

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 DEC 23 PM 2:57

NO. 69918-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NEGATU FENTAHUN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

MAFÉ RAJUL
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	7
1. AMANUEL'S STATEMENTS TO DRUMMOND WERE PROPERLY ADMITTED UNDER ER 803(a)(4) BECAUSE THEY WERE FOR THE PURPOSE OF MEDICAL TREATMENT AND DIAGNOSIS.. ERROR! BOOKMARK NOT DEFINED.	
2. AMANUEL'S STATEMENTS TO THE EMERGENCY ROOM SOCIAL WORKER AND TO THE 911 OPERATOR WERE NOT TESTIMONIAL	14
a. Amanuel's Statements To The Emergency Room Social Worker Were Statements For Medical Diagnosis And Treatment And Did Not Violate Fentahun's Right To Confrontation	15
b. Amanuel's Statements To The 911 Operator Were Not Testimonial And Were Properly Admitted	19
D. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Crawford v. Washington, 541 U.S. 36,
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)..... 14, 15

Petrocelli v. Gallison, 679 F.2d 286
(1st Cir. 1982)..... 12

United States v. Renville, 779 F.2d 430
436 (8th Cir. 1985)..... 9

United States v. Yazzie, 59 F.3d 807
(9th Cir. 1995) 11

Washington State:

State v. Ackerman, 90 Wn. App. 477,
953 P.2d 816 (1998)..... 9

State v. Butler, 53 Wn. App. 214,
766 P.2d 505 (1989)..... 9

State v. Davis, 154 Wn.2d 291,
111 P.3d 844 (2005), aff'd,
547 U.S. 813, 126 S. Ct. 2266,
165 L. Ed. 2d 224 (2006)..... 19, 20

State v. Florczak, 76 Wn. App. 55,
882 P.2d 199 (1994)..... 8

State v. Hurtado, 173 Wn. App. 592,
294 P.3d 838 (2013), rev. denied,
304 P.3d 115 (2013)..... 15, 16, 17, 18

State v. Jasper, 158 Wn. App. 518,
245 P.3d 228 (2010), aff'd,
174 Wn.2d 96, 271 P.3d 876 (2012)..... 15

<u>State v. Justiniano</u> , 48 Wn. App. 572, 740 P.2d 872 (1987).....	9, 13
<u>State v. Moses</u> , 129 Wn. App. 718, 119 P.3d 906 (2005), <u>rev. denied</u> , 157 Wn.2d 1006 (2006).....	16, 18
<u>State v. Powers</u> , 124 Wn. App. 92, 99 P.3d 1262 (2004).....	19, 20, 21
<u>State v. Sandoval</u> , 137 Wn. App. 532, 154 P.3d 271 (2007).....	17, 18
<u>State v. Saunders</u> , 132 Wn. App. 592, 132 P.3d 743 (2006), <u>rev. denied</u> , 159 Wn.2d 1017 (2007).....	16, 18, 20
<u>State v. Sims</u> , 77 Wn. App. 236, 890 P.2d 521 (1995).....	9
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	7
<u>State v. Williams</u> , 137 Wn. App. 736, 154 P.3d 322 (2007).....	8
<u>State v. Woods</u> , 143 Wn.2d 561, 23 P.3d 1046 (2001).....	8, 9, 10
 <u>Other Jurisdictions:</u>	
<u>State v. Grant</u> , 776 N.W.2d 209 (N.D. 2009).....	11
<u>State v. Long</u> , 628 N.W.2d 440 (Iowa 2001)	11

Constitutional Provisions

Federal:

U.S. Const. amend. VI 14, 19, 22

Rules and Regulations

Federal:

FRE 803 12

Washington State:

ER 801 8

ER 802 8

ER 803 1, 7-10, 12, 13, 19, 20

Other:

N.D.R.Ev. 803 11

Other Authorities

4 J. Weinstein and M. Berger,
Weinstein's Evidence, 803(4)[01] (1994)..... 11

A. ISSUES PRESENTED

1. Statements made for purposes of medical diagnosis or treatment are admissible under the firmly rooted hearsay exception of ER 803(a)(4). The rule is not limited to statements made by patients. The victim's brother, who witnessed the assault on his sister, answered the social worker's questions because the injuries to her mouth made it too painful for the victim to speak. Did the trial court act within its discretion by admitting the brother's statements?

