

NO. 47689-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHARLES SATIACUM, III.,

Appellant.

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

The Honorable Philip K. Sorensen, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	6
ADMISSION OF A BYSTANDER’S OUT-OF-COURT STATEMENT TO POLICE VIOLATED SATHIACUM’S RIGHT TO CONFRONT WITNESSES.	6
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Fraser
170 Wn. App. 13, 282 P.3d 152 (2012)..... 12

State v. Guloy
104 Wn.2d 412, 705 P.2d 1182 (1985)..... 12

State v. Hurtado
173 Wn. App. 592, 294 P.3d 838
rev. denied, 177 Wn.2d 1021 (2013) 7

State v. Jasper
174 Wn.2d 96, 271 P.3d 876 (2012)..... 7, 12

State v. Koslowski
166 Wn.2d 409, 209 P.3d 479 (2009)..... 7, 9, 10, 11

State v. Ohlson
162 Wn.2d 1, 168 P.3d 1273 (2007)..... 10

State v. Reed
168 Wn. App. 553, 278 P.3d 203 (2012)..... 8

State v. Robinson
189 Wn. App. 877, 359 P.3d 874 (2015)..... 9

FEDERAL CASES

Crawford v. Washington
541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)..... 6, 7, 8, 11, 12

Davis v. Washington
547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)..... 8, 9, 10, 11

Michigan v. Bryant
562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)..... 8, 9, 10

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9.94A.533	12
RCW 9.94A.834	12
U.S. Const. amend. VI	6, 13
Const. art. I § 22.....	6

A. ASSIGNMENT OF ERROR

Appellant's right to confront the witnesses against him was violated when the court admitted into evidence a bystander's out of court statement to police.

Issue Pertaining to Assignment of Error

A witness told police appellant's car sped by nearly hitting him shortly before it crashed. The witness spoke to police five to ten minutes after the scene was under control. The witness did not testify at trial, but his statements to police were relayed to the jury. Did the witness' out-of-court statements amount to testimonial hearsay in violation of appellant's Sixth Amendment right to confront witnesses?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Charles Satiacum, III with one count of attempting to elude a pursuing police officer, one count of obstructing a law enforcement officer, and one count of resisting arrest. CP 4-5. The information also alleged as a sentence enhancement that at least one person other than the defendant and the pursuing officer were endangered during the attempt to elude. CP 4. The jury found Satiacum guilty as charged and answered "Yes" to a special verdict form for the sentence enhancement. CP 17-20. The court imposed a drug offender

sentencing alternative, requiring Satiacum to serve 18.75 months of confinement, with another 18.75 months suspended on condition of his successful completion of 18.75 months of community custody and drug treatment. CP 66-67. Notice of appeal was timely filed. CP 88.

2. Substantive Facts

The police could not identify the driver of the car they chased on December 20, 2014. 1RP¹ 113-14, 156, 194, 229, 288. However, they testified they pursued the green sedan at speeds of up to 90 miles per hour through heavily trafficked areas of downtown Tacoma at around 9 p.m. on a Saturday evening. 1RP 109, 134-35, 141-45, 169, 209-10. At various times, five different patrol cars were in pursuit, all occupied by uniformed officers who activated their lights and sirens and once used a loudspeaker to order the vehicle to stop. 1RP 103-04, 107, 140, 149, 164-65, 206-07, 211, 274-75. Officers saw the car pass other vehicles by swerving into the oncoming lane and speed through several red lights without any apparent deceleration. 1RP 109, 146, 169. The car ultimately came to rest on the railroad tracks that lie between Schuster Parkway and Commencement Bay. 1RP 154-55. One officer testified he saw the car driving north on Schuster Parkway, but when

¹ There are four volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Apr. 2, 2015 – Apr. 7, 2015; 2RP – Apr. 7, 2015 (afternoon session); 3RP – Apr. 8, 2015; 4RP – May 15, 2015.

he arrived at the accident scene, the car was facing south on the railroad tracks. 1RP 154-55.

