



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

RUBEN CAZARES,	§	No. 08-15-00266-CR
Appellant,	§	Appeal from the
v.	§	41st District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC# 20140D00210)
	§	

OPINION

In this appeal, Appellant Ruben Cazares challenges the trial court's admission of recorded statements of a non-testifying co-defendant in violation of his right of confrontation under the Sixth Amendment to the United States Constitution, and other grounds.¹ In a two-count indictment, Appellant was charged with the felony murders of Alma Reaux and her unborn fetus. The indictment also contained enhancement paragraphs asserting that Appellant had prior, final convictions for the offenses of robbery and aggravated robbery. The jury returned guilty verdicts on both counts of felony murder, found the enhancement allegations to be true, and sentenced Appellant to life imprisonment and a maximum fine on each count. In two issues, Appellant contends the trial court's evidentiary rulings admitting recorded statements of an unavailable co-

¹ U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004).

defendant were erroneous. We affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

Two families related to each other, the Cazares and Moncayo families, are involved in the presentation of this case. Appellant Ruben Cazares is related to several witnesses who testified during his trial, and these relatives are also related to other testifying witnesses. Appellant's nephew, David Cazares, is the non-testifying co-defendant who was recorded while talking with Elizabeth Moncayo, who is David's aunt. Elizabeth is also Appellant's sister-in-law, as she was married to Richard Moncayo, Appellant's pre-deceased half-brother through their shared mother.² Appellant's half-brother Richard also had a half-sister Monica Moncayo. Monica Moncayo also testified during Appellant's trial.³

Arrangement to Buy Marijuana

Prior to November 19, 2013, on multiple occasions, nineteen-year old Monica Moncayo had purchased marijuana from Alma Reaux, a former classmate who was selling marijuana for her "boyfriend," Robert Gamero. The purchases would take place near the intersection of El Paso and California Streets. During one or more of those purchases, Monica had been accompanied by David and his aunt Elizabeth, and on one of those occasions, David had informed Alma that he may be interested in making future purchases from her.

At approximately 11 a.m. on November 19, 2013, David called Monica, who only days earlier had moved to Las Vegas to work and attend school. After David asked Monica to assist

² Richard died before Appellant's trial.

³ According to Monica, Appellant's mother and Monica's father had a relationship "before me and my little sister" and Monica first became familiar with the Cazares family when she was approximately 11 or 12 years old.

him in purchasing some marijuana, Monica sent a text to Alma. Monica understood that the purchase of marijuana was for David only, as David had never informed her that the purchase was also for Appellant. Alma notified Monica that she would sell an ounce of marijuana to David for \$320, and provided a code for David's use in making the purchase. A couple of hours later, when Monica contacted Alma to determine whether David had made the purchase, Alma did not respond.

The Transaction on California Street

As she left her California Street apartment to attend class, at approximately 12:45 p.m. on November 19, 2013, college student Jazmin Lozano observed eighteen-year old Alma Reaux standing amid California Street with a phone in her hand. Alma appeared to be waiting. Jazmin recalled a tall gold-colored SUV had come to a screeching stop next to Alma, who was near the front passenger area. As Jazmin locked the gate to her apartment, she heard arguing and a "frustration" scream, and upon turning she saw that Alma's height changed and she was apparently jumping or possibly standing on running boards, and placing her hands inside the vehicle through the open window. Alma appeared to be using a defensive motion in an attempt to stop something from happening, specifically with the vehicle's front-seat passenger, who in turn was using his hands in an attacking motion. Jazmin heard gravel and screeching tires as the driver accelerated the SUV, "burned rubber," and departed extremely fast. After she focused her attention on the vehicle as it drove away, Jazmin then began to wonder what had happened to Alma, who she did not see running alongside the vehicle. Jazmin first thought Alma may have stayed on the vehicle. As she took a step off the sidewalk, Jazmin saw Alma on the ground, her pregnant belly exposed by her raised shirt, breathing rapidly, with blood coming from her mouth and ears.

At approximately 12:50 or 1 p.m., Alma's neighbor who lived across the hallway, Sherry Laveck, was using a computer located in front of her apartment window. When she heard screaming and "carrying on," Sherry looked through the window and saw a woman arguing and fighting with two people in a burgundy-colored SUV. Although she could not understand the comments being made, Sherry described them as "angry-loud." She observed Alma, who was "quite pregnant," standing on the ground and reaching "quite a ways over her belly" into the vehicle window. As the yelling and screaming continued, Sherry observed that Alma appeared to be grabbing for something in the middle console area of the SUV while a Hispanic male passenger inside the vehicle was hitting her hands in an attempt to get Alma out of the window. The male driver suddenly accelerated the SUV and drove away very rapidly while the passenger continued to hit Alma, who was running alongside the vehicle with her arms and up to half of her body remaining in the vehicle. Alma's upper body came out of the vehicle "little by little." Alma was not standing on a running board. Sherry instantly went outside and saw Alma's "husband" Robert coming outside as well. She asked him where Alma had gone because she had been hanging onto the car, and Robert replied that he did not know as he had lost sight of Alma. They found Alma on the street, and Sherry called 911.

