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NO: 22023-1-III

COURT OF APPEALS DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
Plaintiff/Respondent

v.

DUANE J. KOSLOWSKI  
Defendant/Appellant

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SUPPLEMENTAL BRIEF OF RESPONDENT REGARDING  
*DAVIS V. WASHINGTON*

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## I. ISSUES PRESENTED

1. Were the statements made to the responding police officers by victim Violet Alvarez testimonial under the ruling of *Davis v. Washington*?
2. If the statements were nontestimonial, do they contain “adequate indicia of reliability” as set forth by the court in *Ohio v. Roberts*?
3. If the statements were testimonial, was their admission nevertheless harmless error?

## II. ANSWERS TO ISSUES PRESENTED

1. The excited utterances made to Officer Wentz and Officer Kryger were not testimonial under the reasoning of the court in *Davis v. Washington*.
2. The nontestimonial statements contained “adequate indicia of reliability” as set forth by the court in *Ohio v. Roberts* because, as excited utterances, they are a firmly rooted hearsay exception.
3. Even assuming that they were testimonial, the introduction of the statements were harmless error.

### III. STATEMENT OF THE CASE

On November 13, 2002, Yakima Police Officers Nolan Wentz and Michael Kryger responded to a reported home invasion robbery at 1103 South 34<sup>th</sup> Avenue, Yakima, Washington. (01-29-2003 RP 320-21, 330-31). When Sergeant Wentz first arrived he went to the front door and observed through a window that the victim, Ms. Alvarez, was on the telephone. (01-29-2003 RP 321). Sergeant Wentz got her attention and she put down the phone and opened the door for him. (01-29-2003 RP 321-22). Ms. Alvarez was looking all about, and that she was extremely emotional. (01-29-2003 RP 322). She appeared to be very frightened. She was shaking, with a pale look, and her voice was very shaky. (01-29-2003 RP 332).

Ms. Alvarez directed Sergeant Wentz inside the doorway where there was a couch to the left, and some white wire ties lying on the ground. The ties are like those used by police as temporary handcuffs. (01-29-2006 RP 322). Ms. Alvarez indicated that those were used to bind her hands together, and she pointed to the floor where she had been lying. (01-29-2006).

Ms. Alvarez reported that she was outside her home unloading groceries from her car when she saw a dark-colored foreign car drive by. The car slowed, stopped, and then backed up toward her house. (01-29-2003 RP 323). Three men got out of the foreign car and approached her. One of the three men took out a gun and pushed it into her side and in English, directed her to go into her house. (01-29-2003 RP 323).

After entering her residence, Ms. Alvarez was forced to the floor, where her hands were tied with flexible wire ties and her face was covered with a T-shirt. (01-29-2003 RP 324). Ms. Alvarez believed the three men were Hispanic because they spoke to each other in Spanish, although the gunman first spoke to her in English. (01-29-2003 RP 323-24, 327). She did not see the gunman's face because the hood of his sweatshirt was covering his face. (01-29-2003 RP 333). As she lay tied up on the floor, the three men ransacked her residence. (01-29-2003 RP 325-26).

During the robbery, one of the men took her ring off her finger, and then he checked her other hand for any jewelry. (01-29-2003 RP 335). One of the robbers asked Ms. Alvarez, as he dumped the contents of her purse out, whether she had any money in her checkbook. (01-29-2003 RP 335). She had \$20 or \$25 in her checkbook, which the robbers took. (01-29-2003 RP 336). After she heard the men leave, Ms. Alvarez was able to wiggle her hands free and call 911. (01-29-2003 RP 324, 337).

When the officers arrived, they observed that Ms. Alvarez's grocery bags had been dumped out, and that the contents of her purse had been spilled onto the floor. (01-29-2003 RP 325-26, 335-36). Ms. Alvarez advised them that the robbers took her wallet, cash, credit cards, checkbook, jewelry box, miscellaneous jewelry, a VCR or DVD player, and the keys to her house and car. (01-29-2003 RP 337). Officer Kryger noticed that the robbers had ransacked the master bedroom. They had gone through the dresser drawers, dumping the contents on the floor. They had picked up the mattress and set it off to the side, apparently to look underneath it. Ms. Alvarez pointed out that there was a pillowcase, described as yellow with an orange flower print, missing from the bed. (01-29-2003 RP 338, 353).

