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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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CLERK OF SUPREME COURT
STATE OF WASHINGTON

No. _____

80427-3

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DUANE JONATHON KOSLOWSKI,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 22023-1-III
Appeal from the Superior Court of Yakima County
Superior Court Cause Number 02-1-02351-2
The Honorable Michael Leavitt, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Duane Jonathon Koslowski, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division III, case number 22023-1-III, which was filed on June 14, 2007. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Yakima County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Were Koslowski's rights under the Confrontation Clause violated when the State introduced out-of-court statements made by the non-testifying victim to the responding police officers?
2. Under the ruling of *Davis v. Washington*, were the victim's statements to the investigating officer testimonial?
3. Are statements made by a crime victim to the responding police officers of a nature that a declarant would reasonably understand they would be used "prosecutorially" and are they therefore "testimonial"?

IV. STATEMENT OF THE CASE

A. Procedural History

The State charged Duane Jonathon Koslowski in Yakima County Superior Court by second amended information with seven

counts relating to two different crimes. The State charged first degree robbery (count 4), first degree unlawful possession of a firearm (count 5) and first degree burglary (count 7), stemming from an incident on November 13, 2002 against alleged victim Violet Alvarez. (CP 109-10) The State charged first degree robbery (count 1), first degree assault (count 2), first degree unlawful possession of a firearm (count 3) and first degree burglary (count 6), stemming from an incident on November 14, 2002 against alleged victim Marion Wall. (CP 108-10) The State also alleged that Koslowski was subject to sentence enhancements because he was armed with a firearm during the commission of counts 1, 2, 4, 6, and 7. (CP 108-10)

A jury found Koslowski guilty of all seven counts, and entered special verdicts that Koslowski was armed with a deadly weapon during commission of five of the crimes. (RP XI 144-45; CP 32-43)¹ The trial court imposed an exceptional sentence of 720 months. (RP XII 1103-08; CP 10, 13-15)

¹ Citations to the verbatim reports of proceedings will be as follows. Pretrial hearings on January 13, 14, 22, 23 and 24, 2003 (labeled Volumes 1, 2, III, and 4), will be referred to as RP1, RP2, RP3, and RP4, followed by the page number. Trial proceedings beginning on January 27, 2003 (labeled Volumes I through XII) will be referred to as RP I, RP II, RP III, etc., followed by the page number. The hearing on June 13, 2003 is not referred to in this brief.

Koslowski appealed, raising numerous challenges to his convictions, including the admission of his custodial statements under CrR 3.5, the validity of the search warrant, the trial court's denial of his motion to sever the Wall and Alvarez counts, prosecutorial mismanagement, the admission of testimonial hearsay, sufficiency of the evidence, an improper jury instruction, and the imposition of an exceptional sentence. The Court of Appeals affirmed Koslowski's convictions but reversed his exceptional sentence in an unpublished opinion filed October 20, 2005.

Koslowski filed a Petition for Review in this Court on the testimonial hearsay issue only. While Koslowski's petition was pending, the United States Supreme Court issued *Davis v. Washington*, __ U.S. __, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), which addressed the question of what constitutes "testimonial hearsay." Subsequently, this Court granted Koslowski's petition, and remanded the case to the Court of Appeals for reconsideration in light of *Davis*.

The Court of Appeals applied the *Davis* reasoning to the facts in this case, and again affirmed Koslowski's conviction.

B. Substantive Facts²

On November 13, 2002, Yakima Police Officers Nolan Wentz and Michael Kryger responded to a report of a robbery at 1103 South 34th Street in Yakima, Washington. (RP III 320-21, 330-32) When Wentz arrived, Alvarez was still on the phone with the 911 operator. (RP1 111) When Alvarez saw Wentz, she hung up the phone and opened the door. (RP1 111) Wentz testified that Alvarez was upset and shaking. (RP1 112) Wentz questioned Alvarez about what happened, and she responded in detail. (RP1 112, 114)