2. Statements to a treatment provider are not testimonial when the statements are made for medical purposes and not in furtherance of prosecution. At the time when the emergency room social worker was inquiring as to the incident in order to determine the proper treatment, the only people present in the room were the victim and her brother. Were the statements properly admitted under the Confrontation Clause?

3. Courts must decide on a case-by-case basis whether statements made to 911 operators are not testimonial. When the purpose of the call is to seek aid rather than to report a violation, those statements are not testimonial. The victim's brother called 911 requesting a medic because his sister's teeth had been

knocked out during the assault and her eyes were swollen. Were the statements properly admitted under the Confrontation Clause?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Negatu Fentahun, with Assault in the Second Degree (Domestic Violence) based on Fentahun's assault upon his sister, Wosenyelesh Fentahun, on or about July 13, 2010. CP 1-4. A jury trial was held in January of 2011 before the Honorable Douglass North.

Wosenyelesh¹ did not appear for trial, and the prosecution went forward in her absence based on other evidence. At the conclusion of the trial, the jury convicted Fentahun of Assault in the Second Degree as charged. CP 10. The trial court imposed a standard range sentence. CP 33-39. Fentahun now appeals.

¹ This case involves family members who share the last name Fentahun. For the purpose of clarity, with the exception of the appellant, they will be referred by their first names. No disrespect is intended.

2. SUBSTANTIVE FACTS

On July 13, 2010, the Fentahun family was at the residence located at 6425 24th Ave South. 3RP 6-7.² Among others, present in the house were Negatu Fentahun (Fentahun), his brother Amanuel Fentahun (Amanuel), his 28-year-old sister Wosenyelesh, and their parents. 3RP 7, 22, 78. During the evening hours Fentahun and Wosenyelesh were arguing over a boy Wosenyelesh was talking to on the phone. 4RP 41. During the argument, Fentahun jumped forward toward Wosenyelesh, striking her hard on her head. 4RP 41. Wosenyelesh fell down. 4RP 41. Fentahun then proceeded to jump on Wosenyelesh's back, grabbing her by her head and striking her again and again on the face with a closed fist. 3RP 34, 41, 82-83; 4RP 34. Amanuel, who was present and witnessed the incident, attempted to assist his sister but was unable to do so because Fentahun had her by her hair. 4RP 41. Fentahun left the residence after assaulting his sister. 3RP 29, 39; Ex. 1.

As a result of the assault, Wosenyelesh had fractures on three teeth. 3RP 19; 4RP 13. She spat one tooth out at the

² The Verbatim Report of the Jury Trial consists of four volumes referred to in this brief as 1RP (January 19, 2011); 2RP (January 20, 2011); 3RP (January 24, 2011); 4RP (January 25, 2011); and 5RP (February 18, 2011).

residence, and two remained loose in her mouth. 3RP 31. After seeing the injuries to Wosenyelesh, including the teeth that had been knocked out and the swelling, Amanuel called 911 to get aid for his sister. Ex 1. Amanuel did not ask for the police; instead he asked for medics, and urged the 911 operator to send medical help right away. Ex 1. Amanuel answered the questions the 911 operator asked, and when the operator connected Amanuel with the medics, he again stated that “she need[s] a paramedic right now” and “she needs help right now, please.” Ex 1.

Allen McGaughey, an Emergency Medical Technician (EMT) with American Medical Response, responded to the scene. 3RP 28. When McGaughey arrived, Wosenyelesh was being transported to the ambulance, holding ice to her mouth. 3RP 28. She told him she had been assaulted by her brother, who was no longer at the residence, with a closed fist. 3RP 28-29. Wosenyelesh had swelling and bleeding around her mouth, as well as swelling around her left eye, which was actively bleeding. 3RP 31. McGaughey noticed there was one tooth missing and her two front teeth were very loose. 3RP 31. As the EMT was tending to Wosenyelesh’s medical needs, Amanuel was by her side and very attentive. 3RP 28. Wosenyelesh was very shaken up, scared

and apprehensive. 3RP 32. Given the nature of Wosenyelesh's injuries, the ambulance transported her to Harborview Medical Center. 3RP 31. Since Amanuel was being so attentive, McGaughey allowed him to ride in the ambulance to make Wosenyelesh feel more comfortable. 3RP 35.