### III. ARGUMENT.

1. The excited utterances made to Sergeant Wentz and Officer Kryger were not testimonial under the reasoning of the court in *Davis v. Washington*.

In *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004), the Supreme 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 v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

More recently the Supreme Court decided the case of *Davis v. Washington*, 126 S. Ct. 2266, 165 L. Ed. 2d 224, 2006 U.S. LEXIS 4886, 74 U.S.L.W. 4356 (2006). In that case the Supreme Court further defined the perimeters of what is meant by "testimonial" and "nontestimonial" in *Crawford*. *Davis* at 158 L. Ed. 2d at 203. The basic facts stated by the court were that in *Davis*, a 911 operator ascertained from Michelle McCottry that she had been assaulted by her former boyfriend, the petitioner Davis, who had just fled the scene. McCottry did not testify at Davis's trial for felony violation of a domestic no-contact order, but the court admitted the 911 recording despite Davis's objection.

In *Hammon*, a companion case, the facts were that the police responded to a reported domestic disturbance at the home of Amy and Hershel Hammon. [There is no indication in the Supreme Court's opinion or that of the Indiana appellate courts as to who called the police]. Amy Hammon told them that nothing was wrong, but she did give the police officers permission to enter the residence. Once inside, one officer kept petitioner Hershel in the kitchen while the other interviewed Amy elsewhere and had her complete and sign a battery affidavit. Amy did not appear at Hershel's bench trial for domestic battery

In its analysis of the Confrontation Clause, the *Davis* court stated:

In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), we held that this provision 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.” A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase “testimonial statements.” Only statements of this sort cause the declarant to be a “witness” within the meaning of the Confrontation Clause. See *id.*, at 51. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

*Davis*, 126 S. Ct. at 2273.

In determining the perimeters of the Confrontation Clause, the court in *Davis* stated that, “statements are nontestimonial [and not subject to the Confrontation Clause] when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of 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.” 126 S. Ct. at 2274.

The court recognized the changing nature of police contact with citizens by stating:

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance

cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," 829 N. E. 2d, at 457, once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*, 541 U.S., at 53, n. 4, 124 S. Ct. 1354, 158 L. Ed. 2d 177. This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *New York v. Quarles*, 467 U.S. 649, 658-659, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. Davis's jury did not hear the *complete* 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.

*Davis*, 126 S. Ct. at 2278.

Nothing in the *Davis* opinion changes the law regarding law enforcement's response to emergency situations. Since the Supreme Court's decision in *Davis*, other appellate courts have examined the issue of whether certain hearsay statements were testimonial or not within the

context of the facts similar to the facts to the case at hand. In *State v. Reardon*, 2006 Ohio 3984, P14-P16 (Ohio Ct. App. 2006), a post *Davis v. Washington* case, the court was faced with a set of facts not unlike those in the present case. There the court stated:

[P14] The rule established by *Davis* is: "Statements are non-testimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. *Id.* (Emphasis added). Where the purpose of the questioning is to "prove past events" the statement is testimonial. *Id.* at 2274.

[P15] The court also established three factors to consider in determining whether a statement fits this definition. *Id.* at 2277. The statement is non-testimonial where it is made to identify current conditions. *Id.* at 2276. The key here is the emergency must be ongoing. If the danger is ongoing, the statement is more likely to be non-testimonial. *Id.* Second, the officer must tailor questions to resolving the emergency rather than gathering "the facts" about the emergency as it passed. *Id.* Questions designed to promote safety in an ongoing emergency are non-testimonial as a matter of public policy because officers need to know the character of the individuals they are pursuing. *Id.* Finally, the formality of the questioning is an indicator. The emotional state of the declarant, the tranquility of the environment, and the relative safety of the parties involved all shed light on the testimonial nature of the statement. *Id.* at 2277. The more chaos in the situation, the less likely the statement is testimonial. *Id.* Where a statement meets this test, it is non-testimonial hearsay and its admission into evidence is proper if there is an applicable exception to the normal hearsay rule. *Id.* at 2277.