Alvarez died prior to trial of causes unrelated to this case and was therefore unavailable to testify at trial. (RP III 309) As a result, the State sought to admit her statements to police under the "excited utterance" exception to the hearsay rule, ER 803(a)(2). (RP1 119) The trial court agreed, and allowed the officers to testify about what Alvarez told them. (RP1 121)

The officers testified that Alvarez said she was outside her home unloading grocery bags from her car, when she saw a dark-

² The Substantive Facts recited in this petition are limited to the facts relevant to the issue presented for review. Additional facts can be found in the Court of Appeals opinion, attached in the Appendix, and the Petitioner's Opening Brief of Appellant, on file with this Court.

colored foreign car drive by. (RP III 323-24, 327, 333) Three men got out of the car and approached her. Alvarez told the officers that she thought the three men were Hispanic. (RP III 327, 333, 344, 347) One man put what Alvarez believed was a gun against her back and told her in English to go into the house. (RP III 323, 333-34, 348) However, Officer Kryger was not certain whether Alvarez told him she actually saw the gun or whether she just told him she believed it was a gun. (RP III 348)

Once inside the house, the men ordered Alvarez to the floor, then tied her hands and covered her face with a T-shirt. (RP III 324, 334) Alvarez heard the men rummaging around the house, heard the contents of her purse being dumped onto the floor, and heard the men speak to each other in Spanish. (RP III 324, 335-36) After she heard the men leave, Alvarez called the police. (RP III 324, 336)

Alvarez told the officers that one of the men took a ring off of her finger. (RP III 335) She also told them that they took her wallet, credit cards, jewelry, and a DVD player. (RP III 337)

V. ARGUMENT & AUTHORITIES

The issues raised by Koslowski's petition should be addressed by this Court because the Court of Appeals' decision

conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court, and raises significant constitutional issues under the Washington State Constitution and the United States Constitution. RAP 13.4(b)(1),(2) and (3).

The Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." This guarantee applies to state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). Confrontation is a fundamental "bedrock" protection in a criminal case, and requires evidence be tested by the adversarial process. *Crawford v. Washington*, 124 S. Ct. 1354, 1359, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). The Confrontation Clause thus requires in-person testimony, or a full opportunity for cross-examination where the witness was unavailable, in order to admit out-of-court statements as "testimonial evidence." *Crawford*, 124 S. Ct. at 1364.

The *Crawford* Court recognized that "testimonial" statements include "ex-parte in-court testimony or its functional equivalent." 124 S. Ct. at 1364. Such evidence falls within the "core class of 'testimonial' statements." 124 S. Ct. at 1364. This "core class" includes not only formal affidavits and confessions to police

officers, but also “pretrial statements that declarants would reasonably expect to be used prosecutorially.” 124 S. Ct. at 1364. This includes “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *Crawford*, 124 S. Ct. at 1364.

Crawford further explained that “police interrogation” for purposes of the Confrontation Clause must not be viewed in a technical or legal sense. 124 S. Ct. at 1354 n.4. Unlike *Miranda* issues, “interrogation” in the context of the Confrontation Clause embraces a wide scope of governmental conduct and should be viewed in a colloquial manner. *Crawford*, 124 S. Ct. at 1364-65 n.4.

In *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (consolidated with a second case, *Hammon v. Indiana*), the Supreme Court applied its *Crawford* holding to statements made to a 911 operator and to responding officers. The facts presented by the companion *Hammon* case are relevant here. In that case, police officers responded late to a “reported domestic disturbance” at the home of Hershel and Amy Hammon. They found Amy alone on the front porch, appearing “somewhat

frightened," but she told them that "nothing was the matter." She gave them permission to enter the house, where officers separated Amy and Hershel. One officer went to the living room to talk with Amy, and asked her what had occurred. After hearing Amy's account, the officer had her fill out and sign an affidavit. *Davis*, 126 S. Ct. at 2272.

The State charged Hershel with domestic battery and with violating his probation. Amy was subpoenaed, but she did not appear at his subsequent bench trial. The State called the officer who had questioned Amy, and asked him to recount what Amy told him and to authenticate the affidavit. Hershel's counsel objected, but the trial court allowed the statements as "excited utterances." *Davis*, 126 S. Ct. at 2272.