Student Ramon Lopez was walking from school to his parked car on California Street when he heard screeching tires and a car going very fast. Ramon then saw a vehicle that he described as a dark green Trail Blazer, with its front windows down and its back windows up, turn the corner from California Street onto Los Angeles Street without stopping at the posted stop sign. The vehicle's driver and passenger were Hispanic males. Ramon described the driver as having a thin face, a short haircut, and wearing a white jersey with a blue star on the shoulder, and said the

passenger had a more rounded face. The vehicle appeared to have a white Texas plate. As he looked down California Street, Ramon initially thought he saw a large trash bag but then realized he may have been seeing a body. Thinking that the persons in the vehicle may have shot someone, Ramon ran to his car where he waited and hid, anticipating that the subjects may return to look for him. Later, Ramon drove his car past the intersection of California and Los Angeles Streets, and observed that several people had begun to gather near the item that he initially thought had been a trash bag. He drove to a convenience store, called 911, explained what he had observed, and eventually was interviewed by police.

Robert Gamero testified that Alma had been “[his] girl” for two years, and in November 2013, they began living together in an apartment located at the intersection of El Paso and California streets. At about 12:55 on November 19, 2013, Alma informed Robert, who had been asleep in their apartment, that she was going somewhere and she immediately left. While in the kitchen, Robert heard a yell and “a loud ride take off.” Robert looked outside and saw Alma in the street. Robert found Alma, and after the ambulance arrived, he retrieved Alma’s phone from the street. Robert saw that the last text messages on Alma’s phone were from someone named David. The message, “I’m going with my uncle in his ride,” preceded the message, “I’m outside.” While waiting at the hospital, Robert repeatedly used Alma’s telephone attempting unsuccessfully to call David, a person he did not know. Robert testified that Alma was three months pregnant on the day she died.

Alma’s sister, Alvina Gordon, testified that Alma was four months into her pregnancy at the time of her death. Alvina had spoken with Alma on the morning of November 19, 2013, and around noon or 1 p.m., she received a text message from her sister’s phone, but the message was

from Alma's boyfriend, Robert. Alvina understood that her sister had been hit by a car and was having surgery, and Alvina arrived at the hospital at 2 p.m. While there, Alvina observed that Robert was in possession of and was using Alma's cell phone. Alvina's husband obtained Alma's phone from Robert, and Alvina then began to examine it to determine who had last communicated with Alma. At the time, Alvina had not spoken with any law enforcement officers. When Alvina saw the text messages, "Here," which had been sent at 12:57, and another, "[I]t's David, Monica's homey[,]," she tried to determine David's identity. Alma died that evening. Alvina eventually advised police about the information on Alma's phone.

Monica Moncayo

After Alma died, El Paso Police asked to speak with Monica, who returned to El Paso for that purpose. Monica gave her consent to permit police to download the contents of her phone, provided a statement to police, and agreed to cooperate and testify voluntarily, without threat or coercion, or "getting anything in exchange" for her testimony.

At trial, Monica testified that David had called her at approximately 1 p.m. on November 19, 2013. Hysterical and crying, David told Monica that "he had fucked up [and] . . . didn't know what had happened[,]," but Alma was "on the floor." When Monica asked why, David replied that he did not know. Initially, Monica denied but later admitted that David had informed her "they" had gone to rob Alma.

Monica then received a text message and phone calls from Alma's phone, which Monica believed was coming from Alma's "boyfriend," Robert Gamero, a person she had never met. Robert was angry and threatened Monica because, based on her text messages that he had seen on Alma's phone, Robert believed Monica had set up Alma.

Appellant called Monica in the afternoon of November 19, 2013, and asked her how long she intended to stay in Las Vegas and whether she had heard anything. Monica replied that she did not know how long she was staying in Las Vegas, and informed Appellant that Alma's boyfriend had informed her that Alma was undergoing surgery. Appellant told Monica to stay in Las Vegas, and admonished her to not speak to police or anyone.

Appellant explained to Monica that he and David had "gone with Alma," stated he did not know what had happened but Alma was "on the floor," and they had left. However, Appellant then admitted to Monica that they had tried to rob Alma, and that the tires had been changed on the green SUV that had been used. At this point, Monica understood that Alma had died, and she assumed the men had run over Alma. Appellant's wife, Crystal, also told Monica that the tires on the green SUV had been changed, and advised Monica to stay in Las Vegas.

Prior to Appellant's and David's arrests, David confronted Monica and accused her of being a snitch. Monica's phone records, including excerpts of text and data showing her communications with Alma, David Cazares, Appellant and his wife, Crystal, and Robert Gamero were admitted into evidence without objection.

Monica's Written Statement to Police

At trial, Monica's written statement to police, which comported with much of her testimony, was published to the jury and read into the record without objection. In it, Monica provided additional information. David did not know whether "they" had run over Alma. He informed Monica that Elizabeth had to hide her truck because, according to a news description, the police were looking for it. David told Monica that Appellant was driving the green SUV, and stated that Alma was hanging from the window and would not let go. Monica thought "he" tried

to rob Alma. Alma's boyfriend had asked Monica for "the kid's" name, but then specifically mentioned David. Monica deleted the text message in which she had provided Alma's phone number to David, as well as all other text messages from David.

Robert stopped calling and texting Monica, but Appellant called her at about 6 p.m. and told her to stay in Las Vegas for a while. Monica was aware that "they knew I would say something and not be on their side." Appellant did not disclose to Monica the amount of marijuana they tried to steal or whether they in fact stole any. Robert texted or called Monica again that same evening and informed her that Alma was dead. He again wanted to know "the kid's" name, and told her that "he was fucked." Monica asked David if she could tell her sister-in-law, Elizabeth, but he replied that she could not because "Liz would snitch on him." For this reason, Monica knew that Elizabeth did not know anything.

On the following day, Elizabeth called Monica crying hysterically because she had learned what had happened to Alma. Later, Elizabeth again called Monica to inform her that police had picked up Elizabeth and had taken her truck.

