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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF BOTHELL,

Respondent,

v.

ERIC SCOTT LEVINE,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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A. IDENTITY OF RESPONDENT

The City of Bothell is the Respondent in this matter and opposes the review being sought by the Petitioner, Eric Levine.

B. INTRODUCTION

Levine was convicted after a jury trial of assault in the fourth degree, domestic violence. The victim did not testify. The lower court judge ruled that certain statements from the victim in the case were admissible under the excited utterance exception to the hearsay rule. The judge further ruled that the victim's initial statements to the responding police officer were gathered to enable them to respond to an on-going emergency, were not testimonial, and thus, were not subject to the Confrontation Clause.

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Mr. Levine was found guilty by a jury of assault in the fourth degree, domestic violence on January 5, 2012. Bustos failed to appear for trial on January 4, 2012, despite being personally served a subpoena by the City of Bothell. CP 152. Mr. Levine did not subpoena Bustos. CP 155. The court issued a material witness warrant, and the City elected to proceed without the victim present. CP 155; 148. The City offered statements made by Bustos to Ms.

Cornelius and Officer Lawson. CP 164. The court held that hearsay statements made to Ms. Cornelius fell under the excited utterance exception to the hearsay rule, and there were no issues regarding the Confrontation Clause. CP 167.

The court analyzed the statements made by Bustos to Officer Lawson. CP 167. It held that these hearsay statements fell under the excited utterance exception to the hearsay rule. CP 173. Addressing the Confrontation Clause issue, the court held that the initial statements made to Officer Lawson were non-testimonial after applying the factors articulated in *State v. Ohlson*. 162 Wn.2d 1, 11-12, 168 P.3d 1273 (2007); CP 186-187. The trial court ruled that these statements were non-testimonial for purposes of the Confrontation Clause, and that they were admissible as excited utterances under ER 803(a)(2). The court reasoned that the officer was there to determine what the emergency was, what the officers needed to do, and if there were arrests that needed to be made. CP 183. Subsequent statements were ruled testimonial and thus were not admissible. CP 187.

After the jury returned a guilty verdict, Levine appealed to King County Superior Court arguing that his constitutional right to confront a witness was violated by the use of Bustos's hearsay

statements. CP 4, 138-45, 361-64. The conviction was affirmed. CP 365. The Court of Appeals granted discretionary review regarding only the issue surrounding the Confrontation Clause. The Court of Appeals affirmed the King County Superior Court. Slip Op at 1.

2. SUBSTANTIVE FACTS

On August 4, 2008, Carol Cornelius was at her home in the City of Bothell when she observed the victim in this case, Giovanna Bustos, running up to her front door, screaming, "Help me, help me." CP 206. Prior to this contact, Ms. Cornelius did not know Bustos. CP 206. Bustos kept repeating, "My ear, my ear." CP 207. Ms. Cornelius observed Bustos to have a little bit of blood in her ear, and a scratch or blood on her neck, and proceeded to call 911. CP 207. Bustos appeared very frightened, was crying, and shaking all over. CP 207. When Ms. Cornelius asked what happened, Bustos said, "...she either jumped out or was pushed out of the car, but she was hit in the ear." CP 207. At this point, Ms. Cornelius called 911. CP 207-208.

While speaking with the 911 call taker, Ms. Cornelius relayed that a girl had come to her door, she had either been thrown out or fell out of a car, that she had blood on her neck and ear, and that she was hysterical. RP 207.

When Ms. Cornelius was asked at trial whether she believed Bustos was faking her injuries and demeanor, she answered no. CP 208. When asked what made her think that Bustos was not faking it, Ms. Cornelius responded, "Just that she was shaking and everything. I mean, uh, I don't think anybody could put that on. You know, she was shaking and crying and the tears were coming down her face, and she was definitely afraid." CP 208. Ms. Cornelius was then asked if she believed Bustos, and she answered yes. CP 208.

Officer Lawson, a police officer for the City of Bothell Police Department, received a dispatch call at or around 1:34 p.m. regarding a domestic violence assault. CP 223. The reporting party, Bustos, was alleging her ex-boyfriend, Mr. Levine, with whom she resided, had assaulted her by hitting her, choking her, and that he had threatened to kill her. CP 224. The assault had occurred at 23409 39th Avenue Southeast in the City of Bothell, but Officer Lawson, along with another officer, were dispatched to the 3300 block of 234th Street Southeast, the current location of Bustos. CP 223; 225. Bustos did not know where Mr. Levine was, but provided an address near her location on 39th Avenue Southeast. CP 225.

Two additional officers were dispatched to the address on 39th Avenue Southeast. CP 226.

