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No. 61941-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JAMES ARTIS CASON,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

MS. FRAZIER'S HEARSAY STATEMENTS TO OFFICER JANES WERE INADMISSIBLE UNDER THE SIXTH AMENDMENT, BECAUSE THE STATEMENTS WERE TESTIMONIAL AND MR. CASON NEVER HAD AN OPPORTUNITY TO CROSS-EXAMINE THE WITNESS

In State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009), the Washington Supreme Court clarified the standard to apply in determining whether a witness's hearsay statements to police officers responding to the scene of a crime are "testimonial" for purposes of the Sixth Amendment. Under the four-part standard articulated in Koslowski, Ms. Frazier's hearsay statements to Officer Janes were "testimonial" and therefore inadmissible because Mr. Cason never had an opportunity to cross-examine her.

As an initial matter, the State correctly notes that the parties' arguments, and the court's ruling, were premised on an earlier case, State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007). SRB at 10. But the State is incorrect in asserting that "Cason conceded that factors two (threat of harm) and three (need for information to resolve an emergency) were met in this case." SRB at 10 (citing 5/06/08RP 18-19). To the contrary, defense counsel argued Ms. Frazier's statements to Officer Janes were testimonial and Mr. Cason had a right to cross-examine her. 5/06/08RP 9-10. Counsel

did not concede any of the four factors articulated in Ohlson but instead argued the second factor was "marginal" and the third factor was "right on." 5/06/08RP 18. Later, counsel again argued the statements were not made during an ongoing emergency but instead were "part and parcel to an officer doing an investigation." 5/07/08RP 57-58. Thus, contrary to the State's assertions, counsel repeatedly argued the statements were inadmissible under the four-part test articulated in Ohlson and did not concede any of those factors.

In addition, it is important to note that at the time the parties and the court discussed the admissibility of Ms. Frazier's statements to Officer Janes, the State's intent was to call Ms. Frazier to testify and thus the parties did not anticipate there would be a confrontation problem. 5/06/08RP 10, 20-22. It was not until after Officer Janes began testifying that the prosecutor notified the court that he could not locate Ms. Frazier and that she would not in fact be testifying. 5/07/08RP 91. In sum, this Court should reject any suggestion by the State that Mr. Cason conceded any aspect of his argument regarding his right to confront Ms. Frazier.

The State contends Ms. Frazier's statements to Officer Janes were nontestimonial, because "the primary purpose of the

questioning was to facilitate a police response to a dangerous situation rather than to establish or prove some past fact." SRB at 10. To the contrary, the statements were testimonial because: (1) they described events that had already occurred; (2) a reasonable listener would recognize that Ms. Frazier was not facing an ongoing physical threat, as police were on the scene and there was no evidence the suspect was in the vicinity; (3) the questions and answers, when viewed objectively, were not necessary to resolve a present emergency; and (4) the interrogation was relatively formal.

As stated, in Koslowski, the Washington Supreme Court addressed whether statements made by a witness to police officers responding to the scene of a crime were testimonial. State v. Koslowski, 166 Wn.2d 409. In that case, police responded to a 911 call reporting a robbery. Id. at 414. When an officer arrived at the caller's residence, she was still on the telephone with the 911 operator. Id. The witness was extremely emotional and upset and began to tell the officer what happened right away. Id. She showed the officer some white wire ties on the floor and said they had been used on her and that she had been forced to lie on the floor. Id. The officer asked more questions about what happened, which the witness answered. Id. The questions were brief, as the

officer's intent was to get as much information as he could to give to other officers in the field. Id. A second officer soon arrived, and the first officer had the witness recount again what had happened. Id. The witness said she she had been outside her home unloading groceries from her car when a car drove by, then stopped, and three men got out of the car and approached her. Id. at 415. One of the men had a gun, which he pushed into her side and told her to go into the house. Id. Once inside, the woman was forced to the floor and her hands were tied, and the men took money, valuables and keys from the home before fleeing. Id. After she heard the men leave, the woman freed her hands and called 911. Id.

In assessing whether the woman's statements to the officers were testimonial, the court applied the four factors from Davis v. Washington, which help determine whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency or instead to establish or prove past events:

(1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant. (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency. (3) What was the

nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? . . . (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 418-19 (citing Davis v. Washington, 547 U.S. 813, 827, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)).

