *Davis*, 126 S. Ct. at 2278. The court pointed out that the interrogation of the victim was conducted in a separate room, away from her husband who was forcibly prevented from participating in the interrogation, and that the officer was noting the victim’s replies for use in what he described as his “investigation.” *Davis*, 126 S. Ct. at 2278. As such, the statements here were a “substitute for live testimony” because the situation was similar to a direct examination of a witness. *Davis*, 126 S. Ct. at 2278.

The *Davis* court, however, carefully noted that the determining factor was not the fact that in *Hammon* the police had arrived on the scene as opposed to *Davis* where the facts involved only a 911 call. *Davis*, 126 S. Ct. at 2279. In addition, the court pointed out that the victim in *Hammon* was not making a “cry for help,” nor giving information enabling the officers to end a threatening situation. *Davis*, 126 S. Ct. at 2279. The victim, rather, had stated that everything was fine and the description of events that she later gave occurred at “some remove in time from the danger she described.” *Davis*, 126 S. Ct. at 2278-79. The Court, therefore, specifically stated that it was not holding that “no questions at the scene will yield nontestimonial answers.” *Davis*, 126 S. Ct. at 2279. Rather, the court noted that,

We have already observed of domestic disputes that “[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.” *Hiibel*, 542 U.S., at 186, 124 S. Ct. 2451. Such exigencies may often mean that “initial inquiries” produce nontestimonial statements. But in cases like this one, where [the victim’s] statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were “initial inquiries” is immaterial.

Davis, 126 S. Ct. at 2279.

There is a large middle ground, therefore, between the facts of *Davis* and the facts of *Hammon*, involving situations (such as the one in the present

case) where law enforcement has contacted the victim, but has not yet located a potentially violent suspect who remains at large. Other courts have addressed such situations post-*Davis*.

In *State v Rodriguez*, 722 N.W.2d. 136 (Wis. Ct. App. 2006), for instance, a police officer went to the victim's house in response to a report of a man beating a woman. *Rodriguez*, 722 N.W.2d at 140. The officer arrived within minutes, and found the excited victims (a woman and her seven-year-old child) who both described having been assaulted by the defendant. *Rodriguez*, 722 N.W.2d at 140. The defendant, however, was not located until the following day. *Rodriguez*, 722 N.W.2d at 141. The court discussed the *Crawford* tests (specifically, the third test: whether the statement was made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial) and the *Davis* tests, and applied them to the facts at hand. *Rodriguez*, 722 N.W.2d at 145-46. The court stated that,

Victims' excited utterances to law-enforcement officers responding to either an on-going or recently completed crime, serve, as with the 911-call, a dual role-the dichotomy between finding out what is happening as opposed to recording what had happened, which, as we have seen, was recognized in *Davis*. See, e.g., *Davis*, 126 S. Ct. at 2278; see also *State v. Parks*, 211 Ariz. 19, 116 P.3d 631, 639 (Ariz.Ct.App.2005) ("Whether an excited utterance will be testimonial, thus, depends on the circumstances existing when the statement was made."). Insofar as a victim's excited utterances to a responding law-enforcement officer encompass injuries for

which treatment may be necessary, or reveal who inflicted those injuries, which may facilitate apprehension of the offender, they serve societal goals other than adducing evidence for later use at trial. *Davis*, 126 S. Ct. at 2277. Several of our recent, albeit pre-*Davis*, decisions are consistent with this common-sense recognition.

Rodriguez, 722 N.W.2d at 146. After a brief discussion of these pre-*Davis* cases, the court then court then went on to hold as follows,

There is nothing in the record here that indicates that what Rodriguez does not dispute were “excited utterances” by [the victims] when the officers first spoke with them were motivated by anything other than their desire to get help and secure safety. Moreover, given their contemporaneously endured trauma it cannot be said that objectively they said what they said to the officers with a conscious expectation that their words would somehow have the potential for use in court against Rodriguez. It also cannot be said that, objectively, the officers intended to record past activities rather than assess the then-current situation. Moreover, there is nothing in the Record that indicates that anything either [victim] told the officers during that first encounter was in response to any sort of structured interrogation to questioning beyond simple inquiries. Simply put, Officers Sterling and Kurtz did not go to the [the victims’] house looking for evidence with which to prosecute Rodriguez, and, after they arrived their focus was not on building a case against him but, rather, trying to ensure the safety of [the victims], and other members of the community. Thus, those out-of-court declarations were not testimonial.

Rodriguez, 722 N.W.2d at 147-48. The court also found that statements made the following day when the officers returned to the house were not testimonial, as the defendant had returned as was hiding in the house and thus

posed an ongoing threat and danger to the victims. *Rodriguez*, 722 N.W.2d at 148.