Arriving about five to six minutes later, Officer Lawson contacted a woman who identified herself as Giovanna Bustos, and the officer observed redness, cuts or scratches, and abrasions around her neck. CP 226. Bustos was very upset, crying, and having a difficult time catching her breath to speak with Officer Lawson. CP 229. Officer Lawson testified that it was clear Bustos had been through what appeared to be a traumatic event and was scared. CP 234. Meanwhile, Bothell Fire Department medical personnel had responded to the area, and were notified by Officer Lawson they could enter the particular scene where Bustos was located only after it was determined that it was clear of any immediate danger. CP 230.

Immediately upon his arrival at the Cornelius residence, Officer Lawson asked Bustos if she could explain what happened. CP 229. Bustos stated she was at home that afternoon, and at about 1 p.m. Mr. Levine arrived at the residence. CP 230. Mr. Levine proceeded to use the computer, and he became angry after Bustos inquired as to what he was doing. CP 230. He stood up, started yelling at her, struck her, and placed his hands around her

neck and choked her. CP 231. Mr. Levine took his thumbs and put them over Bustos's eyes and pressed very hard, causing her a great deal of pain. CP 231. Bustos confirmed that Mr. Levine was her ex-boyfriend, and he was the person who had assaulted her. CP 231. Mr. Levine told Bustos that if she called the police, he would most certainly kill her. CP 237. These statements were gathered within moments of Officer Lawson's arrival. He conducted a more thorough interview after the location was made safe, other officers were informed of this information, and after medical providers were allowed on scene. CP 234.

Later that afternoon, Mr. Levine was arrested and charged with assault in the fourth degree, domestic violence, and taken into custody. CP 236-237

D. ARGUMENT AGAINST REVIEW

BUSTOS'S ADMITTED STATEMENTS TO THE RESPONDING OFFICER DID NOT IMPLICATE THE CONFRONTATION CLAUSE BECAUSE THEY WERE NOT TESTIMONIAL.

Levine argues that Bustos's initial statements to Officer Lawson were admitted in violation of the Confrontation Clause of the Sixth Amendment. Petitioner's Brief at 6. This claim should be rejected. The trial court correctly concluded that Bustos's

statements were made for the purpose of enabling a response from police to assist with an ongoing emergency. The ongoing emergency existed because Bustos had fled from Levine to an unknown person's home after Levine had threatened to kill her if she phoned the police. Accordingly, the statements at issue were not testimonial, and this Court should affirm.

The United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), fundamentally changed the focus of federal Confrontation Clause analysis. Whereas prior case law had focused on the reliability of out-of-court statements to determine admissibility, *Crawford* shifted the focus to the question of whether such statements are "testimonial" in nature. Accordingly, under *Crawford*, a witness's "testimonial" out-of-court statements are not admissible unless the defendant has been given an opportunity to cross-examine that witness. However, *Crawford* "[le]ft for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68.

Some further guidance was provided by the Court's later decision in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). In *Davis*, the Court ruled that a 911 call

made by a domestic violence victim was not testimonial because the statements were made to assist the police in responding to an emergency, not to assist in a later court proceeding:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. Accordingly, non-testimonial statements made during an ongoing emergency fall outside the scope of the Confrontation Clause entirely. *Id.*

This Court then applied these principles in *State v. Ohlson*, 162 Wn.2d 1, 168 P.3d 1273 (2007). In further defining the test for determining whether the primary purpose of an interrogation is to meet an ongoing emergency, the *Ohlson* court identified four factors that courts should consider: 1) the timing of the statements; 2) the level of harm threatened; 3) the level of need for the information; and 4) the formality or lack of formality of the questioning. *Ohlson*, 162 Wn.2d at 15. Based on these factors, the court concluded that statements that the victim had made to the

first officer on the scene following a serious assault with racial overtones were not testimonial; thus, they were admissible as excited utterances despite the victim's failure to testify at trial. *Id.* at 16-19. In so holding, the Court found it significant that the assailant was still at large when the statements were made, and therefore, the threat posed was greater than it would have been otherwise. *Id.*

This Court again attempted to clarify what constitutes a testimonial statement for purposes of the federal Confrontation Clause in *State v. Koslowski*, 166 Wn.2d 409, 209 P.3d 479 (2009). In *Koslowski*, the victim of a home-invasion robbery made statements in response to questioning by the police officers who responded to her home in response to her 911 call after the crime. She made some statements initially to the first officer who arrived, and then made far more detailed statements several minutes later when a second officer arrived. *Koslowski*, 166 Wn.2d at 414-15. The victim died prior to trial, so the issue was whether her statements were testimonial such that they were admitted in violation of the Confrontation Clause in the absence of cross-examination.

In considering the issue, the *Koslowski* court expanded on

the factors from *Davis*, as utilized in *Ohlson*, putting forward that courts should consider in distinguishing testimonial statements from statements made for the primary purpose of enabling a response to an ongoing emergency:

(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? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate that the elicited statements were nontestimonial. (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 418-19 (footnote and citation omitted). In summary, the timing of the statements, the nature of the questions and answers, the formality of the questioning (or lack thereof), and whether an objective listener would interpret the statements as

requests for immediate assistance are all relevant in determining whether statements are testimonial under *Crawford* and *Davis*.