Applying these four factors, Koslowski concluded the witness's statements to the responding officers were testimonial. First, the witness was describing events that had already occurred. Id. at 422. The robbery had ended and nothing in the record indicated that the robbers might return to the scene. Id. Although the time that had elapsed was short, the witness was describing past events and not events as they were actually happening. Id. In contrast, in Davis, the witness's statements to the 911 operator occurred while she was alone, unprotected by police, and in apparent immediate danger from her assailant; she was seeking aid, not relating past events. Id. (citing Davis, 547 U.S. at 831-32).

Second, a reasonable listener would recognize the witness was not facing an ongoing emergency, because police had arrived. Koslowski, 166 Wn.2d at 423. Although a reasonable listener

would understand the witness was frightened, nothing in the record indicated she faced any further threat after the robbers had left, she had freed herself, and the police had arrived and were present to protect her. Id. (citing State v. Kirby, 280 Conn. 361, 386, 908 A.2d 506 (2006) (any emergency had ended because the crimes were no longer in process, the defendant was located some miles away, and the victim was protected by the police officer's presence in her home); People v. Trevizo, 181 P.3d 375, 379 (Colo. App. 2007) (woman's statements to police officers responding to a 911 call were testimonial, where the defendant had fled the scene and police had control of the situation, and thus there was no ongoing emergency), cert. denied, 2008 WL 5587533 (Colo. 2008). In contrast, in Davis, the witness's statements were "plainly a call for help against a bona fide physical threat." Id. (quoting Davis, 547 U.S. at 827).

Third, the nature of the questions and answers, and the elicited statements when viewed objectively, were not necessary to resolve a present emergency. Koslowski, 166 Wn.2d at 425-26. When the officers arrived at the scene, the crime had already occurred and there was no evidence suggesting that the police would encounter a violent individual at the residence or that the

robbers were still in the vicinity. Id. at 426. The case was therefore unlike State v. Ohlson, 162 Wn.2d 1, where the court concluded the officer's primary purpose in interrogating the witness was to meet an ongoing emergency. Koslowski, 166 Wn.2d at 426 n.10. In Ohlson, the victim's statements to the officer were made within minutes of an assault by the defendant driving his vehicle up onto the sidewalk so close to the victims that they had to step out of the way. Id. Because the defendant had already left the scene once only to return five minutes later and escalate his behavior, there was "no way to know, and every reason to believe, that Ohlson might return a third time and perhaps escalate his behavior even more." Id. (quoting Ohlson, 162 Wn.2d at 18). In Koslowski, by contrast, there were no circumstances indicating that the robbers might return. Koslowski, 166 Wn.2d at 426 n.10.

A witness's statements at the scene of a crime can be nontestimonial if police interrogation, objectively viewed, is an effort to establish the assailant's identity so that dispatched officers might know whether they would be encountering a violent felon. Id. at 425. But the statements must still be a cry for help in the face of an ongoing emergency or they must provide information that would enable officers immediately to end a threatening situation. Id. at

425-26 (citing Davis, 547 U.S. at 832). The mere fact that a suspect's location is unknown does not in and of itself create an ongoing emergency. Koslowski, 166 Wn.2d at 426-27 (citing State ex rel. J.A., 195 N.J. 324, 949 A.2d 790 (2008) (declining to find statements nontestimonial although made while suspect was still at large, where neither declarant nor victim was in danger); State v. Lewis, 361 N.C. 541, 549, 648 S.E.2d 824 (2007) (although defendant's location was unknown at the time of the interrogation, this fact alone did not create an ongoing emergency)). In Koslowski, at the time of the witness's statements, the robbers had already completed the robbery and fled, and there was no evidence that their car was in the area. Id. at 428. There was therefore no objective basis to conclude that an ongoing threat existed or that the witness's statements were necessary to resolve a present emergency, especially since the officers were present to protect the witness. Id. (citing Davis, 547 U.S. at 830 (because Amy Hammond's statements were made after police had separated her from her assailant husband, her statements were not necessary to resolve a present threat)).

Finally, as to the fourth factor, the witness's emotional state might have caused the interrogation to be less formal than it

otherwise might have been. Id. at 429. Also, the questioning in her home was less formal than the police station taped interrogation in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Koslowski, 166 Wn.2d at 429. Nonetheless, the interrogation was sufficiently formal to weigh in favor of finding the statements were testimonial, as "a certain level of formality occurs whenever police engage in a question-answer sequence with a witness." Id.