When Monica asked Appellant's wife, Crystal, "What they were driving?" she answered, "My truck." David also had confirmed to Monica that they had been driving the green SUV. Toward the conclusion of her written statement, Monica remarked that she was "afraid of what they will do to me, more [Appellant], if I talk."

Elizabeth Moncayo

At trial, Elizabeth Moncayo testified that on November 19, 2013, she had possession of her beige Tahoe, and she had never previously loaned it to Appellant, David, or Crystal. On November 20, 2013, she went to the home of her husband's parents, where Appellant, Crystal, and David

were present. Appellant advised Elizabeth that she needed to hide her beige SUV because news reports were describing a similar vehicle that was being sought. When Elizabeth asked why she needed to hide the vehicle, Appellant explained, “Because we tried to rob Alma [.]” and then stated either “[S]he died,” or “[W]e killed her[.]” Appellant told Elizabeth that when they attempted to rob Alma, she “jumped in the car,” they left, and the car hit her. Elizabeth also learned that they had been driving Crystal’s “green Jeep.”

Elizabeth became nervous and upset, walked out of the house, and asked that she not be told any additional details. Elizabeth cried and called Monica to confirm what she had been told, and asked Monica to call police because Elizabeth was unsure what she should do.

Police contacted Elizabeth two days later. Elizabeth, who had previously used her beige Tahoe when she went to purchase drugs from Alma, consented to a search of her vehicle, which police had confiscated. Elizabeth conveyed to police the information she had learned from Appellant and David on November 20, 2013. Thereafter, Elizabeth agreed to assist the police investigation by wearing “a wire” and speaking with her nephew, David.

The Recorded Statements

The initial recording of Elizabeth’s and David’s conversations was made when Elizabeth picked up David for the purpose of loaning her car to him on December 5, 2013. David had not been arrested but knew he was being investigated. When David informed Elizabeth that he had spoken to a lawyer and that Appellant had “lawyered up,” she asked David whether he and Appellant had told the lawyer, “We . . . really did this.”⁴ David answered, “Yeah.” Elizabeth

⁴ These and the following excerpted comments were interspersed among multiple topics of discussion.

advised David that he should not let Appellant tell him what to do. David acknowledged that the tires to Crystal's vehicle had already been changed, and stated, "That's why . . . they don't have no evidence." He also stated that he wasn't involved in having the vehicle's tires changed, and did not know who had been involved. David advised Elizabeth that "they" wanted him to speak with her because she was believed to be "the snitch," but he believed that Monica, who had returned to El Paso, had gone to police. David admonished Elizabeth to not cooperate with police, and to say she knew nothing. When Elizabeth observed, "All I know is that this shit is fucking fucked up," David replied, ". . . I regret that shit, but it happened."

On December 10, 2013, David picked up Elizabeth from school while driving the vehicle she had loaned to him. During those recorded statements, Elizabeth asked David, "So what's up with the truck . . . Why do you think they took it?" David answered, "I don't know," and then asked Elizabeth whether the vehicle they were in was wired. When Elizabeth reminded David that he had possessed the car all day and asked him why the car would have a wire, David replied that he did not want to be "talking about this shit in this fucking shit-ass . . . (unintelligible)." Elizabeth reiterated that she was asking about the truck, and when she inquired, "What's wrong with me asking about the truck[,]?" David replied, "'Cause that's a criminal fucking situation."

David noted that his girlfriend, Vanessa, had been picked up and was at the police station. He explained that Vanessa had knowledge about what had occurred because on "the day it happened," David had gone straight to Vanessa, and Appellant then "went in there" and "talked about everything and people were inside the room." When Elizabeth again asked why police had taken her truck, David explained, "'Cause you know what, I tell you, that girl was still alive, []" and "the only reason they know I've been in the Tahoe is 'cause [Alma has] seen me go with

[Monica Moncayo] to . . . pick up.” Elizabeth noted that if Alma had been alive, she would have seen that “you guys were in the green truck, not in the Tahoe.” David retorted, “But still, I mean, how the fuck is she gonna say, you know what, I got runned over from a bad fucking -- drug fucking transaction or whatever.” Elizabeth asked, “Dude, seriously, do you think she was gonna be able to talk after that?” To this, David replied, “I don’t know. That’s what I’m saying, nigger. How did she -- (unintelligible).”

Later, when Elizabeth encouraged David to tell police the truth, David responded, “What, nigger? I’m gonna sit there and tell them, oh, yes, I ran over her[?]” After David confirmed that he was not the driver, Elizabeth advised that he should not be worried if he was not the driver. David added that he wasn’t going to “go fucking” Appellant, and would “take the rap for him.” David disclosed that he had informed Appellant that Elizabeth “had already found out” and Appellant did not care, Elizabeth replied, “He don’t care? I’m just saying, ‘cause she was pregnant, dude.” The discussion continued:

DAVID: I know I -- (unintelligible) -- dog. But what am I gonna sit there, tell them, you know what, bro, I did it? Or, I was there when it happened?

LIZ: Yeah, say sorry. Go say sorry to the family and just fucking --

DAVID: Fuck, no.

LIZ: [D]o your time, dude .

DAVID: Do my time, a fucking life sentence?

LIZ: You were not driving, David.

DAVID: But still, he told me, he’s like, “You were involved, bro.” He’s like, “You were involved.” He’s like, “You will go 25 or up, bro, no less.” He’s like, “You were involved in the car.” He’s like, “You were in there, you were there.” He’s like, “You were there, bro.” He’s like --

LIZ: Who told you that?