The *Davis* Court first iterated the following general rule for determining whether statements made during both formal and informal police questioning are testimonial:

Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: 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.

126 S. Ct. at 2273-74 (emphasis added).³

The Court then applied this rule to the facts of the *Hammon* case, and found that Amy's statements to the officer were "testimonial." The Court states:

It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal conduct[.] There was no emergency in progress; the interrogating officer testified that he heard no arguments or crashing and saw no one throw or break anything. . . . Amy told them that things were fine . . . and there was no immediate threat to her person. . . . [The officer] was not seeking to determine . . . "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime[.]

126 S. Ct. at 2278.

Contrary to the Court of Appeals' holding, the facts of this case are similar and require the same conclusion. There was no emergency or current crime in progress when Officer Wentz arrived

³ The Court noted that, although it referred to police "interrogation," it did not intend to limit the holding to cases involving formal police interrogation. The Court states that this is "not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial." 126 S. Ct. at 2274 fn. 1.

at Alvarez's home. There was no immediate threat to Alvarez's safety. Wentz was not seeking to determine what was happening, but instead was trying to determine what *had* happened. The purpose of the investigation and questioning were to gather information and investigate a possible past crime, and to gather facts that were potentially relevant to later criminal prosecution. *Davis*, 126 S. Ct. at 2278.

The declarations made by Alvarez fall squarely within "pretrial statements that declarants would reasonably expect to be used prosecutorially," that comprise the "core class" of testimonial evidence protected by the confrontation clause. *Crawford*, 124 S. Ct. at 1364. The nature of the conversation between Alvarez and the officers clearly demonstrates that the purpose was to gather evidence to use in a criminal investigation and prosecution. Any reasonable person in Alvarez's position would understand that her statements were supplying evidence to the police for a criminal investigation, and that criminal proceedings would likely follow.

This case is similar to *State v. Moses*, 129 Wn. App. 718, 119 P.3d 906 (2005), *review denied*, 157 Wn.2d 1006, 136 P.3d 759 (2006). In that case, the victim gave a detailed report of the assault in response to structured police questioning, and during the

interview, she acknowledged the likelihood that her statements could be used in prosecuting Moses. *Id.* at 910. The court concluded that these statements were testimonial. *Id.* at 911.

This case is also similar to *State v. Powers*, 124 Wn. App. 92, 99 P.3d 1262 (2004), which addressed the admissibility of statements made during a call to 911. In the 911 call at issue, the victim reported that Powers had been in her home in violation of a protective order. The *Powers* court rejected the State's request for a bright-line rule to admit all 911 calls as contrary to *Crawford*. Instead, the court adopted a fact-intensive case-by-case approach and considered whether the purpose of the 911 call was a plea for help, whether the call was part of the criminal incident, and whether the call was made while the crime was in progress or to further a prosecution. The court concluded the victim's statements to the 911 dispatcher were testimonial because the purpose of the call was to report the crime and "assist in [Powers'] apprehension and prosecution, rather than to protect herself or her child from his return." *Id.* at 102.

Similarly here, the purpose of Alvarez's call to police was to report a crime, not to seek protection from the perpetrators. Her statements were clearly testimonial, and the Court of Appeals was

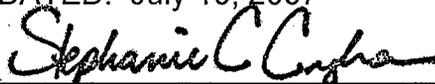
incorrect when it held that they were not.

Alvarez's statements are "testimonial" under the standards set forth in both *Crawford* and *Davis*. The statements made up the bulk of the evidence against Koslowski on the Alvarez incident counts. The statements provided the only evidence describing the alleged crime, the alleged participants, or the possible presence of a gun, and there admission was not harmless. The protection offered by the Confrontation Clause is acutely applicable in this case, and the use of the statements clearly violated the holdings of *Crawford* and *Davis*.

VI. CONCLUSION

Alvarez's statements to the responding officers fall squarely within the broad definition of "testimonial" because any reasonable person would understand that they could be used prosecutorially, and because they were made to officers investigating a possible past crime. Because Alvarez could not appear for trial or otherwise submit to cross-examination, Koslowski's right to confront the witnesses against him was violated, and a new trial is required.