While at Harborview, Wosenyelesh and Amanuel spoke with Annie Drummond, an emergency room social worker. 4RP 29. Drummond's role as a social worker is to assist patients and families who have suffered serious traumas and who have been victims of domestic violence. 4RP 30. As part of her role, it is customary for her to meet with the victim herself, but also with the victim's family. 4RP 30. In this case, Drummond mainly spoke with Amanuel, who had witnessed the incident, because Wosenyelesh was having a great deal of difficulty speaking. 4RP 36-40. It was apparent to Drummond that it was physically painful for Wosenyelesh to speak due to her injuries in her mouth. 4RP 36-37. Drummond stated, "I attempted to interview her, and in my note I state that her voice was soft and meek when she speaks, and she's unable to say more than two words because her teeth are so loose in her mouth." 4RP 40. In fact, the three teeth that

were knocked out were unsalvageable and had to be extracted.

4RP 13-19.

Wosenyelesh was transported to Harborview before police arrived at the Fentahun residence. 3RP 10, 37-38, 45, 47, 63. Seattle Police Department Officers Eggers and Bauer responded to the residence between 9:30 p.m. and 10:00 p.m., and when they realized Wosenyelesh had already been transported, they went to Harborview to contact her. 3RP 12, 49-51. When the officers arrived, Wosenyelesh was being treated by medical staff. 3RP 12. Wosenyelesh's face was red and puffy with blood down her face, her lips were swollen, and two of her front teeth were loose. 3RP 12, 52. Officers Eggers and Bauer attempted to speak with Wosenyelesh, but she was simply unable to speak. 3RP 18-19, 49-51.

On July 19, 2010, Fentahun went to the Seattle Police Department's South Precinct and stated that his family had told him the police were looking for him. 3RP 19, 54-55. Fentahun said that he had been in an argument with his mother and, while arguing, his sister walked up behind him and he accidentally knocked her over with his head, causing her to fall onto a chair and hit her mouth. 3RP 56-58. Officer Bauer realized that Fentahun was the person

involved in the July 13th incident and arrested him without incident.

3RP 57, 60.

C. ARGUMENT

1. AMANUEL'S STATEMENTS TO DRUMMOND WERE PROPERLY ADMITTED UNDER ER 803(a)(4) BECAUSE THEY WERE FOR THE PURPOSE OF MEDICAL TREATMENT AND DIAGNOSIS.

Fentahun claims that the trial court improperly admitted the statements Amanuel made to Drummond because they are hearsay. Specifically, Fentahun argues that the statements do not fall under the ER 803(a)(4) hearsay exception for medical treatment or diagnosis because Wosenyelesh was the patient and not Amanuel. Fentahun's argument should be rejected because the rule does not set a requirement that such statements can only come from the patient. Therefore, the trial court properly exercised its discretion in admitting the statements.

When the trial court admits testimony pursuant to a hearsay exception, this Court reviews that decision under an abuse of discretion standard. State v. Swan, 114 Wn.2d 613, 667, 790 P.2d 610 (1990). Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence

to prove the truth of the matter asserted. ER 801(c). Hearsay is not admissible unless it falls within an exception to the rule.

ER 802. One such exception is a statement for purposes of medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4).

A party demonstrates that a statement is reasonably pertinent for medical diagnosis or treatment when (1) the declarant's motive in making the statement is to promote treatment, and (2) the medical professional reasonably relied on the statement for purposes of treatment. State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007). The medical treatment exception is not limited only to physical injuries but it also encompasses psychological treatment. State v. Woods, 143 Wn.2d 561, 601-03, 23 P.3d 1046, 1069-70 (2001) (citing State v. Florczak, 76 Wn. App. 55, 65, 882 P.2d 199 (1994)). In domestic violence and sexual abuse situations, a declarant's statement disclosing the identity of a closely related perpetrator is admissible under

ER 803(a)(4) because part of reasonable treatment and therapy is to prevent recurrence and future injury. State v. Ackerman, 90 Wn. App. 477, 482, 953 P.2d 816 (1998); State v. Sims, 77 Wn. App. 236, 239, 890 P.2d 521 (1995). The rationale for allowing statements under this exception is the presumption that a medical patient has a strong motive to be truthful and accurate, which provides a significant guarantee of trustworthiness. State v. Butler, 53 Wn. App. 214, 220, 766 P.2d 505 (1989) (quoting United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985)).

The plain language of the rule does not limit its application to patient-declarants. Washington has recognized that statements for medical treatment and diagnosis can come from third parties. State v. Justiniano, 48 Wn. App. 572, 579-81, 740 P.2d 872 (1987); Woods, 143 Wn.2d at 601-03.