In *United States v. Clemmons*, 461 F.3d 1057 (8th Cir. 2006), an officer was dispatched to an address and, when he arrived, found the victim lying on the ground with a gunshot wound to his leg. *Clemmons*, 461 F.3d at 1058-59. The officer approached the victim and asked him who had shot him, and the victim responded by stating that the defendant had shot him and that the defendant had also attempted to rob him a month earlier. *Clemmons*, 461 F.3d at 1059. The defendant, however, was not located and arrested until several weeks later. *Clemmons*, 461 F.3d at 1059. Prior to trial, the victim was murdered, and the defendant made a pretrial motion to suppress the victim's statements to the officers, but the trial court denied the motion. *Clemmons*, 461 F.3d at 1059-60.

On appeal, the *Clemmons* court discussed *Crawford* and *Davis*, and noted that the nature of the questions asked in *Davis* elicited answers that were necessary to be able to resolve an ongoing emergency, including the operator's "effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon." *Clemmons*, 461 F.3d at 1060, *citing Davis*, 126 S. Ct. at 2276.

The *Clemmons* court, therefore, held that that nature of the questions asked by the officer in *Clemmons* and the responses given were similar to the questions asked by the 911 operator in *Davis*, and that the victims statements were not testimonial because the circumstances, viewed objectively, indicated that the primary purpose of the officer's questions was to enable him to "assess the situation and to meet the needs of the victim," even though one of the officer's stated purposes was to try to figure out who had shot the victim. *Clemmons*, 461 F.3d at 1060.

Similarly, in *State v. Alvarez*, 143 P.3d 668, 669 (Ariz. Ct. App. 2006), an officer saw the victim staggering on a roadway, and saw that the victim was bleeding badly from his face. The officer stopped and asked the victim what his name was and what had happened. *Alvarez*, 143 P.3d at 669. The victim eventually stated that three men had jumped him and taken his car. *Alvarez*, 143 P.3d at 669. The defendant was not present at the scene, but was later arrested at the Mexican border. *Alvarez*, 143 P.3d at 669. On appeal, Alvarez argued that the officer's testimony concerning the victim's "testimonial" statements violated the Confrontation Clause because the victim did not testify. *Alvarez*, 143 P.3d at 670. Alvarez further argued that the statements were not made during an ongoing crime or crisis, but rather, were made hours after the emergency, and that the officer's questions were designed to produce information useful in a later trial and were solely geared

to discover what had happened in the past, and that the victim's answers constituted a brief narrative report of a past crime and did not discuss medical treatment or injuries. *Alvarez*, 143 P.3d at 672.

The *Alvarez* court discussed *Crawford* and *Davis*, and held that, viewed objectively, the circumstances under which the victim made the statements indicated that the officer's primary purpose was to enable police assistance to meet an ongoing emergency rather than to establish or prove past events potentially relevant to later criminal prosecution. *Alvarez*, 143 P.3d at 673. The court noted that while it is possible that an investigating officer's asking a victim at the scene "what happened" might often lead to testimonial answers, it cannot be said that such a question always seeks and results in a testimonial response. *Alvarez*, 143 P.3d at 673-74, citing *Vinson v. State*, --- S.W.3d ---, 2006 WL 2291000, at *7 (Tex.Crim.App., Aug. 10, 2006) (statements by domestic assault victim, including her identification of assailant, in response to investigating officer's question, "what happened," deemed nontestimonial; "the deputy's asking only what had happened was tantamount to his having asked whether an emergency existed or whether [the victim] needed assistance"). The *Alvarez* court, therefore, disagreed with the defendant's argument that the statements were testimonial and that there was not an ongoing emergency, stating,

Although the criminal activity that resulted in [the victim's] injuries and the ensuing charges against Alvarez had ended, the emergency that those events set in motion was very much ongoing. Under these circumstances, “[a]ny reasonable observer would understand that [the victim] was facing an ongoing emergency and that the purpose of the interrogation was to enable police assistance to meet that emergency.”

Alvarez, 143 P.3d at 674, quoting *Clemmons*, 461 F.3d at 1060-61. The court, therefore, held that there was no violation of the Confrontation Clause.

Alvarez, 143 P.3d at 674.

In the present case, Officer Gray made contact with D.L. and L.F., but, as in *Clemmons*, *Alvarez*, and *Rodriguez*, the Defendant was not located until later, and was thus still at large at the time the statements were made to the officer. As Ohlson was still at large and presented a danger not only to the victims in this case but to the community at large, the emergency was still ongoing. The facts in the present case bolster this conclusion, as Ohlson had previously left the scene only to later return, and certainly could have done so again. RP 66-67, 69, 142. In addition, Ohlson himself admitted that after he left the scene the final time he continued to drive around in an “agitated” state. RP 148.