DATED: July 10, 2007



STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Duane J. Koslowski

CERTIFICATE OF SERVICE

I certify that on July 10, 2007, I caused to be placed in the mails of the US, postage pre-paid, a copy of this document to: (1) Kenneth Ramm, DPA, Prosecuting Attorney's Office, 128 N. Second St., Rm. 211, Yakima, WA 98901; and (2) Duane J. Koslowski, # 965011, Airway Heights Correction Center, P.O. Box 1839, Airway Heights, WA 99001-1839.



STEPHANIE C. CUNNINGHAM, WSBA # 26436

APPENDIX
COURT OF APPEALS OPINION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|---------------------------------|---|----------------------------|
| STATE OF WASHINGTON, |) | No. 22023-1-III |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | Division Three |
| |) | |
| DUANE JONATHON KOSLOWSKI |) | |
| |) | |
| Appellant. |) | UNPUBLISHED OPINION |

Kato, J.* – Duane Koslowski was convicted of first degree robbery, first degree burglary, and first degree unlawful possession of a firearm. In his first appeal, he claimed the admission of the victim’s statements to police violated his constitutional right to confront witnesses. This court affirmed the convictions. Mr. Koslowski then filed a petition for review. On remand for reconsideration in light of *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), we again affirm.

Mr. Koslowski was charged with first degree robbery, first degree burglary,

* Judge Kenneth H. Kato is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

and unlawful possession of a firearm as a result of an incident in November 2002, involving Violet Alvarez. She died of causes unrelated to the crimes charged and was thus unavailable to testify at the January 2003 trial.

On November 13, 2002, Yakima police officers Nolan Wentz and Michael Kryger responded to the report of a robbery at the home of Ms. Alvarez. Officer Wentz described her as "extremely emotional, very upset." Report of Proceedings (RP) (Jan. 29, 2003) at 322. Officer Kryger described her as "very pale," with a "very shaky voice," and "very, very frightened, scared." RP (Jan. 29, 2003) at 332. Ms. Alvarez was weak and wanted to sit down, so the officers helped her sit on the couch.

She told them she had been outside her home, unloading grocery bags from her car, when she saw a dark-colored car drive by. The car slowed, stopped, and backed up toward her house. Three men got out and approached her. She thought the three men were Hispanic. According to Officer Wentz, Ms. Alvarez reported one man had a gun pushed against her back, ordering her into the house. Officer Kryger, however, stated Ms. Alvarez "had a strong belief there was a gun," but he was uncertain if she actually saw the gun or whether she thought it was a gun. RP (Jan. 29, 2003) at 348.

Once inside, the men ordered Ms. Alvarez to the floor, tied her hands

together with wire ties, and covered her face with a T-shirt. She heard them rummaging around the house and heard them speak to each other in Spanish. She did not see the gunman's face because it was obscured by the hood of his sweatshirt. When Ms. Alvarez heard the men leave, she called police.

While she was tied up on the floor, one of the men took her grandmother's ring off her finger. The men also took her wallet, cash, credit cards, jewelry, jewelry box, and a DVD player. The officers saw grocery bags knocked over and the contents of her purse spilled on the floor. They also noted the master bedroom had been ransacked.

The jury convicted Mr. Koslowski of first degree robbery, first degree burglary, and first degree unlawful possession of a firearm. Claiming in part that the court erred by admitting Ms. Alvarez's statements to police because their admission violated the confrontation clause, he appealed. This court affirmed the convictions, holding that her statements were not testimonial in nature so their admission did not violate the confrontation clause. Mr. Koslowski filed a petition for review. The court granted the petition and remanded for reconsideration in light of *Davis*.

The Confrontation Clause of the Sixth Amendment dictates that in all "criminal prosecutions, the accused shall enjoy the right . . . to be confronted with

the witnesses against him.” U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court held that the right to confrontation bars the “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.” *Crawford*, 541 U.S. at 53-54. The court did not define “testimonial,” but observed that at minimum the term applied to “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* at 68.