In Justiniano, a four-year-old victim told her mother while she was being washed in between the legs during her bath “that is what David [the defendant] does with his finger, he did it for a long time and it hurt.” 48 Wn. App at 575. The mother relayed this information to the doctor, who in turn testified at trial as to the statement. The court held that statements made to a doctor by the mother of a sexual assault victim are the equivalent of statements

made by the child and are admissible under ER 803(a)(4). The court reasoned that children of tender years are incapable of expressing their medical concerns to a physician. Id. at 581.

In Woods, the defendant brutally assaulted three victims, Venus, Jade, and Telisha. 143 Wn.2d at 570-71. Venus was the only victim to survive the attack. Id. at 573. While at the hospital prior to her death, Jade made several statements to the emergency room physician and the emergency room nurse. Id. at 601. The statements related the defendant's assault on her as well as the assault on Telisha. Jade described to Dr. Edminster that when Telisha entered the trailer she was ordered to stand up against the window and look out. Jade further told Dr. Edminster that Telisha was bound so Jade couldn't see what actually happened, but she heard the bat swing and hit Telisha's head. The court held that the challenged statements were pertinent to the physical and psychological treatment of Jade or Telisha. Most importantly, the court held that Jade's statements were reasonably pertinent to Telisha's treatment. Id. at 602-03.

Other courts have also applied this interpretation of the rule. For example, North Dakota has held under its parallel evidence that courts may admit statements for the purpose of diagnosis or

treatment rule made by the person seeking treatment or a third party, so long as the relationship between the person seeking treatment and the third party is sufficiently close to ensure that the guaranty of trustworthiness inherent in the rule applies under the circumstances. State v. Grant, 776 N.W.2d 209, 215 (N.D. 2009); N.D.R.Ev. 803(4).

Similarly, the Supreme Court of Iowa has held that the rationale for allowing statements by a third party who has a close relationship to the patient is the same rationale for the exception itself. That is, the motivation to speak truthfully exists not only when it is the declarant seeking medical treatment, but also when the declarant is in a close relationship with the person seeking medical treatment. State v. Long, 628 N.W.2d 440, 443-44 (Iowa 2001) (citing 4 J. Weinstein and M. Berger, Weinstein's Evidence, 803(4)[01], at 803-152 (1994)). The Long court emphasized that third persons who have a strong motivation to obtain satisfactory treatment or diagnosis for a person in a close relationship, such as a parent or spouse, would ordinarily be motivated to be truthful. Id. at 44. See United States v. Yazzie, 59 F.3d 807, 813 (9th Cir. 1995) (holding that statements to a doctor by a parent of an injured child qualified as a statement for the purpose of obtaining a proper

medical diagnosis); Petrocelli v. Gallison, 679 F.2d 286, 291 (1st Cir. 1982) (finding Federal Rule ER 803(4) permits admission of patient or family statements provided the statements are reasonably pertinent to diagnosis or treatment).

In this case, the trial court ruled that most of Amanuel's statements to Drummond were admissible but redacted a portion where Amanuel added, "I grabbed a knife and said I'm going to cut your hand if you don't let go and then he ran." 2RP 37-40. The trial court properly admitted portions of the statements under ER 803(a)(4). First, the statements were directly related to the causation of her injuries. Second, Amanuel spoke for Wosenyelesh because it was too painful for her to speak. 4RP 36-37. Lastly, Amanuel, who is one of Wosenyelesh's brothers, demonstrated a close relationship to Wosenyelesh. He was clearly concerned for the wellbeing of his sister. Out of all of the family members present, Amanuel was the brother who was very attentive and who rode to the hospital in the ambulance. 3RP 28, 35. Wosenyelesh was shaken up, scared and apprehensive, and the EMT felt allowing Amanuel in the ambulance would make her comfortable. 3RP 32, 35. There is no reason to believe that the statements made by Amanuel were not reliable. Amanuel was clearly looking

out for his injured sister and had no motive to fabricate statements to the people who were rendering her aid. Additionally, Wosenyelesh was alert and conscious while Amanuel was speaking with Drummond. 4RP 42. She listened to their conversation and could have interrupted if Amanuel's statements were incorrect.

Wosenyelesh was in a position similar to that of the child in Justiniano. Even though Wosenyelesh is not a child, she was unable to express her medical concerns to the physician. There are many reasons why someone may be incapable of communicating with a doctor; in this case Wosenyelesh was unable to say more than two words because her teeth were loose in her mouth. 4RP 40. Amanuel's statements to Drummond were solely for medical purposes and have the indicia of reliability because his only concern at the time was to assist his sister so that she would get the necessary treatment. Therefore, this Court should find that the trial court properly exercised its discretion in admitting the statements under ER 803(a)(4).