As Ohlson had not been apprehended by the police, the situation was still ongoing, and is, therefore, distinguishable from the facts of *Hammon*, where the police were present with both the suspect and the victim were in

control of all parties involved to some degree. This element of police control, however, was absent from the present case as well as *Clemmons*, *Rodriguez*, and *Alvarez*, and the police in each case therefore needed to ask some basic questions in order to assess the situation, meet the needs of the victims and the communities, and “establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon.” *Clemmons*, 461 F.3d at 1060, *citing Davis*, 126 S. Ct. at 2276. As in *Rodriguez*, it cannot be said that, objectively, Officer Gray intended to record past activities rather than assess the then-current situation, and there is nothing in the record to indicate that D.L.’s statements were in response to any sort of structured interrogation beyond simple inquiries. *See, Rodriguez*, 722 N.W.2d at 147-48. Furthermore, as with the officer in *Rodriguez*, Officer Gray did not go to the scene looking for evidence with which to prosecute Ohlson, but rather was trying to assess the situation and ensure the safety of the victims and the community. *See, Rodriguez*, 722 N.W.2d at 146. In the present case, and as the court held in *Rodriguez*, the victim’s excited utterances to the responding officer which described the situation and identified the suspect was necessary to “facilitate apprehension of the offender,” and thereby served “societal goals other than adducing evidence for later use at trial.” *Rodriguez*, 722 N.W.2d at 146, *citing Davis*, 126 S. Ct. at 2277. This was especially true in the present case where the officers were

presented with a situation where a suspect was still at large after repeatedly driving by juvenile victims and yelling racial slurs at them as well as driving his car onto the sidewalk at the juveniles with no apparent prior motivation.

For all of these reasons, the “purpose” behind Officer Gray’s brief discussion with the victims in the present case more closely mirrors the factual situations in *Davis* proper, *Clemmons*, *Rodriguez*, and *Alvarez*, where the suspect was still at large and posed a danger to the victims and their communities, thus requiring a brief inquiry by the officers in order to assess the situation and identify the suspect. As in the above mentioned cases, this limited inquiry immediately after the commission of the crime, and the court’s admission of the victim’s excited utterances, did not violate the Confrontation Clause and was distinguishable from the facts in *Hammon* where the victim had denied that there was an ongoing emergency, the police had control over the suspect, and the officers admitted that their purpose was to investigate what had happened in the past. For all of these reasons, the trial court did not err in admitted the excited utterances in the present case.

D. EVEN ASSUMING FOR THE SAKE OF ARGUMENT THAT THE TRIAL COURT ERRED IN ADMITTING D.L.’S STATEMENTS, ANY ERROR WAS HARMLESS.

A violation of the confrontation clause is subject to harmless error analysis. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). If a

court finds a manifest constitutional error was committed, in determining if the error was harmless, the “overwhelming untainted evidence” test will be used. *State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004). Under this test, the evidence untainted by the error is examined to determine if the evidence is “so overwhelming that it leads necessarily to a finding of guilty.” *Barr*, 123 Wn. App. at 384. If so, then the error is harmless. *See State v. Palomo*, 113 Wn.2d 789, 798-799, 796, 783 P.2d 575 (1989).

In this case, the untainted evidence necessarily led to a finding of guilt. First, L.F. testified that Ohlson repeatedly drove back and forth in front of L.F. and D.L. in a dangerous manner, was yelling racial slurs and profanities, and drove at the juveniles causing them to have to jump out of the way to avoid being hit and causing L.F. to believe that Ohlson was trying to run them over. *See*, RP 63-68. Mr. Klose confirmed this account, and saw Ohlson come up onto the sidewalk and “take a pretty good swipe at them.” RP 113-14. Klose then yelled to the kids, “Hey, that guy tried to hit you.” RP 112. In addition, Olson admitted to the officers that he had drove past the kids numerous times and yelled at them, and had drove “kind of recklessly to scare them.” RP 85. He also admitted that his intention was “to scare them.” RP 86. On the stand Ohlson confirmed that he had driven towards the kids and was in an angry state of mind and was in a “fit of rage.” RP 124. Ohlson

also admitted that when asked if his intention was to scare the kids, he had told the officer, "Yeah, I guess." RP 124-25.

All of this untainted evidence leads to but one conclusion: that Ohlson, while driving a motor vehicle, drove at the victims and intended to put both L.F. and D.L. in reasonable apprehension of bodily harm. Any potential error in the admission of D.L.'s statements to Officer Gray was, therefore, harmless error.¹

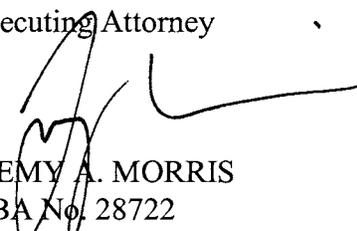
IV. CONCLUSION

For the foregoing reasons, Ohlson's conviction and sentence should be affirmed.

DATED November 9, 2006.

Respectfully submitted,

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¹ In addition, the actual excited utterances admitted at trial were not parsed out in any way that would enable the jury to attribute any specific statement to D.L. as opposed to L.F. Rather, Officer Gray only testified as to what "they" told her. RP 92-93. As L.F. testified at trial, there is no Confrontation Clause issue regarding excited utterances L.F. made. As the jury, therefore, was not provided with any statement that it could specifically attribute to D.L. as opposed to L.F., and as L.F. had testified at trial, any potential error in admitting the statements at issue was harmless and essentially cumulative.