In *Koslowski*, the court ultimately determined that the victim's statements were testimonial, because they were made in response to police questioning after the danger had passed and there was no longer an ongoing emergency or a need for immediate assistance. *Koslowski*, 166 Wn.2d at 421-22. Noteworthy is that in *Koslowski*, the suspect tied the victim and left her in her home. The victim did not flee from *Koslowski*. *Id.*

More recently, this Court considered whether a recording of a 911 call was admissible under both the federal and state confrontation clauses in *State v. Pugh*, 167 Wn.2d 825, 255 P.3d 892 (2009). In *Pugh*, the victim called 911 to report that the defendant had just assaulted her, that he was no longer in the house, and, in response to the operator's questions, she provided a description of the defendant. *Pugh*, 167 Wn.2d at 829. After a brief analysis of the "ongoing emergency" analysis from *Davis*, the *Pugh* court concluded that the 911 call was clearly not testimonial because it was a request for immediate assistance, and thus, that the call was properly admitted under the federal Confrontation Clause. *Pugh*, 167 Wn.2d at 831-34.

In addition, the *Pugh* court considered whether the victim's 911 call was admissible under article I, section 22 of the Washington Constitution.¹ In conducting this analysis, the court discussed the historical underpinnings of the "res gestae" exception to the requirement for cross-examination, which existed when the state constitution was ratified, and held that the admission of "res gestae" statements without cross-examination or a showing that the declarant was unavailable did not violate the state Confrontation Clause. *Id.* at 834-43.

As this Court explained, "res gestae" statements relate to the main event at issue, are natural declarations growing out of the event, are statements of fact rather than opinion, are spontaneous or instinctive rather than premeditated, and are made by a participant or witness to the event. *Id.* at 839 (citing *Beck v. Dye*, 200 Wn. 1, 9-10, 92 P.2d 1113 (1939)). As such, the "res gestae" doctrine "evolved into several present day hearsay exceptions," including present sense impressions and excited utterances. *Pugh*, 167 Wn.2d at 839. Ultimately, the court held that the victim's 911 call was properly admitted against the defendant at trial because it

¹ Although Levine's claim on appeal is made solely under the Sixth Amendment of the federal constitution, the court's state constitutional analysis in *Pugh* is instructive.

consisted of traditional res gestae statements. *Id.* at 843.

Even more recently, the United States Supreme Court performed further analysis regarding the Confrontation Clause in *Michigan v. Bryant*, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). Unlike *Crawford*, which involved a formal police interrogation, and unlike *Davis*, which involved a 911 call, *Bryant* concerned statements made by a shooting victim to the first officers to arrive on the scene where the victim was found bleeding in a parking lot. In response to questioning by the officers, the victim identified the shooter and told them where and how the shooting had occurred. The victim later died, and his statements were admitted at the defendant's murder trial. *Bryant*, 131 S. Ct. at 1150.

The Court observed that in resolving the question of whether statements to police are testimonial, the "primary purpose of the interrogation" must be objectively ascertained, and that the existence of an ongoing emergency "is among the most important circumstances" in making that determination. *Bryant*, 131 S. Ct. at 1156-57. The Court further observed that "the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished," and that "[t]his logic is not unlike that justifying the excited utterance

exception in hearsay law." *Id.* at 1157. The Court recognized that the question of whether an emergency exists "is a highly context-dependent inquiry," and that factors such as whether the suspect is still at large, whether the victim is injured, whether weapons are involved, and whether there may be a threat to the public or the officers themselves must all be taken into consideration. *Id.* at 1158-59.

Further, the Court emphasized that the level of formality of the questioning is an important consideration, and that a lack of formality often signals that the statements at issue are not testimonial. *Id.* at 1160. Significantly, the Court recognized that the officers' questioning of the shooting victim "occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion." *Id.* After examining all relevant factors, the Court concluded that there was an emergency, and that the victim's statements were the product of questioning designed to assist the officers in responding to that emergency. As such, the statements were not testimonial, and their admission did not violate the Sixth Amendment. *Id.* at 1166-67.

Finally, in *State v. Reed*, 168 Wn.App. 533, 278 P.3d 203, *rev. denied*, 176 Wn.2d 1009 (2012), the court ruled that a victim's

statements made during 911 calls, as well as her initial statements to the responding officer, were not testimonial, and did not violate the confrontation clause. *Id.*

In *Reed*, the victim made two different calls to 911. During the second call, the court acknowledged that the victim, Ta, was describing Reed's actions, which had occurred in the recent past. *Reed* at 566. The court pointed out that when statements are made "within minutes of the assault," these statements are to be considered as "contemporaneous with the events described." *Reed*, quoting *Ohlson*, 162 Wn.2d at 17.

