In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00359-CR

JOSEPH EDWARD RODGERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 410th District Court
Montgomery County, Texas
Trial Cause No. 09-03-02439-CR

MEMORANDUM OPINION

Joseph Edward Rodgers appeals his conviction and seven year sentence for driving while intoxicated. *See* TEX. PEN. CODE ANN. § 49.04 (Vernon 2003), § 49.09 (Vernon Supp. 2009). The sole issue raised on appeal contends that the trial court violated Rodgers's right of confrontation by admitting into evidence a recording of the 911 call made by the person with whom Rodgers had a motor vehicle accident. We hold that the statements on the recording are non-testimonial, and affirm the judgment of the trial court.

The Confrontation Clause of the Sixth Amendment to the United States Constitution prohibits the admission of testimonial statements of a witness who does not

appear at trial unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington,* 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In a subsequent opinion, the Court explained 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.

Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (footnote omitted). We evaluate "the declarant's statements, not the interrogator's questions" under the Confrontation Clause. 547 U.S. at 822, n.1. The non-inclusive factors considered in determining whether a particular statement is testimonial are:

> 1) whether the situation was still in progress; 2) whether the questions sought to determine what is presently happening as opposed to what has happened in the past; 3) whether the primary purpose of the interrogation was to render aid rather than to memorialize a possible crime; 4) whether the questioning was conducted in a separate room, away from the alleged attacker; and 5) whether the events were deliberately recounted in a step-by-step fashion.

Vinson v. State, 252 S.W.3d 336, 339 (Tex. Crim. App. 2008) (citing *Davis*, 547 U.S. at 829-30).

Rodgers argues that the declarant made the statements on the 911 call after the emergency had ended. Although the accident had already occurred when the declarant called 911, the emergency was still ongoing. On the recording of the 911 call, the

declarant can be heard telling the dispatcher that a "[y]oung man, he's drunk, he just hit my car." Shortly thereafter, the declarant exclaims, "[T]hat's why he took off." The declarant describes the vehicle, gives the dispatcher a partial license plate number, and tries to describe the occupants in the vehicle. The declarant also describes the motor vehicle accident and informs the dispatcher that the driver has left the scene and is travelling north.

The declarant initiated the communication with emergency services. The recording of the 911 call demonstrates that as the situation evolved, the caller's purpose was not only to report an accident that had just occurred and to ask for immediate assistance, but also to alert emergency services that an intoxicated person had just committed a hit-and-run and was at that moment driving on a public roadway. Thus, the communication concerned a situation in progress regarding matters that were still developing. The communication was spontaneous, not deliberately recounted. These circumstances objectively indicate that the primary purpose for the communication was to enable police to meet an ongoing emergency. *See Davis*, 547 U.S. at 822.

Other courts presented with similar 911 calls have also found the communications to be non-testimonial. *See Reyes v. State*, No. 04-09-00210-CR, 2010 WL 956140 (Tex. App.--San Antonio Mar. 17, 2010, no pet.) (Child called 911 to request assistance because his father "beat my mom" and father was still present.); *Dixon v. State*, 244 S.W.3d 472, 484-85 (Tex. App.--Houston [14th Dist.] 2007, pet. ref'd) (Excited caller who reported that her boyfriend had just assaulted her in her car was seeking immediate

police assistance, not making a formal statement for later use.); *Santacruz v. State*, 237 S.W.3d 822, 828-29 (Tex. App.--Houston [14th Dist.] 2007, pet. ref'd) (Assault victim, "facing an ongoing emergency[,]" called 911, reported that defendant had just assaulted her, and described her location and the defendant's vehicle.); *Garcia v. State*, 212 S.W.3d 877, 883-84 (Tex. App.--Austin 2006, no pet.) (Mother made statement to responding officer after mother called 911 to report that father had assaulted her, forcibly taken their child, and was still at large.); *Cook v. State*, 199 S.W.3d 495, 496-97 (Tex. App.--Houston [1st Dist.] 2006, no pet.) (Excited observer called 911 to report potential crime after defendant threw a beer bottle at declarant's truck.). We hold that the declarant's call for emergency services is a non-testimonial statement. *See Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006) (Whether a statement is testimonial is a matter of law reviewed *de novo*.). Although the trial court admitted the out-of-court statement of a person who did not testify at trial, the admission of that evidence did not violate the Confrontation Clause, because the statement was non-testimonial. *See Crawford*, 541 U.S. at 53-54. We overrule the issue and affirm the judgment of the trial court.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on July 13, 2010
Opinion Delivered August 4, 2010
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.