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FILED
October 23, 2015
Court of Appeals
Division I
State of Washington

No. 73154-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

D'ANGELO BROWN,

Appellant.

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

The Honorable Laura Gene Middaugh

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The admission of the 911 call violated Mr. Brown's constitutionally protected right to confrontation.

2. The trial court violated Mr. Brown's right to confrontation when it admitted the hearsay statements of an unidentified 911 caller.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The Confrontation Clauses of the United States and Washington Constitutions bar admission of testimonial hearsay where the defendant has no opportunity to cross-examine the declarant. Here, the court admitted the hearsay statements of an unidentified 911 caller who related past events or related information for which he had no personal knowledge. Did the admission of the caller's testimonial hearsay statements violate Mr. Brown's constitutionally protected right to confrontation?

C. STATEMENT OF THE CASE

D'Angelo Brown was charged with fourth degree assault involving his girlfriend, Bria Gomez. CP 31.¹ Prior to trial, the State moved, and Mr. Brown objected, to admit a 911 call where in three separate people are heard, one being Ms. Gomez. CP 16-17; 12/1/2014RP 30-33. Specifically, Mr. Brown objected to the statements of the second voice, an unidentified male voice who claims to see a man and a woman fighting but then admits to only hearing something, and seeing a woman outside his apartment. CP Supp ____, Sub No. 40B, Exhibit 1 at 1-2. The caller notes that the woman needs medical attention "cause she got beat on." *Id.* at 2. The caller also relates that the male had left on foot. *Id.* at 3-4. The caller conveys a few questions to the woman asked by the 911 operator, then turns the phone over to the woman, later identified as Ms. Gomez. *Id.* at 4.

Mr. Brown conceded that the bulk of Ms. Gomez's statements on the 911 call were an effort to assess an on-going emergency and thus nontestimonial. 12/1/2014RP 45. But, Mr. Brown objected that

¹ Mr. Brown was originally charged with second degree assault, unlawful imprisonment, and several counts of misdemeanor violation of a court order. CP 1-3, 31-34. At the time of trial, the State had amended the assault charge to a single count of fourth degree assault. CP 31. Following the jury trial, Mr. Brown was acquitted of the unlawful imprisonment count but convicted on the remaining misdemeanor counts. CP 35-42. Mr. Brown does not challenge the violation of a court order counts.

admission of the unidentified man's statements about an incident he did not see violated his right to confront the witnesses against him.

12/1/2014RP 45. Mr. Brown urged the court to do a line-by-line analysis of the 911 recording to differentiate nontestimonial from testimonial statements. 12/1/2014RP 45-48. The court agreed that the first person heard on the tape was incomprehensible because of a language barrier, thus the court refused to admit his statements.

12/1/2014RP 50-52. The court admitted the hearsay statements of Ms. Gomez and the unidentified second man without redaction.

12/1/2014RP 50-54.

The 911 call was admitted at trial during the testimony of the initial responding Seattle police officer and played for the jury.

12/4/2014RP 67-69. At the conclusion of the trial, Mr. Brown was convicted of fourth degree assault. CP 35.

D. ARGUMENT

The admission of the unidentified caller's hearsay statements without cross-examination violated Mr. Brown's right to confrontation.

1. *The admission of testimonial hearsay statements violates a defendant's constitutionally protected right to confrontation.*

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with

the witnesses against him.” U.S. Const. amend. VI; Const. Art. I, section 22. The right to confrontation embodies the belief that criminal defendants should have the opportunity to test evidence against them in the adversarial “crucible of cross-examination.” *Michigan v. Bryant*, — — U.S. —, 131 S.Ct. 1143, 1157, 179 L.Ed.2d 93 (2011). Thus, the Confrontation Clause excludes a declarant’s out-of-court statements unless the declarant either appears at trial for cross examination or is unavailable for trial but the defendant had a prior opportunity for cross examination. *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The right to confrontation applies to witnesses who “bear testimony” against the defendant. *Crawford*, 541 U.S. at 51, quoting 2 N. Webster, *An American Dictionary of the English Language* (1828). To determine whether one making a statement to a law enforcement officer or agent has become a witness, courts look to the speaker’s primary purpose in making the statement. *Bryant*, 131 S.Ct. at 1153; *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). A witness’s statements are testimonial when he makes “[a] solemn declaration or affirmation ... for the purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51, quoting 2 N. Webster,

An American Dictionary of the English Language (definition of “testimony”). But “[n]o ‘witness’ goes into court to proclaim an emergency and seek help.” *Davis*, 547 U.S. at 828. Thus, statements “are testimonial when the circumstances objectively indicate that there is no ... 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. Conversely, “[s]tatements 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.” *Davis*, 547 U.S. at 822.