Reed argued that because Ta had told the 911 operator that Reed had left the area, no possible ongoing emergency existed. This argument was rejected and this court specifically noted the presence of an ongoing emergency should be assessed "from the perspective of whether there was a continuing threat to [the victim]." *Id.* at 567. A critical part of the holding is this court's recognition that the **departure** of a domestic violence assailant does not eliminate a potential threat. *Reed* at 567, quoting *Bryant*, 131 S.Ct. at 1158. (Emphasis mine).

The court specifically emphasized that Ta's assailant was still at large, that Reed was in a vehicle and highly mobile, and

could have returned to the scene at any time. Even though Reed may not have posed a public threat, he still posed a legitimate threat to Ta. *Reed* at 568.

The responding officer arrived approximately 6 minutes after Ta's 911 call. Ta ran to the officer and told him that she had been attacked. The initial statements were not subject to the confrontation clause and were admissible as they were made to secure police protection. This court held that the Officer's arrival may have "*temporarily* eliminated the threat that Reed might return and do further harm to Ta, this protection was contingent upon his *continued* presence at the scene." *Reed* at 570.

After an objective evaluation of the situation and circumstances, the court conducted a thorough analysis involving the four relevant factors set forth in *Koslowski* and determined the statements were admissible.²

Here, Officer Lawson arrived within 5 to 6 minutes of the 911 call. CP 226. Ms. Cornelius had told 911 that a girl had come running to her door and had either been thrown or had fallen from a vehicle. CP 207-208. Ms. Cornelius also described injuries to Ms.

² Ta made statements to two different officers after the emergency had been resolved and these statements were properly determined to be testimonial and were inadmissible.

Bustos. CP 2-7-208. Bustos reported that she had been hit, choked, and that the assailant had threatened to kill her. CP 224.

Levine asserts that the Court of Appeals erred in its finding that Bustos's statement occurred "within minutes" of the assault. Petitioner's Brief at 12. However, when viewed objectively, the record does support this proposition. As noted by the Court of Appeals, Officer Lawson arrived within 6 minutes of being dispatched, Bustos was hysterical, had fresh injuries, and had either jumped or been forced from a vehicle. Slip Op. at 8. This is enough to conclude that Officer Lawson arrived within minutes of the event. Further, there is no requirement of showing that the assault had occurred moments prior, it simply must be showed that the incident occurred in the recent past. *Reed* at 566.

The contention that the Court of Appeals misinterpreted the second *Davis* factor regarding the determination of an ongoing emergency is also without merit. Petitioner's Brief at 12. "Whether an emergency exists and is ongoing is a highly context-dependent inquiry." *Bryant*, 131 S.Ct. at 1158. "[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals'

statements and actions and the circumstances in which the encounter occurred.” *Bryant*, 131 S.Ct. at 1156.

Upon arrival, Officer Lawson noted that Bustos had visible injuries consistent with the 911 call. Bustos was hysterical and crying, had a difficult time catching her breath, and was quite upset and scared. At this time, not knowing what the situation was, or whether it was safe at the location, Officer Lawson kept aid from entering the scene. CP 229-230.

Officer Lawson asked Bustos what happened, and immediately was told of the assault and the identity of the assailant. Part of Bustos’s initial statement was that Levine had threatened to kill her, and that if she called the police, he would most certainly do so. CP 230-231, 237.

The present facts are on point with the facts this court considered in *Reed*. In both cases the victims had exited a vehicle and were in areas that were not inherently safe. Both victims were extremely fearful and both had injuries visible to the responding officers. In both cases, the assailant had fled in a vehicle, was highly mobile, and was still at large. Add to the *Reed* facts that Bustos was afraid Levine was going to follow her down the drive and that he had threatened to kill Bustos if she called police. Under

the *Reed* analysis, Bustos's statements to Officer Lawson are non-testimonial because they are an effort to inform police of an emergency and ensure a continued police presence to provide assistance. *Reed* at 570.

Levine attempts to distinguish this case from *Bryant* and equate it to *Kowalski* by relying on the fact that Ms. Cornelius told Bustos she was safe. Petition for review at 12. They further point out that Mr. Cornelius waited until the aid car arrived. Petitioner's Brief at 12. However this argument is also without merit. The fact that a civilian told Bustos she was safe does not make it so. Further, the aid car was not allowed on scene until after the initial statements were gathered. CP 230. This further supports the proposition that Officer Lawson was indeed treating this as an on-going emergency.

Generally, *Koslowski* can easily be distinguished. In that case, one of the main issues noted by this court is that the assailants had left the scene of their own accord after restraining the victim with plastic restraints. Further, it is unclear how much time had passed from the assailant's departure and the 911 call. *Koslowski*, 166 Wn.2d 409.

The facts here are the opposite – Bustos fled from her assailant, he didn't leave her. Bustos either fell from or was thrown from a vehicle. Bustos ran from Levine to a nearby home whose occupants were unknown to her. Bustos told Ms. Cornelius she was afraid "he" was going to come up the driveway, referring to her assailant. Bustos was so adamant about this Ms. Cornelius posted somebody at the end of the road. CP 206-207.