[P16] When subjected to the *Davis* test, Bair's statement is clearly non-testimonial. The questions by Officer Haynes concerned an ongoing emergency. As Officer Haynes and his partner arrived on

the scene, they saw suspects fleeing. Silva's 9-1-1 call specified the home had been invaded, but he could not pinpoint exactly how many suspects there were, or how heavily armed they were. The officers needed to ensure their own safety and the safety of the rest of the neighborhood by eliciting information from the victims. Nothing in the record indicates Officer Haynes' directed his questions to any goal other than this. Thus, Bair's statement meets the first prong of the test.

[P17] The record is unclear as to exactly what questions were asked, and when Bair blurted out her statement. What is clear from the record is Officer Haynes was actively relaying any information he could glean from the victims over his portable radio. He would relay the information to other officers responding to the call, *as the victims answered*. The United States Supreme Court points out in *Davis*, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence." *Id.* at 2277. The record demonstrates this is one of those situations and Officer Haynes' actions should not be second-guessed. Thus, Bair's statement meets the second prong of the test.

[\*P18] Finally, the police questioning does not meet the required level of formality to produce a testimonial statement. Officer Haynes initially interviewed the victims in the kitchen where the invasion started. He described the scene as emotionally charged and "chaotic." At the point when Bair blurted out her statement, Officer Haynes described her as "hysterical." He further noted that she never really seemed to calm down. The agitation of the declarant, the lack of tranquility in the kitchen, and the insecurity of knowing there are armed, violent men loose in the neighborhood all point to the conclusion that Bair's statement meets this prong of the test.

The court in *Reardon* held that Bair's statement to Officer Haynes was nontestimonial and did not trigger the Confrontation Clause. Its primary purpose was to assist police in resolving an ongoing emergency,

and as an excited utterance, was admissible under the normal rules of evidence. *Reardon*, 2006 Ohio 3984, P19.

In *United States v. Clemmons*, 461 F.3d 1057, (8th Cir. 2006), the court was presented with the issue of whether the excited utterances in that case were testimonial or nontestimonial according to the standards set for in *Crawford* and *Davis* as noted above. In that case, two Kansas City, Missouri police officers, Steven Lester and Lawrence Cory, were dispatched to a residence. When they arrived they found Jamil Williams lying on the ground with a pool of blood gathering on his right leg. Officer Lester testified that he asked Williams who had shot him, Williams answered that Clemmons had shot him and stole his Mac-11 pistol. In deciding the issue of the applicability of the Confrontation Clause to this testimony, the 8<sup>th</sup> Circuit Court found that the Supreme Court in *Davis* drew

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." *Id.*

Viewing the facts in the light of the Supreme Court's decision in *Davis*, we conclude that Williams's statements to Officer Lester were nontestimonial. The circumstances, viewed objectively, indicate that the primary purpose of Lester's questions was to

enable him to assess the situation and to meet the needs of the victim. Officer Lester testified that he had parked his vehicle several houses away from the address to which he was dispatched "due to the fact that there could be a party armed." Sentencing Tr. at 15. When the officers arrived at the scene, Williams was lying in front of a neighbor's house, suffering from multiple gunshot wounds. Officer Lester further testified that his purpose in speaking to the victim was, "to investigate, one, his health to order him medical attention and, two, try to figure out who did this to him." Sentencing Tr. at 16-17. Any reasonable observer would understand that Williams was facing an ongoing emergency and that the purpose of the interrogation was to enable police assistance to meet that emergency. Accordingly, because Williams's statements were nontestimonial, they do not implicate Clemmons's right to confrontation.

*Clemmons*, 461 F.3d 1057, 1061 (8th Cir. 2006). See also *Frye v. Indiana*, 850 N.E.2d 951 (2006)(court held girlfriend's statement to responding police officers that defendant was armed with two guns after assault on third person found to be nontestimonial under *Davis*).