2. AMANUEL'S STATEMENTS TO THE EMERGENCY ROOM SOCIAL WORKER AND TO THE 911 OPERATOR WERE NOT TESTIMONIAL.

Relying on the U.S. Supreme Court decision in Crawford v. Washington, Fentahun contends that his Sixth Amendment right to confront witnesses was violated by the trial court's admission of out-of-court statements to the emergency room social worker, and to the 911 operator. In both situations, Amanuel's statements were made to obtain medical assistance. Therefore, these statements were properly admitted.

The Confrontation Clause of the Sixth Amendment bars the admission of testimonial out-of-court statements in the absence of an opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Confrontation Clause applies only to testimonial statements or materials. A testimonial statement is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 68. The United States Supreme Court has not yet provided a comprehensive definition of what constitutes a testimonial statement, but the Court has listed three possible formulations for the core class of testimonial statements:
(1) *ex parte* in-court testimony or its functional equivalent;

(2) extrajudicial statements that contain formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. State v. Hurtado, 173 Wn. App. 592, 598-99, 294 P.3d 838, 842 (2013), rev. denied, 304 P.3d 115 (2013) (citing State v. Jasper, 158 Wn. App. 518, 527, 245 P.3d 228 (2010), aff'd, 174 Wn.2d 96, 271 P.3d 876 (2012)).

Accordingly, the key to any post-Crawford analysis under the federal constitution begins with the question of whether the statement at issue is testimonial or not. Neither of the challenged statements were testimonial. Thus, their admission was proper, and Fentahun's argument should be rejected.

- a. Amanuel's Statements To The Emergency Room Social Worker Were Statements For Medical Diagnosis And Treatment And Did Not Violate Fentahun's Right To Confrontation.

In situations where a statement is made to medical providers for medical diagnosis and treatment, this Court has generally ruled that the statement is not testimonial unless it is reasonably

apparent that government officials are gathering evidence for prosecution. Washington courts have examined whether or not the following factors are present: (1) where they are made for diagnosis and treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working with the State. Hurtado, 173 Wn. App. at 843.

In State v. Moses, 129 Wn. App. 718, 730-31, 119 P.3d 906 (2005), rev. denied, 157 Wn.2d 1006 (2006), a domestic violence victim told the treating physician and a social worker at the emergency room that the defendant had hit her and kicked her in the face. These statements were held not to be testimonial because the purpose of these statements was the treatment of the victim's injuries, not the investigation of a crime. In reaching this conclusion, this Court specifically noted that the doctor had no role in the investigation of the assault and he was not working on behalf of or in conjunction with the police or governmental officials to develop testimony for the prosecution. Id. at 730.

Similarly, in State v. Saunders, 132 Wn. App. 592, 603, 132 P.3d 743 (2006), rev. denied, 159 Wn.2d 1017 (2007), this Court held that statements made by the victim to the paramedic

and the treating physician were not testimonial because “there is no reason to believe that a reasonable person in [the victim’s] position would think she was making a record of evidence for a future prosecution when she told paramedic Keyes and [treating physician] Dr. Andrews that her injuries occurred as a result of her boyfriend choking her and throwing her against the wall.” Id.

And in State v. Sandoval, 137 Wn. App. 532, 538, 154 P.3d 271 (2007), the domestic violence victim’s statements to emergency room staff that the defendant kicked her, hit her with his fists, and hit her several times with a belt were held not to be testimonial. The Sandoval court explained that statements are not testimonial when they are made for diagnosis and treatment purposes, when there is no indication that the witness expected the statements to be used at trial, and when the medical provider is not an agent of the State. Id. at 537.

By contrast, in Hurtado, the Court found the statements the victim made to the emergency room nurse that her boyfriend had struck her in the face were testimonial because the officer was present during the entire time that the victim was at the hospital, was actively collecting evidence, and was continuing his investigation of the incident that began at the victim’s home. The

Court opined that it would have been reasonable for the victim to assume from these circumstances that her statements in the officer's presence would be used for prosecution. Hurtado, 173 Wn. App. at 605-06.