On one side of Schuster Parkway is a wooded hillside. 1RP 157. On the other are the railroad tracks, an embankment, the beach, and then the waters of Commencement Bay, the area of Puget Sound adjacent to downtown Tacoma. 1RP 156-57. Officer Zachery Wolfe arrived to find the green sedan facing south on the railroad tracks and two men running south, a couple of yards from the car. 1RP 214-16. According to Officer Ryan Koskovich, a tree and a fire hydrant appeared to have been struck by a northbound vehicle. 1RP 189-92. When Wolfe pulled up and blocked access to the wooded hillside, he testified, the two men ran toward the water. 1RP 217-18. When he began to catch up, one of the men stopped, and Wolfe detained him at gunpoint. 1RP 218-19. The man who stopped was identified as Talon Saluskin. 1RP 221.

When other officers took over the detention of Saluskin, Wolfe and Koskovich followed the other man, later identified as Satiacum, into the water. 1RP 180, 194, 221. The officers repeatedly announced themselves as police and ordered Satiacum out of the water, to no avail. 1RP 179, 222. After swimming out about 25 yards, Wolfe testified, Satiacum began to swim back toward the shore. 1RP 222. When Satiacum reached a place where he could stand, Wolfe claimed, Satiacum dipped down into the water.

1RP 222. Officer Ryan Koskovich testified he saw Satiacum submerge himself and then come up again a couple of times. 1RP 179. At that point, Wolfe and Koskovich entered the water and detained Satiacum. 1RP 180, 222. The officers testified their attempts to identify the driver of the car were delayed by Satiacum's flight into the water. 1RP 180, 294.

As they walked him out of the water, Koskovich testified Satiacum began to tense up and pull away from Koskovich's grip. 1RP 181. Koskovich told Satiacum to comply and let himself be arrested. 1RP 181. After they cleared the water's edge and Satiacum began to pull away, Koskovich testified he "escorted" Satiacum to the ground. 1RP 182. Koskovich claimed Satiacum then placed his hands under his body where the officers could not see them. 1RP 183-84. He testified Satiacum failed to respond to several verbal commands to put his hands behind his back, and the officers had to "pry" Satiacum's hands out from under him in order to put handcuffs on his wrists. 1RP 184-85. Officer Joseph Harris also testified Satiacum struggled with the officers attempting to place him in handcuffs. 1RP 282-83.

Wolfe testified he placed Satiacum in the back of his patrol car, turned on the heat, and advised him of his constitutional rights. 1RP 223, 249-50. After agreeing to speak, Satiacum told Wolfe a friend had picked him up about 20 minutes earlier, Saluskin was driving the car, and he ran

because he did not know what else to do. 1RP 224-25. Wolfe claimed Satiacum told him he was sitting in the right front passenger seat and had been wearing a seatbelt with shoulder strap. 1RP 225-26. However, when Wolfe lifted up Satiacum's shirt, he observed red marks extending from Satiacum's left shoulder to his right hip, consistent with a driver's side seatbelt. 1RP 226. Harris' report described what he saw as a "laceration," which, he explained at trial, referred to more of an abrasion or bruise, from the left shoulder down to the right hip. 1RP 285-86, 292, 299. Officer Cory Peyton, who observed Satiacum at the hospital, also saw an abrasion on Satiacum's left shoulder and concluded he was on the left side of the car. 1RP 259-60. The officers testified no photographs were taken of the marks they described. 1RP 293.

By stipulation, Saluskin's statements to Officer Nicole Faivre were admitted. 1RP 307-08; CP 15-16. Faivre testified Saluskin told her he was asleep in the back seat and woke up to find the car first all over the road and then on the railroad tracks. 1RP 324-25.

Five to ten minutes after the accident scene was under control, a civilian witness, approached Officer David Johnson and reported that the car had come up behind him on Schuster way so quickly he feared he would be struck from behind, then squeezed into a narrow space between his car and the oncoming traffic to go around him, missing both cars by only about a

foot. 1RP 152. The witness reported the car then lost control, went airborne, and crashed onto the railroad tracks. 1RP 152.