Levine also puts forward that because Bustos was ultimately determined not to need medical attention, there can be no medical emergency. Petitioner's Brief at 13. This too is an argument without merit. Aid was nearby, but not allowed to come to the actual location because of the possible danger involved. CP 230. Bustos's actual injuries were unknown at that time. She had visible cuts, abrasions, had been strangled, was bloody, and had exited a moving vehicle. There is no possible way that Officer Lawson could have known whether she had serious injuries. It's only necessary that a reasonable person would have considered there to be a threat of harm. *State v. Reed*, 168 Wash.App. at 564.

Levine argues that because Officer Lawson's contact with the victim occurred "in the calm of Mr. and Mrs. Cornelius's protected yard", that the interview equals a formal police

interrogation. Petitioner's Brief at 14. First, there is no evidence whatsoever to support the assertion that the yard was calm and protected. Second, they cite to *Koslowski* for the proposition that the setting for questioning was "safe", but this assertion is without support. *Koslowski* doesn't address facts such as these. *Koslowski*, 166 Wn.2d 409.

To the contrary, there was neither formality nor solemnity when Officer Lawson contacted bleeding and hysterical Bustos, who had fled Levine to the property of a person unknown to her, with her assailant still at large, in a vehicle, and in the area. Thus, this argument is without merit.

Considering that *Crawford*, *Davis*, *Ohlson*, *Koslowski*, *Pugh*, and *Bryant* all concern statements given in response to some form of interrogation, they are obviously applicable. Even though the statements in *Reed* were spontaneous, the court applied the same analysis, and it too should be considered. Here, Bustos's frantic state, her obvious fear, her fresh injuries, and the immediate nature and content of her initial statements to Officer Lawson demonstrate that these statements were made for the purpose of obtaining immediate assistance, and thus, they were not testimonial.

In sum, the trial court ruled correctly that Bustos's initial and preliminary statements to Officer Lawson were not testimonial, and hence, admissible as excited utterances despite Bustos's failure to testify at trial.

E. CONCLUSION

The trial court properly admitted non-testimonial statements as excited utterances, and thus, the victim's unavailability was immaterial and there was no violation of the confrontation clause. This Court should deny review and affirm the Court of Appeals.

DATED this 26th day of March, 2015.

Respectfully submitted,

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CITY OF BOTHELL,

Respondent,

v.

ERIC SCOTT LEVINE,

Petitioner.

No. 70241-6-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: January 12, 2015

LEACH, J. — We granted discretionary review of the superior court's order affirming Eric Levine's municipal court conviction for fourth degree assault. The superior and municipal courts rejected Levine's argument, which he reasserts in this court, that admission of the victim's initial statements to police violated his right to confrontation. Because those statements were not testimonial and therefore did not violate the confrontation clause, we affirm.

FACTS

Based on allegations that Levine choked, assaulted, and threatened his former girlfriend, Giovanna Bustos, the city of Bothell (City) charged him with fourth degree assault.¹

Before trial, the City informed the municipal court that Bustos had not responded to a subpoena and it would proceed without her. The court then considered the admissibility of Bustos's hearsay statements to Carol Cornelius and the police.

¹ Levine's first trial ended in a dismissal without prejudice.

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In its offer of proof, the City said Cornelius would testify that a hysterical woman, later identified as Bustos, appeared at her door on August 4, 2008. Bustos was "scared," "crying and panicky," and holding her ear. She told Cornelius that Levine "attacked her in the [truck]" and that she was "smacked in the ear." Bustos had either jumped or been pushed from the truck. Cornelius reported this information to 911. Based on this offer of proof, the court ruled that Bustos's statements to Cornelius came within the excited utterance exception to the hearsay rule. The defense then stipulated that the statements did not violate Levine's right to confrontation.

The court next considered Bustos's two statements to police—a brief initial statement made moments after police arrived and a subsequent, lengthier statement. The parties agreed that Bustos's second statement was testimonial and could not be admitted in her absence. They disagreed about the admissibility of her initial statement.

The City told the court that Bustos made her initial statement within minutes of Cornelius's 911 call. Bothell Police Officer John Lawson would testify that he arrived on the scene within six minutes of a police dispatch report and made "immediate contact" with Bustos. Officer Rogers arrived moments later. Bustos was crying, "very traumatized," and had red marks on her neck. Officer Lawson "had to . . . ask her to sort of slow down and calm down so he could even get a statement from her to determine what had happened, and if any

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action needed to be taken.” She said “her boyfriend had assaulted her at their residence, that he had hit her, choked her, and threatened to kill her. He drove her away and then threw her out of the vehicle a short distance away.” Bustos “believed the threat to kill was real.”