As the court stated in its opinion in this case, the facts of the case are more like a call for emergency assistance than merely reporting a crime. This court held that "we view the other circumstances surrounding her declarations as akin to the situation in *Mason*. She called 911 for help, and Officer Wentz arrived almost immediately, while she was still on the telephone. Officer Wentz testified Ms. Alvarez was very frightened and was hesitant even to return to the garage, where the perpetrators had first contacted her, without him being right there. He stated that when a vehicle

went by, she turned and got a wide-eyed look. She made her statements while still very upset, shaking, and with tears in her eyes. All of this indicates that Ms. Alvarez was seeking the protection of the police and was not thinking of the future prosecution of the crimes against her. Nor does it appear that Officer Wentz's purpose was to procure testimonial evidence. He stated that his questions of Ms. Alvarez did not take long-he [Officer Wentz] "*was trying to get as much information as I could to give to the other officers in the field.*" RP (Jan. 13, 2003) at 113." *State v. Koslowski*, no. 22023-1-III, pg. 31-32.

In *Leavitt v. Arave*, 371 F.3d 663 (9<sup>th</sup> Cir. 2004), also cited by this court in its opinion, the petitioner was a state inmate appealing a death sentence for the murder of Danette Elg. The night before her murder, Ms. Elg had been severely frightened and shaken when a prowler tried to enter her home. She called 911 and the police came, but they found nothing other than signs of forced entry and a petrified young lady. She told the police that she thought Leavitt was the culprit because he had tried to talk himself into her home earlier that day, but she had refused him entry.

The *Leavitt* court found that the victim's statements to the responding police officers were properly admitted as excited utterances. *Id.* at 683. The court further found that the victim's statements were

“nontestimonial” under a *Crawford* analysis. The court reasoned that the victim’s statements to the police, that she called to her home, fall within the compass of the examples given in *Crawford*. She, not the police, initiated their interaction. She was in no way being interrogated by them, but instead sought their help in ending a frightening intrusion into her home. *Id.* at 683 n.22. The court concluded that the admission of her hearsay statements against the defendant did not implicate “the principal evil at which the Confrontation Clause was directed: . . . The civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.” *Id.* at 684.

Like the victim in *Leavitt*, the victim in the case at hand, Violet Alvarez, called the police for help. Similarly, both victims were terrified that their attacking might return. In the pretrial hearing on the admission of the statement, Officer Wentz testified that Ms. Alvarez was very hesitant just to go out in the garage without the police being right with her. (01-13-2003 RP 114). And every time a vehicle started to go by that area, she’d turn, get wide-eyed look, to see if the vehicle [with the robbers] was going by. (01-13-2003 RP 114). Ms. Alvarez was not being interrogated by the police, in fact they tried to calm her down. (01-13-2003 RP 114). When the police first arrived, Ms. Alvarez was very upset, shaking, with tears in her eyes. (01-13-2003 RP 112).

It is important to look at the facts that are necessary for the emergency response. The fact that the subjects that robbed Ms. Alvarez were armed, what their description was, and what type of vehicle they were in, all having to do with community safety and the officers role of community caretaking, so that other law enforcement officers can take the necessary precautions if they came across these individuals. These three facts were immediate and continuing, not only for the safety of the public, but also that of Ms. Alvarez and the law enforcement officers themselves.

As the *Davis* court reiterated "officers 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, 159 L. Ed. 2d 292. Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements." *Davis*, 126 S. Ct. at 2279.

2. The nontestimonial statements were admissible since they are excited utterances and are firmly rooted hearsay exception.

Although Washington courts have not addressed it, other courts have held that *Roberts* is still valid when addressing nontestimonial hearsay. See e.g. *United States v. Saget*, 377 F.3d 223, 227 (2nd Cir. 2004). If the statement is nontestimonial, the court determines whether

the statement qualifies under a firmly rooted exception to the hearsay rule.

*State v. Moses*, 129 Wn. App. 718, 723, 119 P.3d 906 (2005).

Here, the trial court found after a pretrial hearing, that the statements made by Violet Alvarez were excited utterances. (01-13-2003 RP 119-121). The excited utterance hearsay exception is a firmly rooted exception to the hearsay rule. *State v. Woods*, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001). The trial court did not err in admitting the nontestimonial evidence.