DAVID: The lawyer.

LIZ: Oh.

DAVID: He's like, "Bro," he's like, "you have to stick with me, bro." He's like, "I'm really worried about you right now," he's like, "'cause you're young." He's like, "I wouldn't like -- he's like, "I wouldn't like for your girl to go see you behind bars your whole lifetime, bro." I'm like, "Thank you." I'm like, "Thank you, bro." I'm like, "Thank you. Thank you." I'm like, "You know why I hired you, bro? So you could let me know what's good."

LIZ: You hired him? I thought Rascal⁵ --

DAVID: Well, we all had to lawyer up eventually. 'Cause, I mean, it's fucking all bullshit. Like it came out through all -- all of us, nigger. I mean, I don't know how in the fuck, but some -- (unintelligible) -- fucking -- (unintelligible).

LIZ: He's telling everybody, dude. I know he told Tone because that's how I found out.

. . . .

LIZ: Did you go with Rascal?

DAVID: (Unintelligible.)

LIZ: Right now you just told me you were with Rascal, and Rascal's telling [Vanessa] everything.

DAVID: No, shit. I'm telling you, when he hit that vehicle, I jumped out right there. I got -- jumped out right there and Rascal went home to get the Caddy.

LIZ: Uh-huh.

DAVID: He went to get the Cadillac and went back.

LIZ: By himself or with Crystal?

DAVID: No, by himself.

At trial, Elizabeth acknowledged that this portion of the conversation revealed that after the vehicle

⁵ Appellant is also known as "Rascal."

struck Alma, David was dropped off at Vanessa's and that Appellant eventually informed Vanessa of everything that had occurred. Elizabeth also testified that four people had been in the vehicle at the time of the offense, which included Appellant and David, as well as Crystal's nephew, Damian, and a person named Michael who were seated in the back of the vehicle.

Police and Medical Examiner

Detective Alfredo Hernandez of the El Paso Police Department investigated Alma's death. On executing a search warrant, officers confiscated a green Trail Blazer and a temporary Texas plate for the vehicle, which belonged to Appellant's wife, Crystal Rodriguez. Detective Hernandez explained that David had been named early in the investigation as being involved with the vehicle. He denied that he had informed Elizabeth that David was a suspect or that she should attempt to speak with him if possible, but explained that David's name was mentioned, and Elizabeth was aware that David's name had been mentioned during their discussions. During the execution of a different search warrant on December 12, 2013, officers retrieved a towel and a white Dallas Cowboys jersey bearing a star on the front, left-hand side from a washing machine at Crystal and Appellant's residence.

Appellant and David were subsequently arrested together on December 23, 2013. Information from David's phone was extracted pursuant to a search warrant. Detective Hernandez was aware that a witness had described an individual wearing a Dallas Cowboys jersey and may have identified that person as the driver, and agreed that Ramon Lopez, who had stated that he was 80 percent certain that the person whose photo he circled on a photo lineup card was the driver, failed to circle Appellant's photograph. However, after examining all witnesses and evidence and completing the investigation, police identified Appellant as the driver of the green Trail Blazer,

which had been recovered, and Appellant's nephew David Cazares as its front-seat passenger. Detective Hernandez explained that there is no legal authority to compel a witness who is not under arrest to speak with or cooperate with police, but such persons are asked to voluntarily speak with police.

Officer Luis Sarmiento was assigned to the police department's crimes and investigations unit. He processed the green Trail Blazer for unknown substances found on the interior and exterior of the vehicle, and photographed the vehicle and its tires. The tires found on the green Trail Blazer during Officer Sarmiento's inspection were Michelin Cross Terrain tires, which did not match the four GIT Savero HT2 tires that were shown by tire shop records to have been installed on the vehicle on April 9, 2013, slightly seven months before Alma was killed.

El Paso County's Chief Medical Examiner, Dr. Mario Rascon, performed an autopsy and determined that Alma, who had been pregnant, died as a result of blunt force trauma, and exhibited injuries consistent with being hit by a motor vehicle. In addition to other injuries, Alma had a pattern mark on her face that Dr. Rascon attested was consistent with a tire mark. Alma's male fetus had a fetal heart rate, and had been alive at the time Alma was admitted to the hospital.

II. DISCUSSION

A. Issue One: Right of Confrontation

1. Admissibility of David's Statements

In Issue One, Appellant contends the admission of David's statements, made to and recorded by his aunt Elizabeth, violated his Sixth Amendment right of confrontation because Elizabeth was acting as an agent of the police for purposes of their criminal investigation, thus rendering David's statements testimonial. We agree that David's statements were testimonial and

the trial court erred in admitting them in evidence at trial.

Preservation of Error

During trial, Appellant objected to the introduction and publication of David's recorded statements in denial of his right to cross-examine witnesses and in violation of *Crawford v. Washington* and the Confrontation Clause of the Sixth Amendment of the U.S. Constitution. Therefore, his Confrontation Clause complaint is preserved for our consideration. *See Briggs v. State*, 789 S.W.2d 918, 924 (Tex.Crim.App. 1990) (constitutional error may be waived by failure to object at trial); *Holland v. State*, 802 S.W.2d 696, 700 (Tex.Crim.App. 1991) (defendant waives constitutional right to confront witnesses in failing to object at trial). Once Appellant objected, the burden shifted to the State to establish that David's recorded statements were not testimonial hearsay statements in violation of the Confrontation Clause. *De La Paz v. State*, 273 S.W.3d 671, 680-81 (Tex.Crim.App. 2008). The State asserted that these statements were admissible under Rule 803(24) as an exception to the hearsay rule, and claimed they did not violate Appellant's confrontation rights. TEX. R. EVID. 803(24). More specifically, the State claimed that David's statements were not testimonial as they were not made to police while he was under arrest, and that David made them without knowing he was being recorded or that they would be used against him, or Appellant, in a later trial. The trial court expressly overruled Appellant's objections.