Defense counsel argued that some of the proffered evidence was not in Officer Lawson’s police report and that Bustos was not, in fact, in an excited state when she talked to him. The City countered that Officer Rogers was also present during Bustos’s statements and that his report contained the challenged facts. The court ruled that Bustos’s initial statements to Officer Lawson satisfied the excited utterance exception.

The court then considered whether Bustos’s initial statements were testimonial and therefore inadmissible under the confrontation clause. The court framed the issue as whether the “circumstances objectively indicate that the primary purpose [of the interrogation] is to enable police assistance to meet an ongoing emergency.” The City argued that an ongoing emergency existed because Bustos had a fresh injury, Levine had threatened to kill her, Bustos was “asking the officers for help,” and the incident had “occurred . . . within the last 10 minutes.” The City noted that Officer Lawson observed scratches on both sides of Bustos’s neck. The City also represented that the responding officers received the following information in a police dispatch report:

Giovanna Bustos saying her boyfriend hit her, saying he was going to kill her, and that he tried to choke her. . . . This occurred at the residence and in the [truck]. She jumped out of the vehicle and ran to listed address, . . . occurred five ago. Neck hurts, put finger in her arm. He has guns, . . . suspect driving, . . . and [she] thinks he probably went back home.^[2]

The City argued that the primary purpose of Officer's Lawson's questions to Bustos was "to ascertain the nature of the call, the nature of the emergency, and then to effectuate an arrest." The emergency "was a threat to kill, her being afraid, and Officer Lawson passing on that information to fellow officers to go make an arrest."

Defense counsel disagreed. He maintained any emergency had ended because Levine was no longer at the scene, Bustos was protected by several police officers, and her statements were about past events, not current risks of harm. The court asked whether Officer Lawson had asked Bustos questions or whether she "blurted out" her initial statement. The City responded that it "assumed" Officer Lawson asked questions and offered to bring him in to lay a foundation. The court elected to rule on the existing record, stating,

The officer was there to try to figure out what the emergency was, what the officers need to do, if there was arrests that needed to be made. So I do believe that the statements that Officer Lawson can testify to, it did also happen approximately six minutes after the alleged assault, and so at this time I will find those to be nontestimonial.

Following additional argument, the court added,

² (Emphasis added.) The defense did not object to the court's consideration of the dispatch report or dispute that the officers received it.

[T]he critical consideration is not whether the perpetrator is . . . at the scene, but rather whether the perpetrator poses a threat of harm, thereby contributing to an ongoing emergency.

[Bustos] stated: ["I think he went home."] But they don't know where he is.

. . . . [J]ust because you're surrounded by police officers doesn't mean somebody doesn't act inappropriately.

At trial, Cornelius and Officer Lawson testified consistent with the City's offers of proof.³ Cornelius testified that Bustos ran up to her door, screaming "Help me, help me," and had blood on her neck and ear. Officer Lawson testified that when he arrived at the scene, he immediately noticed redness and cuts and scratches around Bustos's neck. She was hysterical and had a difficult time catching her breath to speak. Officer Lawson kept medical personnel from entering the area until the scene "was actually clear of any danger." He asked Bustos "if she could tell me what had happened." Bustos then described the entire incident without intervening questions from Officer Lawson. Bustos said Levine had assaulted her and threatened to kill her. She also said that "if she called the police, he would most certainly kill her." Once Officer Lawson determined that Levine was not in the immediate area, he cleared medical personnel to enter the area and examine Bustos for any "injuries that needed immediate medical attention." He then notified other officers that probable cause

³ Although Levine did not renew his motion to exclude Bustos's initial statements to police at trial, both parties rely largely on the testimony at trial. We have considered both the pretrial offers of proof and the testimony at trial.

existed to arrest Levine for domestic violence. Officer Lawson stayed with Bustos because she was still "very afraid."

Levine testified and denied assaulting Bustos. He claimed that on the day of his arrest, Bustos left him a phone message accusing him of "following her breath" and "cheating with the girl with the green eyes on the computer." After taking a shower, Levine emerged to find Bustos inside his residence. He told her to leave and offered to drive her wherever she wanted to go. When they entered his truck, she started screaming so loud that he "couldn't even think straight." He quickly pulled the truck to the side of the road, got out, and turned the alarm on. Bustos left the truck and ran to a nearby home. Levine then drove his truck to his residence, which was a quarter mile away. Police arrested him a short time later.

The jury convicted Levine as charged. He appealed to the superior court, which affirmed. We granted discretionary review.

DECISION

The Sixth Amendment's confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."⁴ 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."⁵

⁴ U.S. CONST. amend. VI.