3. Even assuming that they were testimonial, the introduction of the statements were harmless error.

Other testimony provided the necessary evidence both to supply identification of the robber and the fact that a gun was used in the robbery. Furthermore, the testimony of Sergeant Wentz was based not only on what Ms. Alvarez stated to him, but also as to his observation. Sergeant Wentz testified that when he arrived Ms. Alvarez was looking all about, and that she was extremely emotional. (01-29-2003 RP 322).

Ms. Alvarez directed Sergeant Wentz inside the doorway where there was a couch to the left, and some white wire ties lying on the ground. The ties are like those used by police as temporary handcuffs. (01-29-2006 RP 322). When the officers arrived, they observed that Mrs. Alvarez's grocery bags had been dumped out, and that the contents of her

purse had been spilled onto the floor. (01-29-2003 RP 325-26, 335-36). Officer Kryger noticed that the robbers had ransacked the master bedroom. They had gone through the dresser drawers, dumping the contents on the floor. They had picked up the mattress and set it off to the side, apparently to look underneath it. (01-29-2003 RP 338, 353).

The testimony of Heather Killion and Brenda Duffy, as well as the fact that the other victim, Mr. Wall, was shot during the robbery attempt of him, supply the necessary evidence of identification and the fact that the appellant was armed with a firearm at the time of the robbery of Ms. Alvarez.

On the same evening as the robbery of Violet Alvarez, Brenda Duffy was in the process of moving out of the residence that she shared with Mr. Koslowski. (01-29-2003 RP 380; 01-31-2003 RP 652-53). Ms. Duffy had shared a trailer with Mr. Koslowski for approximately two weeks before deciding to move out. (01-31-2003 RP 652-653). During the evening of November 13, 2002, Ms. Duffy's daughter, Heather Killion and three of her friends came to her residence to help Ms. Duffy move. (01-31-2003 RP 652-53).

Later that evening, Ms. Killion was shown credit cards by her mother and Mr. Koslowski. (01-29-2003 RP 385). Ms. Killion asked Mr. Koslowski whose cards they were, he made a gesture using his hand,

making it into a gun. (01-29-2003 RP 387-88). She felt that he was bragging when he made the gun gesture which described how he got the credit cards. (01-29-2003 RP 387-88, 396). During conversations at the trailer Ms. Killion learned that Mr. Koslowski had robbed an old lady. (01-29-2003 RP 437, 438). Disregarding Ms. Killion's warning about the credit cards, Mr. Koslowski gave Glen Dockins a credit card so that Ms. Duffy could buy gas. (01-31-2003 RP 656-57).

If any evidence was admitted in violation of a defendant's confrontation rights, appellate courts consider whether the error was harmless beyond a reasonable doubt. *Lilly v. Virginia*, 527 U.S. 116, 140, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999). The Washington State Supreme Court has adopted the "overwhelming untainted evidence test" as the standard for harmless error. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Under that test, the court "looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Guloy*, 104 Wn.2d at 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

Here, based upon the observations of Officers Wentz and Kryger regarding a robbery having occurred, and the statements that the appellant made to Brenda Duffy and Heather Killion as to how he obtained the

credit card of Violet Alvarez, as well as the evidence that the appellant attempted to rob Mr. Wall with a firearm the next day, provide overwhelming untainted evidence that necessarily leads to a finding of guilt, as well as the evidence necessary for the firearm enhancement.

#### IV. CONCLUSION

From this reasoning, one can conclude that the excited utterances of Violet Alvarez to Yakima Police officers Nolan Wentz and Michael Kryger were “nontestimonial” in nature. The context and manner in which they were made, all while under the stress of the event, clearly place the statements outside the focus of *Crawford, Davis/Hammon* and the Confrontation Clause. Even assuming that they were, it was harmless error since the overwhelming untainted evidence necessarily establishes guilt. This Court should affirm the conviction.

Respectfully submitted this 10<sup>th</sup> day of December, 2006.



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