Before trial began, Satiacum alerted the court he may object to this witness' testimony under Crawford, apparently referring to the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). 1RP 71. Immediately before the testimony, Satiacum objected again, citing Crawford and concerns that the statements were testimonial. 1RP 121-22. After an offer of proof by the prosecutor, Satiacum again argued the statements were testimonial under Crawford. 1RP 128-29. The court found the statements met the requirements for the excited utterance exception to the rules against hearsay and admitted the statements. 1RP 130.

C. ARGUMENT

ADMISSION OF A BYSTANDER'S OUT-OF-COURT STATEMENT TO POLICE VIOLATED SATIACUM'S RIGHT TO CONFRONT WITNESSES.

Both our state and federal constitutions guarantee accused persons the right to confront the government's witnesses at trial. U.S. Const. amend. VI; Const. art. I § 22. The Sixth Amendment Confrontation Clause aims to prevent substitutes for live testimony that deny defendants the opportunity to test an accuser's claims "in the crucible of cross-examination." State v. Hurtado, 173 Wn. App. 592, 598, 294 P.3d 838, rev. denied, 177 Wn.2d

1021 (2013) (quoting Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). Testimonial statements by a witness who does not testify are inadmissible unless the witness is unavailable and there has been a prior opportunity for cross-examination. Crawford, 541 U.S. at 59. Violations of the Confrontation Clause are reviewed de novo, and the constitutional error requires reversal unless the State proves it harmless beyond a reasonable doubt. Hurtado, 173 Wn. App. at 598 (citing State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012)).

Crawford's categorical requirement of cross-examination or exclusion applies to all out-of-court statements that are deemed testimonial. 541 U.S. at 59. "The State has the burden of establishing that a statement is nontestimonial." Hurtado, 173 Wn. App. at 600 (citing State v. Koslowski, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009)).

The Supreme Court has yet to provide an all-encompassing definition of which statements are testimonial. But case law does provide some guidance. The Crawford court noted the class of statements deemed testimonial likely includes, "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52. As the court explained, "An accuser who makes a formal statement to

government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” Id. at 51.

Statements made to a police officer are likely to be testimonial. Id. at 53 n. 4. The exception to this general rule is when the primary purpose of the statement is to enable police to meet an ongoing emergency, rather than to establish or prove past events relevant to a criminal prosecution.² Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Although the Crawford opinion speaks in terms of interrogation, cases have applied the same standard whether the statements to the police were spontaneous or in response to questions. See, e.g., State v. Reed, 168 Wn. App. 553, 569-70, 278 P.3d 203 (2012) (holding confrontation clause not violated by admission of spontaneous statements to police that were intended not to prove past events but to secure police assistance in responding to an emergency). As the Reed court explained, “interrogation is not a prerequisite for testimonial hearsay.” Id. at 569 n. 9 (discussing Davis, 547 U.S. at 822 n. 1).

Washington courts have distilled the Davis analysis into four factors to consider in determining whether a statement is testimonial:

² The United States Supreme Court later clarified that there may be purposes other than an ongoing emergency that may render the statements non-testimonial so long as the primary purpose is something other than establishing past facts relevant to a criminal prosecution. Michigan v. Bryant, 562 U.S. 344, 358-59, 131 S. Ct. 1143, 1155, 179 L. Ed. 2d 93 (2011).

(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 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?

State v. Robinson, 189 Wn. App. 877, 888, 359 P.3d 874 (2015) (citing Koslowski, 166 Wn.2d at 417).

The existence of an ongoing emergency is the single most important factor in determining whether the primary purpose of a statement to law enforcement is testimonial. Bryant, 562 U.S. at 361. This is because the emergency is presumed to focus the participants on more immediate needs than criminal prosecution. Id. (discussing Davis, 547 U.S. at 822). The

focus is, instead, on “end[ing] a threatening situation.” Id. (quoting Davis, 547 U.S. at 832).