⁵ Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Whether statements made to police are testimonial turns on whether the primary purpose of the interrogation was to determine past facts or to address an emergency or other circumstances.⁶ "When . . . the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause."⁷ A court determines the primary purpose of an interrogation by objectively evaluating the circumstances of the encounter and the statements and actions of the parties.⁸ It focuses on the purpose reasonable participants would have had, not the subjective or actual purpose of the participants.⁹ The State has the burden of establishing that witness statements were nontestimonial.¹⁰ We review alleged violations of the confrontation clause de novo.¹¹

Under the primary purpose test, "[w]e first examine the circumstances in which the interrogation occurred."¹² These include "the timing of the statements relative to when the described events occurred."¹³ When a victim makes statements within minutes of an assault, they may be considered

⁶ Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 1154-55, 179 L. Ed. 2d 93 (2011).

⁷ Bryant, 131 S. Ct. at 1155.

⁸ Bryant, 131 S. Ct. at 1156.

⁹ Bryant, 131 S. Ct. at 1156.

¹⁰ State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

¹¹ Koslowski, 166 Wn.2d at 417.

¹² Bryant, 131 S. Ct. at 1163.

¹³ State v. Reed, 168 Wn. App. 553, 563, 278 P.3d 203 (2012) (citing Davis v. Washington, 547 U.S. 813, 827, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

contemporaneous with the described events.¹⁴ Here, Officer Lawson arrived on the scene within six minutes of receiving the dispatch and made "immediate contact" with Bustos. While the time between the assault at Levine's residence and Bustos's statements to Officer Lawson is less clear, the assault was essentially ongoing in nature, having begun only a few blocks away at the residence and continued in the truck.¹⁵ And Bustos's hysterical state and fresh injuries objectively manifested a recent assault and/or threat. Viewed objectively, the record supports the inference, drawn by the City below, that Bustos made her first statement within minutes of her being thrown out of or forced to jump from a vehicle in which she had been assaulted.

In addition to the surrounding circumstances, we assess the statements and actions of the parties, including the nature of what was asked and answered during the interrogation.¹⁶ Officer Lawson asked Bustos "what . . . happened." Bustos's answer described both past events and an ongoing threat to her safety. She also showed Officer Lawson the injuries to her neck and expressed her belief that Levine would make good on his threat to kill her. Officer Lawson asked her to "slow down and calm down so he could even get a statement from her to determine what had happened, and if any action needed to be taken."

¹⁴ Reed, 168 Wn. App. at 566.

¹⁵ Bustos told Officer Lawson that Levine's residence was only "a few blocks away."

¹⁶ Bryant, 131 S. Ct. at 1160-61; Reed, 168 Wn. App. at 563-64.

(Emphasis added.) An objective view of these facts supports a conclusion that the interrogation was not merely an investigation of past facts but also a response to an ongoing threat.

We also consider the level of formality of the interrogation.¹⁷ “The greater the formality of the encounter, the more likely it is that a statement elicited during that encounter is testimonial. In contrast, disorganized questioning in an exposed, public area that is neither tranquil nor safe” indicates the opposite.¹⁸ The initial questioning in this case “lacked any formality that would have alerted [Bustos] to or focused [her] on the possible future prosecutorial use of [her] statements.”¹⁹ Officer Lawson simply asked Bustos what happened, and she recited the essential facts. This type of encounter is more indicative of a response to an emergency than evidence gathering for future prosecution.²⁰ And while it appears that the questioning occurred on private property, it occurred in the open and close to the spot where Levine was last seen.

Finally, we assess the threat of harm posed by the situation.²¹ We do so by considering whether a reasonable listener would conclude that the speaker was facing an ongoing emergency that required help.²² As noted above, a

¹⁷ Reed, 168 Wn. App. at 564; Bryant, 131 S. Ct. at 1160.

¹⁸ Reed, 168 Wn. App. at 564.

¹⁹ Bryant, 131 S. Ct. at 1166.

²⁰ See Bryant, 131 S. Ct. at 1165-67.

²¹ Reed, 168 Wn. App. at 564.

²² Koslowski, 166 Wn.2d at 419.

scared and injured Bustos ran to Cornelius's home for assistance. Within minutes of either jumping or being forced from Levine's truck, she told Cornelius and Officer Lawson that Levine had assaulted and choked her at his residence, attacked her in the truck, and threatened to kill her if she contacted police. She told Lawson that she believed he would carry out the threat. The dispatch report indicated Levine had guns.²³ Bustos thought Levine had gone to his residence a few blocks away, but his precise whereabouts were unknown. Because he left in a vehicle, he was "highly mobile and could potentially return to the scene."²⁴ A reasonable listener would conclude from these facts that Bustos was facing a continuing threat.

We reject Levine's contention that any threat had been neutralized because Levine appeared to have left the scene and Bustos was protected by police. Neither the departure of an assailant nor the presence of police automatically neutralizes a threat or ends an emergency.²⁵ In this case, the offer of proof indicated that while Levine had departed in his truck, he lived only a few

²³ We emphasize that the primary purpose test is concerned with the perspectives of all participants, including the declarant. Bryant, 131 S. Ct. at 1160-61. The dispatch report was thus relevant not only to the purpose of Officer Lawson's questions but also to the purpose of Bustos's statements.