As in Koslowski, Ms. Frazier's statements to Officer Janes were nontestimonial, because the circumstances objectively indicated that the primary purpose of the interrogation was not to enable police assistance to meet an ongoing emergency. First, Ms. Frazier was describing events that had already occurred. Officer Janes responded to the apartment complex at 3:48 a.m. 5/07/08RP 69, 113. As he sat in his patrol car waiting for backup, Ms. Frazier emerged from the front door of the building. 5/07/08RP 69-70. When Officer Janes approached and questioned her, she told him James Cason had hit her with a liquor bottle. 5/07/08RP 100, 107-08. According to the time display on the police car video recording, the officer's interview with Ms. Frazier began at around 3:52 a.m. Ex. 25. As noted in the opening brief, a video recorded

from the camera in the hallway on the third floor of the apartment building shows a man, purportedly the suspect, coming out of Ms. Frazier's apartment at around 3:40 a.m., 12 minutes before Officer Janes's interview with Ms. Frazier began. 5/07/08RP 46, 150-51; Ex. 1. Thus, Ms. Frazier was describing past events, as the alleged assault had ended, the suspect had left the scene, and nothing in the record indicated that he might return. See Koslowski, 166 Wn.2d at 422.

Second, a reasonable listener would recognize Ms. Frazier was not facing an ongoing physical threat, because police were on the scene. Nothing in the record indicates Ms. Frazier faced any further threat from the suspect, as he had left the scene and the police were present to protect her. See Koslowski, 166 Wn.2d at 423.

Third, the nature of the questions and answers, and the elicited statements when viewed objectively, were not necessary to resolve a present emergency. When Officer Janes contacted Ms. Frazier, he asked what happened and she said James Cason had hit her with a liquor bottle. 5/07/08RP 100, 107-08; Ex. 25. The officer asked if she knew where Cason was, and she said she did not know but did not think he was still inside the apartment.

5/07/08RP 70, 85, 108; Ex. 25. As noted, the record shows the suspect had left Ms. Frazier's apartment at least 12 minutes earlier, and there is no indication that he was anywhere in the vicinity at the time of the police questioning, or that he was likely to return anytime soon. 5/07/08RP 46, 150-51; Ex. 1. See Koslowski, 166 Wn.2d at 426. Although the suspect's location was unknown, this was not enough to establish an ongoing emergency. Id. at 426-27. There was no objective basis to conclude that any ongoing threat existed or that the witness's statements were necessary to resolve a present emergency, especially since police were present to protect her. Id. at 428.

It is true that Officer Janes observed that Ms. Frazier was injured, and that he called medics to assist her, but his questions and her answers, when objectively viewed, were not necessary to deal with her injuries. 5/07/08RP 70-71; Ex. 25. The focus of the officer's questioning was to gain information in an attempt to locate the suspect, not to provide medical assistance. 5/07/08RP 70; Ex. 25. Because the questions and answers involved learning about the crime and obtaining information to apprehend the suspect, not to acquire information necessary to resolve a current emergency,

this factor weighs in favor of finding the witness's statements were testimonial. See Koslowski, 166 Wn.2d at 427.

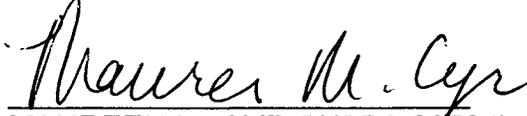
Finally, the interrogation was as formal as the interrogation in Koslowski. Although the questioning was less formal than a police station interrogation, it was sufficiently formal to render the statements testimonial, as "a certain level of formality occurs whenever police engage in a question-answer sequence with a witness." Id. at 429.

In sum, considering all of the factors as discussed in Koslowski, Ms. Frazier's statements to Officer Janes were testimonial. The statements described past events; a reasonable listener would recognize Ms. Frazier was not facing an ongoing physical threat once police had arrived; the questions and answers, when viewed objectively, were not necessary to resolve a present emergency; and the interview was relatively formal. Because Ms. Frazier did not testify at trial, and Mr. Cason never had an opportunity to cross-examine her, his Sixth Amendment right to confront his accusers was violated. For the reasons stated in the opening brief, the error was not harmless and the conviction must be reversed.

B. CONCLUSION

Mr. Cason's Sixth Amendment right to confront his accusers was violated and his conviction for second degree assault must therefore be reversed.

Respectfully submitted this 3rd day of March 2010.

  
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