This case is analogous to Moses, Saunders, and Sandoval, and distinguishable from Hurtado. If the Court applies the three factors employed in Washington, it will conclude the statements were not testimonial. The statements Amanuel made to Drummond were for the sole purpose of assisting Drummond in her role as a social worker in determining how to best treat Wosenyelesh. There was no evidence that the police were present or that Drummond was attempting to speak with Wosenyelesh and Amanuel on behalf of the police. The record indicates that when Drummond was attempting to interview Wosenyelesh, the only other person present was Amanuel. 4RP 42. Unlike in Hurtado, given that Drummond was not gathering evidence and no government official was present, it was not reasonable to believe the statements made in this context would assist in prosecution.

Fentahun's claim under the federal constitution should be rejected, as the record shows that Amanuel's statements that his sister was struck several times on her face with a closed fist by

their brother were made for the non-testimonial purpose of receiving the necessary treatment. Their admission does not violate the Confrontation Clause of the Sixth Amendment.

b. Amanuel's Statements To The 911 Operator Were Not Testimonial And Were Properly Admitted.

An excited utterance is a statement describing a startling event, made while the declarant is still under the influence of that event. ER 803(a)(2). Generally, an emergency 911 call is not of the same nature as an in-custody interrogation by police. Such an emergency call is not the functional equivalent of uncross-examined, in-court testimony. State v. Davis, 154 Wn.2d 291, 295, 111 P.3d 844 (2005), aff'd, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). However, it is not sufficient for the State to simply demonstrate that the offered statement was made in the course of a 911 call. Instead, the trial court, on a case-by-case basis, must assess whether the 911 recording is testimonial or nontestimonial and whether the statement originates from interrogation. Davis, 154 Wn.2d at 295; State v. Powers, 124 Wn. App. 92, 101, 99 P.3d 1262 (2004).

In Davis, the Court found the 911 call was nontestimonial because the victim's statements were made about events as they were actually occurring, a reasonable listener would recognize that the victim was facing an ongoing emergency, the call was a cry for help in the face of a physical threat, and the environment was chaotic and probably unsafe. Davis, 154 Wn.2d at 827-28. The Court also explained that the caller was seeking aid, not relating past events. Id. at 831-32.

Similarly, in State v. Saunders, 132 Wn. App. 592, 603, 132 P.3d 743 (2006), a recording of the victim's 911 call was admitted as an excited utterance under ER 803(a)(2). During the call, she was crying and audibly distressed and told the operator that her boyfriend had grabbed her by the throat, thrown her against a wall, and broken her cell phone. The caller also expressed fear that Saunders would return to their home. This Court classified this as a call for help and for protection, not as a statement in aid of future prosecution and concluded that the statements to the 911 operator were not testimonial and were properly admitted at trial. Id. at 602-03.

By contrast, in Powers, a call to 911 where the declarant was not requesting help but rather was reporting a violation of an

existing protective order was held to be testimonial and thus subject to cross-examination. 124 Wn. App. at 101.

In the case at bar, Amanuel's motivation for calling 911 was not to report a violation but rather to seek medical help. Ex. 1. Immediately after the operator answered, Amanuel said his sister's teeth had been knocked out and she had a swollen eye. Ex. 1. It is apparent that Amanuel was more interested in medical aid than in the apprehension of his brother, because as the operator asked questions about where Fentahun may have gone or what he was wearing, Amanuel answered but insisted that his sister needed a medic and stated "please hurry up." Ex 1. Amanuel made clear the purpose of his call: "she needs help now, please." Ex. 1. Amanuel's intent could not be more evident. Unlike the victim in Powers, who had no need for aid when she called 911, but simply wanted to report that the defendant had committed a protection order violation, Amanuel manifested a palpable fear for his sister's wellbeing and a need for help. His use of the 911 system is not unusual. A reasonable person does not typically call 911 to provide statements for prosecution. In most circumstances, people dial 911 because they need emergency help. A reasonable person, in

Amanuel's position, would not likely anticipate that his call to 911 would later be used at trial.

Fentahun's claim under the federal constitution should be rejected, as the record shows that Amanuel's statements to the 911 operator were for the sole purpose of procuring aid for his sister, rendering them not testimonial. Their admission at trial did not violate the Confrontation Clause of the Sixth Amendment.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Fentahun's conviction of Assault in the Second Degree (Domestic Violence).

DATED this 23rd day of December, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
MAFÉ RAJUL, WSBA #37877
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. NEGATU FENTAHUN, Cause No. 69918-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Bora Ly
Done in Seattle, Washington

12-23-13
Date