Testimonial Statements

The Confrontation Clause of the Sixth Amendment of the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI. A defendant's confrontation right is violated when a trial court admits a hearsay statement made by a non-testifying declarant if the

statement is testimonial in nature and the defendant had no prior opportunity to cross-examine the declarant. *See Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). This right of confrontation is a “bedrock procedural guarantee,” that applies to both federal and state prosecutions. *Id.* at 42, 124 S.Ct. at 1359; *accord De La Paz*, 273 S.W.3d at 680 (citing *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (the Fourteenth Amendment renders the Sixth Amendment binding on the States)). We review *de novo* the threshold question of whether a statement is testimonial in nature. *See Langham v. State*, 305 S.W.3d 568, 576 (Tex.Crim.App. 2010).

As explained by the United States Supreme Court in *Crawford*, an out-of-court statement must be testimonial in nature to implicate the Confrontation Clause. *Crawford*, 541 U.S. at 68, 124 S.Ct. at 1374; *Woods v. State*, 152 S.W.3d 105, 113 (Tex.Crim.App. 2004). “[The Clause] applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” *Crawford*, 541 U.S. at 51, 124 S.Ct. at 1364 (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). The term, “testimony,” means a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* In giving an example, the Court stated, “[a]n 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 51-52, 124 S.Ct. at 1364. At a minimum, the *Crawford* Court found that the term “testimonial” applied to police interrogations and prior testimony at a preliminary hearing, before a grand jury, or at a former trial. *Id.* at 68, 124 S.Ct. at 1374; *Woods*, 152 S.W.3d at 113.

The Supreme Court next focused on further clarifying the Confrontation Clause concerns that arise during police interrogations. In *Davis v. Washington*, 547 U.S. 813, 817, 126 S.Ct. 2266,

2270, 165 L.Ed.2d 224 (2006), the Court decided two companion cases together and considered differing types of police interrogations that arose in response to complaints of domestic violence. In the first case, *Davis*, the Court considered objections to the admission of a 911 recording of a victim's initial call to police and found the recording did not implicate confrontation concerns although the victim was not available for cross-examination. *Id.* at 828, 126 S.Ct. at 2277 (“[victim] was not acting as a *witness*; she was not *testifying*”). Whereas in the companion case, *Hammon v. Indiana*, the Court decided that an affidavit prepared from an interview of the victim at the police station did result in a confrontation violation when the affidavit was later admitted during trial. *Id.* at 834, 126 S.Ct. at 2280.

In resolving *Davis* and *Hammon*, the Court announced the “primary purpose” test to distinguish between non-testimonial and testimonial statements that arise from police interrogations:

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, 126 S.Ct. at 2273-74.

After applying the primary purpose test, the Court found in *Davis* that the officer involved with the 911 call was seeking information to determine what was happening in order to provide a police response to an ongoing emergency. *Id.* at 829, 126 S.Ct. at 2278. Whereas, in *Hammon*, the Court stated, “[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct—as, indeed, the testifying officer expressly

acknowledged.” *Id.* Distinguishing between the two police interrogations, the Court found a testimonial distinction between police encounters that seek information about “what is happening,” from those that seek information about “what [has] happened.” *Id.* at 830, 126 S.Ct. at 2278.

Subsequently, in *Michigan v. Bryant*, 562 U.S. 344, 356, 131 S.Ct. 1143, 1154, 179 L.Ed.2d 93 (2011), the Supreme Court stressed that in determining the “primary purpose” of an interrogation or interview, courts must view the circumstances, statements, and actions of the parties, from an objective point of view. “An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the ‘primary purpose of the interrogation.’” *Id.* at 360, 131 S.Ct. at 1156. Thus, the *Bryant* Court described the following factors to consider when objectively applying the primary purpose test to a given situation: (1) the circumstances in which an encounter occurs—*e.g.*, at or near the scene of the crime versus at a police station; (2) during an ongoing emergency or afterwards; and (3) the statements and actions of the parties. *Id.* As observed in *Davis*, the *Bryant* Court reiterated that the primary purpose test will show that “not all those questioned by the police are witnesses and not all ‘interrogations by law enforcement officers,’ are subject to the Confrontation Clause.” *Id.* at 355, 131 S.Ct. at 1153.

Having clarified how to determine the testimonial nature of a police interrogation, the Supreme Court next addressed whether statements to someone other than law enforcement officers would also implicate Confrontation Clause requirements. *Ohio v. Clark*, 135 S.Ct. 2173, 2181, 192 L.Ed.2d 306 (2015). Under the facts of *Clark*, a three-year old child responded to questioning from teachers who noticed he had suspicious marks on him when he arrived for school. *Id.* During a later criminal trial, when the prosecutor admitted the child’s statements to his teachers as

evidence, the defendant charged with harming the child objected to the admission on the basis that the admission violated his right to confrontation, as the child was not available for cross-examination. *Id.*

Although police officers were not involved in the questioning at issue, the Supreme Court expressly declined to adopt a categorical rule placing this type of interrogation out of reach of Sixth Amendment protections. *Id.* Recognizing that such statements are *much* less likely to be testimonial than statements made to law enforcement officers, the Supreme Court nonetheless noted that “[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are *significantly* less likely to be testimonial than statements given to law enforcement officers[.]” *Id.* at 2182. The Court determined that the admission of the child’s statements did not run afoul of the Confrontation Clause as they were clearly not made with the primary purpose of creating evidence for the defendant’s prosecution but, instead, were made in the context of an ongoing emergency involving child abuse. *Id.* (citing *Giles v. California*, 554 U.S. 353, 376, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008)).