After *Crawford*, the Washington State Supreme Court, held in *State v. Davis*, 154 Wn.2d 291, 302, 111 P.3d 844 (2005), *aff'd*, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), that the admission of hearsay statements of a domestic violence victim in a 911 call did not violate the defendant’s right to confrontation or *Crawford*. Our Supreme Court stated it was necessary to examine the circumstances of the statements in each case in order to determine whether “the declarant knowingly provided the functional equivalent of testimony to a government agent.” *Id.* at 302.

The court held that when statements made during a 911 call are a plea for help or protection, rather than for prosecution, the statements are not testimonial. *Id.* at 304. The court distinguished emergency 911 calls from the in-custody

police interrogation that took place in *Crawford*: “Even though an emergency 911 call may assist police in investigation or assist the State in prosecution, where the call is not undertaken for those purposes, it does not resemble the specific type of out-of-court statement with which the Sixth Amendment is concerned.” *Id.* at 301. Noting the declarant’s perspective and purpose for making a statement were important factors to consider in deciding whether a statement was testimonial, the court concluded that the emergency 911 call identifying the assailant was not testimonial “because of [the] immediate danger [and] there [wa]s no evidence [the victim] sought to ‘bear witness’ in contemplation of legal proceedings.” *Id.* at 304.

The U.S. Supreme Court affirmed the decision in *Davis*, holding that the hearsay statements in the 911 call were not testimonial because the circumstances objectively indicated the call’s primary purpose was to enable police assistance to meet an ongoing emergency. *Davis*, 126 S. Ct. at 2276. The court observed the victim was describing events as they actually happened; the victim was facing an ongoing emergency; the answers were necessary for law enforcement to resolve the emergency; and the questioning during the call was informal. *Id.* at 2276-77.

Here, the officers who testified had responded to a robbery report. *State v. Koslowski*, No. 22023-1-III, 2005 Wash. App. LEXIS 2728 at *5 (Oct. 20, 2005).

When they arrived, Ms. Alvarez was extremely emotional and frightened. *Id.* at *5-6. The officers tried to calm her and get information from her.

The State argues the police were resolving an ongoing emergency. They were trying to get information from the crime victim, calm her down, and relay information to other officers to apprehend a potentially dangerous suspect. In effect, the State asserts the officers were getting information to protect the public. As the court indicated in *Davis*, investigating officers need to assess a situation and often the exigencies involved will mean that initial inquiries produce non-testimonial statements. *Davis*, 126 S. Ct. at 2279. *Davis* considered whether the initial statements were a cry for help or a means of providing officers with information to end a threatening situation. *Id.* Ms. Alvarez was seeking help and protection from the police. She gave the officers information to apprehend an armed suspect. An officer also testified he was trying to get as much information as possible so he could relay it to other officers in the field. In these circumstances, Ms. Alvarez's statements were not testimonial.

But even if the statements were testimonial, their admission was harmless. See *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (violation of the confrontation clause is subject to harmless error analysis). In addition to the testimony of the officers, Mr. Koslowski's roommate

testified that, on the date in question, he came home and displayed some credit cards he had stolen. *Koslowski*, 2005 Wash. App. LEXIS 2728 at *7-8. The cards had a woman's name on them. When asked how he got them, Mr. Koslowski made the gesture of a gun. *Id.* at *8. The roommate took this to mean he robbed an old lady. *Id.* A friend of Mr. Koslowski's had a credit card with Ms. Alvarez's name on it in his possession. *Id.* at *13. The credit card was used to purchase gas on the day of the crime. The friend testified Mr. Koslowski had given the card to him. The officers also testified regarding their own observations.

The evidence showed crimes occurred in Ms. Alvarez's house. The statements of Mr. Koslowski's friend and roommate tied him to the crimes. This was sufficient evidence to establish guilt. The error, if any, was harmless.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kato, J. Pro Tem.

WE CONCUR:

No. 22023-1-III
State v. Koslowski

Sweeney, C.J.

Schultheis, J.