“To determine whether the ‘primary purpose’ of an interrogation is ‘to enable police ... to meet an ongoing emergency,’ ... [courts] objectively evaluate the circumstances in which the encounter occur[red] and the statements and actions of the parties.” *Bryant*, 131 S.Ct. at 1156, *quoting Davis*, 547 U.S. at 822. 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. *Bryant*, 131 S.Ct. at 1156. It focuses on the purpose reasonable

participants would have had, not the subjective or actual purpose of the participants. *Id.*

2. *The statements were testimonial and inadmissible absent the opportunity of Mr. Brown to cross examine.*

Mr. Brown submits the admission of the unidentified caller's hearsay statements without an opportunity to cross examine the caller violated his right to confrontation as the statements were testimonial.

Washington Supreme Court has adopted a four-part test for determining whether hearsay statements are testimonial: (1) whether the speaker is speaking of events as they are actually occurring or instead describing past events, (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency, (3) whether the questions and answers show that the statements were necessary to resolve an emergency or to learn what happened in the past, and (4) the level of formality of the interrogation. *See State v. Koslowski*, 166 Wn.2d 409, 418–19, 421, 209 P.3d 479 (2009) (where initial statements taken at scene were neither a cry for help nor information enabling police to end a threatening situation, statements were testimonial).

“[A] conversation which begins as an interrogation to determine the need for emergency assistance [can] ... ‘evolve into testimonial statements.’” *Davis*, 547 U.S. at 828, *quoting Hammon v. State*, 829

N.E.2d 444, 457 (2005). “Just as, for Fifth Amendment purposes, ‘police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect,’ ... trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial.” *Davis*, 547 U.S. at 829, *quoting New York v. Quarles*, 467 U.S. 649, 658-59, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984).

Courts review violations of the confrontation clause *de novo*. *Koslowski*, 166 Wn.2d at 417.

Here, the level of questioning by the 911 operator was very informal. Further, the caller was describing events that had already happened as he noted that Mr. Brown had left the area. Additionally, the caller was not relating information that he had observed but was assuming what had happened based upon what he had heard but not observed. Finally, although the 911 operator’s questions seemed to be designed to resolve an emergency or determine what had happened, the caller’s statements were intended to point to Mr. Brown as the aggressor in the argument between he and Ms. Gomez.

Finally, although the caller's initial statements seemed to be an attempt to obtain assistance for Ms. Gomez, the statements evolved into plainly testimonial statements when the caller began to point the finger at Mr. Brown.

Thus, under the analysis gleaned from *Koslowski*, the caller's hearsay statements were testimonial and should have been excluded.

3. *The error in violating Mr. Brown's right to confrontation was not a harmless error.*

"It is well established that constitutional errors, including violations of a defendant's right under the confrontation clause, may be harmless." *State v. Moses*, 129 Wn.App. 718, 732, 119 P.3d 906 (2005); *Harrington v. California*, 395 U.S. 250, 251-52, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). Such error is subject to the more stringent constitutional harmless error test—that is, the State must demonstrate that the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635-41, 160 P.3d 640 (2007).

In Mr. Brown's matter, none of the percipient witnesses testified at trial. Ms. Gomez did not appear or testify, nor did the State intend to have the unidentified caller testify at trial. Only the police officers assigned to the case testified, and since they were not present during the

alleged assault, all of their information came from the people who did not testify. Had Mr. Brown been given the opportunity to cross examine the unidentified caller, the outcome of the trial court could have been different as it could have been determined that no assault occurred and Mr. Brown and Ms. Gomez were merely engaged in a verbal dispute that never became physical. As such, the error in admitting the unidentified caller's hearsay statements in the 911 call were not harmless. Mr. Brown is entitled to reversal of his assault conviction and remand for a new trial.

E. CONCLUSION

For the reasons stated, Mr. Brown asks this Court to reverse his conviction for fourth degree assault because his constitutionally guaranteed right to confrontation was violated.

DATED this 23rd day of October 2015.

Respectfully submitted,

s/Thomas M. Kummerow

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

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| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 73154-8-I |
| v. |) | |
| |) | |
| D'ANGELO BROWN, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

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