Noting that the Supreme Court had not comprehensively demarcated “testimonial statements,” the United States Court of Appeals for the Fifth Circuit also considered whether a recorded statement of unidentified individuals arranging a drug transaction would qualify as testimonial in nature. *Brown v. Epps*, 686 F.3d 281, 286-88 (5th Cir. 2012). In *Brown*, the Court performed a primary purpose test and determined that two factors were lacking to make a finding of testimonial statements: (1) the declarants were unaware that their conversations were being recorded and could not have predicted that their statements might later be available for use at trial; and (2) the statements were not part of a formal interrogation about past events. *Id.* at 288.

Because of these deficiencies, the Fifth Circuit determined the statements were not within the scope of the Confrontation Clause. *Id.* at 288-89.

Analysis

Preliminarily, we note that the State conceded at trial that Elizabeth was acting as an agent of the State at the time she was wearing a wire and recording David's statements. Additionally, the State did not dispute that David was unavailable for cross-examination due to him exercising his Fifth Amendment privilege to remain silent. *Bryan v. State*, 837 S.W.2d 637, 644 (Tex.Crim.App. 1992); TEX. R. EVID. 804(a)(1). Thus, the only issue disputed by the parties regarding the Confrontation Clause objection is the question of whether David's statements were testimonial in nature.

Applying the primary purpose analysis to the facts of this case, we first examine the circumstances surrounding the questioning of David by Elizabeth as shown by the transcript of the recordings. There is no doubt that the conversation took place in an informal setting as Elizabeth and David were talking as they drove around and made a variety of stops. They listened to music, talked about David's dating life, put gas in the car, and ordered food through a drive thru line at a fast food restaurant. To some extent, the language used during the conversation reflected a casual setting lacking in formalities as David uttered heavily profane statements. On the other hand, in other parts of the recording, David spoke with seriousness of the consequences he faced and inquired whether the vehicle in which they spoke was wired expressing his awareness of the dangers of speaking of criminal matters.

Ordinarily, informality of setting suggests that the interrogators' primary purpose is more likely meant to address what is perceived to be an ongoing emergency, and such informal setting

would not alert a declarant of the possible future prosecutorial use of his or her statements. Despite the casual setting at play here, Elizabeth clearly was not addressing an ongoing emergency as she asked David to reveal material information about past events implicating criminal consequences. As an undisputed agent of the police, Elizabeth questioned David about the circumstances that occurred when he and Appellant interacted with Alma moments before she was run over by their vehicle, and about what occurred afterwards as they hid evidence by changing the tires on the vehicle that had been used on the occasion. She pointedly asked him to confirm details including the fact that Appellant was the driver at the time and that others were also in the car.

Unlike the teachers in *Clark*, Elizabeth was clearly not asking for information to respond to a situation or emergency, or to provide aid to a child victim of abuse. Instead, the content of her questioning shows that Elizabeth was eliciting responses from David to develop a record of past events and circumstances that was relevant to a criminal prosecution. *Davis*, 547 U.S. at 838, 126 S.Ct. at 2283 (“Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of *ex parte* statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process.”). In performing the primary purpose test, we must objectively view the statements and actions of both the declarant and interrogator. “[C]ourts making a ‘primary purpose’ assessment should not be unjustifiably restrained from consulting all relevant information, including the statements and actions of interrogators.” *Bryant*, 562 U.S. at 369-70, 131 S.Ct. at 1162.

At trial, Elizabeth testified she was aware that David had declined to speak with police. She admitted that she believed that police had wanted her to speak with David because “they were not able to talk to [David] themselves because [he] already had a lawyer . . . [a]nd [he was] not

talking.” She explained that she had offered to wear a wire while speaking with David because police officers did not believe her when she claimed she was not involved in the event or its cover-up. Elizabeth testified that she had agreed to help police “for Alma,” and had worn the wire with the knowledge that the recorded conversations would be turned over to Appellant and David. She further explained that she had given her testimony without threat or coercion, and without exchange of any benefit in relation to a pending misdemeanor possession of marijuana charge.⁶ Elizabeth acknowledged that Appellant and David were arrested after her conversations with David had been recorded.

As for the elicited responses from David, the State argues that David had no idea that anything he told Elizabeth would ultimately be used against him or Appellant at trial thus rendering these statements non-testimonial in nature. The relevant inquiry, however, is an objective inquiry of David’s statements and actions, rather than a subjective one. In *Bryant*, the Supreme Court stated, “the 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*, 562 U.S. at 360, 131 S.Ct. at 1156. And, in applying the primary purpose test in *Davis* and *Hammon*, the Court did not inquire about subjective states of mind, but instead, objectively viewed responses from both victims of domestic violence to determine whether elicited statements resolved a present emergency or were descriptive of past events. *Davis*, 547 U.S. at 830, 126 S.Ct. at 2278. Here, David’s comments in substance were about past

⁶ She acknowledged as well that years after she had agreed to wear a wire in this case, she began cooperating with DEA in lieu of being arrested in a case where she could be charged for selling drugs.

events and showed he knew he was implicating himself and Appellant in circumstances that could likely lead to a criminal prosecution.