This analysis is different from the analysis under the excited utterance exception to the general prohibition on hearsay. The hearsay exception for excited utterances applies so long as the speaker remains under the stress of a startling event. State v. Ohlson, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007). By contrast, the testimonial analysis under Davis inquires whether the emergency itself is ongoing such that the statement is a cry for help. Bryant, 562 U.S. at 361. Our supreme court has rejected the suggestion that excited utterances cannot be testimonial. Ohlson, 162 Wn.2d at 16-17. “[A] predominantly excited utterance might contain testimonial elements.” Id. In Koslowski, the court considered just such a scenario and found the victim’s statements violated the confrontation clause, even though she remained frightened after a robbery.

The Confrontation Clause is violated by admission of a victim’s statements to police after the emergency has ended. Koslowski, 166 Wn.2d at 432-33. Koslowski involved a home invasion robbery, wherein a Ms. Alvarez was forced into her home at gunpoint and tied up while robbers took her valuables. 166 Wn.2d at 415. After the men left, she freed herself and called 911. Id. In discussing Davis, the court explained, “the statements are neither a cry for help nor provision of information that will enable officers

immediately to end a threatening situation.” Koslowski, 166 Wn.2d at 421 (citing Davis, 547 U.S. at 832). The court determined that, although Ms. Alvarez was frightened, her statements to the responding officer were testimonial because there was no ongoing threat or emergency at the time. Id. at 423-32.

Like the statements in Koslowski, the bystander’s statements in this case were made after the emergency had ended. Therefore, the State cannot meet its burden to show that the bystander’s statements to police were not testimonial in violation of the Confrontation Clause. According to Officer Johnson, the witness came up to him approximately five to ten minutes after the scene was under control. RP 150, 152. Neither the witness nor anyone else was in danger at that point. The witness was reporting what had happened earlier, before the car crashed onto the railroad tracks. 1RP 151-52. There was no ongoing emergency, and thus, the statements were testimonial under Davis and Koslowski. Davis, 547 U.S. at 822; Koslowski, 166 Wn.2d at 421-32.

The statements easily meet the more general standard elucidated in Crawford: In voluntarily reporting to the police what had occurred, a reasonable person would expect the statements to be available for use in a criminal prosecution. Crawford, 541 U.S. at 52. Therefore, the witness’

statements to police were testimonial and admission of them at trial violated the Confrontation Clause.

Testimonial hearsay must be excluded unless the witness is unavailable and the defense has had a prior opportunity to cross-examine him. Crawford, 541 U.S. at 59. The police witness merely reported these statements at trial. 1RP 151-52. There was no prior opportunity for Satiacum to cross-examine him. The out-of-court statements should have been excluded. Crawford, 541 U.S. at 59.

This violation of Satiacum's right to confront witnesses is presumed prejudicial. State v. Fraser, 170 Wn. App. 13, 23-24, 282 P.3d 152 (2012) (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). Reversal is required unless the State can show beyond a reasonable doubt that the error did not contribute to the jury's verdict. Id. (citing Jasper, 174 Wn.2d at 117). This is yet another burden the State cannot meet.

The bystander's statements were particularly important in the context of the sentence enhancement. Twelve months and one day were added to Satiacum's standard range based on the jury's special verdict finding that at least one person, other than Satiacum and the pursuing officers, were endangered by his attempt to elude. CP 18, 62; RCW 9.94A.533(11); RCW 9.94A.834. While there was other testimony about traffic in the area, the bystander's account was likely to have a powerful influence on the jury

because it was a specific person, rather than a general assertion by the police that there was traffic in the area. On these facts, the State cannot prove beyond a reasonable doubt that this violation of Satiacum's Sixth Amendment rights was harmless.

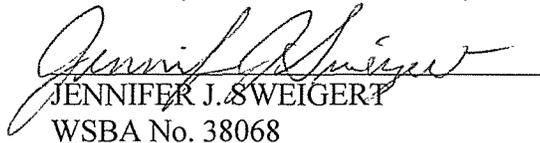
D. CONCLUSION

The violation of Satiacum's rights under the Sixth Amendment Confrontation Clause requires reversal of his sentence enhancement.

DATED this 30th day of December, 2015.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 47689-4-II
)	
CHARLES SATICUM,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF DECEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHARLES SATICUM
DOC NO. 851943
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER 2015.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

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