²⁴ Reed, 168 Wn. App. at 568.

²⁵ Reed, 168 Wn. App. at 567-70; Davis, 547 U.S. at 832 (officers investigating domestic disputes "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." (emphasis omitted) (citation omitted) (internal quotation marks omitted)).

blocks away, was very mobile, and had guns. He had threatened to kill Bustos if she contacted police. She had done just that and was interviewed outside in the open. In these circumstances, Levine still posed a potential threat to both Bustos and the officers. And to the extent the officers' presence provided Bustos some protection, "this protection was contingent upon [the officers'] continued presence at the scene."²⁶

We also reject Levine's assertion that Bustos's initial statement was testimonial because she spoke primarily of past facts. As noted above, when statements are made within minutes of the described incident, they may be considered to be statements of contemporaneous, not past, facts. In addition, "it is not inconsistent to speak of past events in conjunction with an ongoing emergency and . . . the fact that some statements are made with regard to recent past events does not cast them in testimonial stone."²⁷ Thus, while the information provided by Bustos involved past events, those events were contemporaneous with the continuing assault and included an ongoing threat to kill.

Contrary to Levine's assertions, State v. Koslowski²⁸ does not dictate a different result. In that case, an armed robbery victim gave police a statement minutes after calling 911. In holding that the statement was testimonial and not

²⁶ Reed, 168 Wn. App. at 570.

²⁷ Koslowski, 166 Wn.2d at 423 n.8.

²⁸ 166 Wn.2d 409, 209 P.3d 479 (2009).

part of an ongoing emergency, the Koslowski court emphasized that nothing in the record indicated the robbers might return to the scene or had "any ongoing situation or relationship with [the victim] that might suggest she was still in danger from them."²⁹ There was no "bona fide physical threat" or any "reason to think that she faced any further threat after the robbers left."³⁰ In that context, the court found it significant that the victim was also protected by police when she made her statements. Here, by contrast, there was a relationship between the victim and the assailant and an "ongoing situation" and "bona fide threat." Thus, unlike the victim in Koslowski, the victim in this case faced an ongoing threat despite the presence of police.

In conclusion, an objective view of the record indicates that the primary purpose of Officer Lawson's initial questions, and Bustos's initial answers, was to address an ongoing threat to Bustos.³¹

²⁹ Koslowski, 166 Wn.2d at 422.

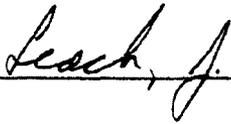
³⁰ Koslowski, 166 Wn.2d at 423, 425.

³¹ See Koslowski, 166 Wn.2d at 428 (citing United States v. Arnold, 486 F.3d 177, 179-80 (6th Cir. 2007) for the proposition that "statements were nontestimonial where the witness [told police at the scene] that the armed defendant had threatened to kill her and he was still in the vicinity"). The Arnold court's reasoning reveals several factual and analytical parallels to this case:

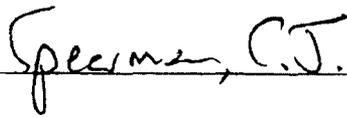
While it may often be the case that on-the-scene statements in response to officers' questions will be testimonial because the presence of the officers will alleviate the emergency, this is not one of those cases. Neither the brief interval of time after the 911 call nor the arrival of the officers ended the emergency. Arnold remained at large; . . . and for all Gordon (or the officers) knew Arnold remained armed and in the residence immediately in front of them or at least in the nearby vicinity.

Levine's statement of additional grounds fails to adequately inform this court of the nature and occurrence of any alleged errors.³²

Affirmed.



WE CONCUR:





... [T]he distress that the officers described in her voice, the present tense of the emergency, the officers' efforts to calm her and the targeted questioning of the officers as to the nature of the threat, all . . . suggested that the engagement had not reached the stage of a retrospective inquiry into an emergency gone by. No reasonable officer could arrive at a scene while the victim was still "screaming" and "crying" about a recent threat to her life by an individual who had a gun and who was likely still in the vicinity without perceiving that an emergency still existed.

Arnold, 486 F.3d at 190 (emphasis added).

³² RAP 10.10(c).

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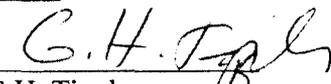
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City of Bothell,)	
)	Supreme Court No. 91339-1
Respondent,)	
)	
vs.)	
)	
Eric S. Levine,)	Declaration of Mailing
)	
Petitioner.)	
_____)	

I, G. H. Tipple, declare under penalty of perjury of the laws of the State of Washington that on March 26, 2015, I deposited in the U.S. Mail, postage pre-paid, the enclosed copy of City's Answer to Petition for Review in the above-referenced case, to:

Elaine Winters
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle WA 98101

DATED this 26th day of March, 2015, at Bothell,
Washington.


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City of Bothell v. Eric S. Levine

Case no. 91339-1

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