Because the circumstances of the encounter as well as the statements and actions of David and Elizabeth objectively indicate that the primary purpose of the interrogation was to record a past event, we conclude that David's out-of-court statements were testimonial under *Crawford* and its progeny. *Davis*, 547 U.S. at 822, 126 S.Ct. at 2273; *see also Bullcoming v. New Mexico*, 564 U.S. 647, 664, 131 S.Ct. 2705, 2717, 180 L.Ed.2d 610 (2011) ("A document created solely for an 'evidentiary purpose[]' . . . made in aid of a police investigation, ranks as testimonial."). The Confrontation Clause of the Sixth Amendment barred admission of the recording of David's statements as he was an unavailable witness not subject to cross-examination. *Crawford*, 541 U.S. at 52, 124 S.Ct. at 1364.

2. Harm Analysis

Because the trial court's admission of David's testimonial statements violated Appellant's Sixth Amendment right to confrontation and cross-examination, we proceed to consider whether this error requires reversal of the trial court's judgment. *Crawford*, 541 U.S. at 53-54, 124 S.Ct. at 1365. A violation of the Confrontation Clause is constitutional error requiring reversal unless the reviewing court can determine beyond a reasonable doubt that the error did not contribute to the defendant's conviction or punishment. TEX. R. APP. P. 44.2(a).

In determining whether error was harmless, we consider the importance of the hearsay statement to the State's case, whether the hearsay evidence was cumulative of other evidence, the absence or presence of evidence either contradicting or corroborating the hearsay statement on material points, and the overall strength of the case against the defendant. *Woodall v. State*, 336

S.W.3d 634, 639 n.6 (Tex.Crim.App. 2011) (citing *Davis v. State*, 203 S.W.3d 845, 852 (Tex.Crim.App. 2006)). We may also consider other factors contained in the record that shed light on the likely impact of the error on the mind of an average juror. *Davis*, 203 S.W.3d at 852. The error is harmless when the reviewing court is convinced beyond a reasonable doubt that the barred statement would probably not have had a significant impact on the mind of an average juror in making their determination. *Id.*

The question we must resolve is not whether the verdict was supported by the evidence but, rather, the likelihood that the constitutional error was a contributing factor in the jury's deliberations in arriving at their decision, that is, whether the error adversely affected the integrity of the process leading to the decision. *Langham v. State*, 305 S.W.3d 568, 582 (Tex.Crim.App. 2010) (citing *Scott v. State*, 227 S.W.3d 670, 690-91 (Tex.Crim.App. 2007)). We also consider other constitutional harm factors, if relevant, such as the nature of the error, whether or to what extent it was emphasized by the State, probable implications of the error, and the weight a juror would probably place on the error. *Snowden v. State*, 353 S.W.3d 815, 822 (Tex.Crim.App. 2011). We then consider whether there is a reasonable possibility that the *Crawford* error moved the jury from a state of non-persuasion to one of persuasion on a particular issue. "At bottom, an analysis for whether a particular constitutional error is harmless should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment.'" *Id.* (quoting TEX. R. APP. P. 44.2(a)); see also *Langham*, 305 S.W.3d at 582; *Scott*, 227 S.W.3d at 690-91.

Given the testimony admitted in evidence through other witnesses, David's recorded

statements did not likely move the jury from a state of non-persuasion to one of persuasion on any material issue in the case. *Snowden*, 353 S.W.3d at 825; *Davis*, 203 S.W.3d at 853. Jazmin's and Sherry's testimonies show Alma had an encounter with someone through the passenger-side window of an SUV amid California Street at about 1 p.m. on November 19, 2013. Jazmin saw Alma place her hands inside the vehicle and using a defensive motion against the passenger who was using his hands in an attacking motion, heard the driver accelerate the SUV which departed, and then found Alma wounded on the ground. Sherry saw Alma fighting with two people through the SUV, and grabbing for something in the middle console area as the passenger was hitting Alma's hands. Sherry observed the driver accelerate the vehicle while Alma's upper body was inside the vehicle, beside which Alma was running, and the passenger was hitting Alma.

Jazmin, Sherry, and Ramon, respectively, described the color of the SUV as being gold, burgundy, and green. Ramon testified that he noticed the green Trail Blazer because he likes those cars, and described the driver as an Hispanic man wearing a white jersey with a blue star. Jazmin described the driver as being a dark-skinned Mexican. Ramon did not identify Appellant as the driver of the vehicle when shown a photo lineup card.

On David's behalf, Monica had contacted Alma by text message on November 19, 2013. David was seeking to purchase marijuana from Alma, and Monica later received threatening text messages sent from Alma's phone. Robert had observed that the last text messages on Alma's phone were from someone named David, and the messages indicated that David was with his uncle in his uncle's vehicle and later announced, "I'm outside." Alvina observed the text message, "[I]'s David, Monica's homey," on Alma's phone, and then notified police regarding this information.

Monica not only testified at trial, her statement to police was read into the record without

objection, and her phone records were admitted into evidence without objection. That evidence showed Monica had met with police on November 27, 2013, and consented to a download of the contents of her phone, then provided a statement to police, and had agreed to cooperate and testify.

Through Monica, the State presented evidence that on November 19, 2013, Appellant himself informed Monica that he and David had “gone with Alma,” that Appellant had tried to rob Alma who was left “on the floor,” and afterwards, Appellant and his wife both disclosed to Monica that the tires on the green SUV had been changed. From this, Monica assumed the men had struck Alma with the vehicle. Appellant instructed Monica to not speak with police. Appellant and Crystal both told Monica to stay in Las Vegas.

Hysterical and crying, David had also called Monica on the day Alma was struck with the vehicle, told Monica that he had “fucked up,” explained that Appellant was driving the green SUV in which they had gone to rob Alma, and described how Alma had been hanging from the window, but would not let go, and then Alma was “on the floor.” Crystal confirmed to Monica that her truck was the one that was driven, and David informed Monica that the green SUV was driven during the offense.

Elizabeth testified that during a family gathering on November 20, 2013, Appellant had advised her to hide her SUV because Alma had jumped in the car during the robbery, and as they left, the car hit Alma, and she had died or had been killed. She was also told that the men had been driving Crystal’s green “Jeep.” Two days later, police interviewed Elizabeth, and she informed them of Appellant’s and David’s statements to her regarding the incident with Alma. Detectives later took possession of Crystal’s green Trail Blazer and a white Dallas Cowboys jersey at Appellant’s residence. Overall, the State presented a strong case against Appellant. *Davis*, 203

S.W.3d at 852.

Clearly, David's recorded statements to Elizabeth were cumulative of this evidence, particularly of that elicited through Monica's testimony and her written statement, and through Elizabeth's testimony as well. It is also cumulative of Ramon's testimony that he saw a green Trail Blazer leaving California Street on November 19, 2013, of Jazmin and Sherry's testimony that they saw Alma involved in an encounter with an SUV, and Sherry's testimony that Alma's body was partially inside the departing SUV.

Much of the evidence corroborates David's recorded statements on material points. In her written statement, Monica asserted that David had informed her that Appellant was driving the green SUV from which Alma was hanging and would not let go. Crystal and Appellant both informed Monica that the tires on the green SUV had been changed, and after police seized Crystal's green Trail Blazer from Appellant's residence, they discovered that the tires on the vehicle differed from the tires that were on the vehicle when it was purchased months earlier. This evidence is corroborative of David's recorded statements regarding the encounter with Alma, the vehicle striking Alma and leaving her "on the floor," and the changing of the tires on the green SUV. Moreover, Ramon described the driver of the green Trail Blazer as wearing a white jersey with a blue star, and on execution of a search warrant at Appellant's home, police recovered a white Dallas Cowboys jersey bearing a blue star.

The contradictory evidence at trial consisted of Ramon's photo show-up identification of someone other than Appellant as the driver of the green Trail Blazer, but other evidence that Appellant was the driver was admitted through the testimonies of Monica and Elizabeth. Jazmin's and Sherry's identifications of the SUV's color as being, respectively, gold and burgundy

contradicts the description of the green SUV that Ramon saw, but Monica's and Elizabeth's testimony corroborates David's description of the green SUV used in the commission of the offense. However, we find no other evidence that contradicts David's out-of-court statements on material points.

The State devoted very little time to David's recorded statements during its closing argument, and did not expressly refer to them, other than to indirectly note that Elizabeth had stated that David informed her that the tires had been changed. But as the State argued during its summation, Monica's testimony also presented evidence that the tires on the Trail Blazer had been changed. Based on our review of the record, and in considering the other evidence in the record, we do not believe a jury would have given significant weight to David's recorded statements compared to the balance of the evidence with respect to the element to which it is relevant. *Scott*, 227 S.W.3d at 690; *Langham*, 305 S.W.3d at 582.

After reviewing the entire record and weighing the erroneous admission of David's testimonial statement, we conclude the trial court's error did not adversely affect the integrity of the process leading to Appellant's conviction and there is no reasonable possibility that the *Crawford* error moved the jury from a state of non-persuasion on a material issue. We are satisfied to a level of confidence beyond a reasonable doubt that the error did not contribute to Appellant's conviction. *Scott*, 227 S.W.3d at 690-91; *Langham*, 305 S.W.3d at 582. Accordingly, any error by the trial court in admitting this evidence was harmless. Issue One is overruled.

B. Issue Two: Right to Counsel

In Issue Two, Appellant argues the trial court should have excluded David's recorded statements under article 38.23 of the Texas Code of Criminal Procedure because police violated

David's Fifth and Sixth Amendment rights when they recorded the statements despite knowing that David had retained counsel. TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2005) (no evidence obtained in violation of the Constitution or laws of the United States or Texas shall be admitted against the accused on the trial of any criminal case unless obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause). The State argues on appeal, as it did at trial, that Appellant does not have standing to complain that David's rights, rather than his own, were violated. We agree.

Both Appellant and the State cite to *Neal v. State*, 256 S.W.3d 264, 284 (Tex.Crim.App. 2008) and to *Fuller v. State*, 829 S.W.2d 191, 201-02 (Tex.Crim.App. 1992), on which *Neal* relies. *Fuller* posits, and *Neal* reiterates, that article 38.23(a) does not confer standing to challenge the admission of evidence obtained by violation of another's rights, which is precisely what Appellant attempts to challenge in this issue. TEX. CODE CRIM. PROC. ANN. art. 38.23; *Fuller*, 829 S.W.2d at 202, and *Neal*, 256 S.W.3d at 284. Appellant has no standing to challenge a violation of David's rights. Because we conclude Appellant is without standing to present this challenge, Issue Two is overruled.

III. CONCLUSION

The trial court's judgment is affirmed.

GINA M. PALAFOX, Justice

August 16, 2017

Before McClure, C.J., Palafox, J., and Larsen, J. (Senior Judge)
Larsen, J. (Senior Judge), sitting by assignment

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