

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00096-CR

Curtis Danial Rosenbusch, Appellant

v.

The State of Texas, Appellee

**FROM THE COUNTY COURT AT LAW NO. 4 OF TRAVIS COUNTY
NO. C-1-CR-15-211147, HONORABLE MIKE DENTON, JUDGE PRESIDING**

MEMORANDUM OPINION

A jury found appellant Curtis Danial Rosenbusch guilty of assault with family violence, a Class A misdemeanor. *See* Tex. Penal Code § 22.01(a), (b). The trial court then sentenced Rosenbusch to one year in the Travis County Correctional Center but suspended the sentence and placed him on community supervision for 18 months. In his sole point of error, Rosenbusch contends that the trial court erred in admitting 911 calls into evidence over his Confrontation Clause objections. We will affirm the trial court's judgment of conviction.

BACKGROUND

At trial, it was undisputed that Rosenbusch struck the complainant, with whom he was in a dating relationship at the time, causing her injuries. The only question for the jury was whether Rosenbusch acted in self-defense. The State offered recorded 911 calls, which, according to the State, tended to show that Rosenbusch did not act in self-defense. The trial court admitted

the recordings over Rosenbusch's Confrontation Clause objections. Rosenbusch was convicted and placed on community supervision, and this appeal followed.

DISCUSSION

In his sole point of error, Rosenbusch contends that the trial court erred in admitting the 911 recordings into evidence over his Confrontation Clause objections. "The Confrontation Clause of the Sixth Amendment provides a criminal defendant with the right to cross-examine witnesses against him." *Townsend v. State*, No. 03-17-00495-CR, 2018 WL 3978489, at *1 (Tex. App.—Austin Aug. 21, 2018, no pet.) (mem. op., not designated for publication) (citing U.S. Const. amend. VI). "The Confrontation Clause prohibits the admission of 'testimonial hearsay' unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant." *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 53 (2004)). The Confrontation Clause only applies to statements that are testimonial in nature. *See Knight v. State*, No. 08-16-00123-CR, 2018 WL 3867570, at *6 (Tex. App.—El Paso Aug. 15, 2018, no pet.) (not designated for publication) ("Hence, to implicate the Confrontation Clause, an out-of-court statement must (1) have been made by a witness absent from trial and (2) be testimonial in nature.") (cleaned up); *Avant v. State*, 499 S.W.3d 123, 126 (Tex. App.—San Antonio 2016, no pet.) ("The Confrontation Clause, however, only attaches to statements that are testimonial in nature.").

Therefore, to determine whether the admission of the 911 recordings violated the Confrontation Clause, we must first determine whether the statements in the recordings are testimonial. *See Patrick v. State*, No. 05-18-00435-CR, 2018 WL 3968781, at *34 (Tex. App.—Dallas Aug. 20, 2018, no pet.) (mem. op., not designated for publication) ("The threshold inquiry for any alleged

confrontation violation involving the admission of a statement is whether the admitted statement is testimonial or nontestimonial in nature.”); accord *Hernandez v. State*, No. 01-16-00755-CR, 2017 WL 3429414, at *2 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, no pet.). Statements made during a 911 call primarily to request help during an emergency are not testimonial in nature. See *Davis v. Washington*, 547 U.S. 813, 822 (2006) (“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.”); *Patrick*, 2018 WL 3968781, at *34 (“Statements on 911 calls that relate to ongoing emergencies, and do not establish historical facts, are non-testimonial and do not implicate the Sixth Amendment. Statements made during an ongoing emergency that identify one’s attacker are similarly non-testimonial.”) (citation omitted); *Knight*, 2018 WL 3867570, at *7 (“Statements made to resolve an ongoing emergency are not typically considered testimonial in nature.”); *Hernandez*, 2017 WL 3429414, at *2 (“Statements made to police during contact initiated by a witness at the beginning of an investigation are generally not considered testimonial. For this reason, 911 calls initiated to summon police assistance are generally nontestimonial because they are a cry for help or the provision of information enabling officers to end a threatening situation.”) (cleaned up); *Walls v. State*, No. 03-12-00055-CR, 2014 WL 1208017, at *7 (Tex. App.—Austin Mar. 20, 2014, no pet.) (mem. op., not designated for publication) (same). We review whether a statement is testimonial in nature de novo. See *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006); *Walls*, 2014 WL 1208017, at *7.

Here, two 911 recordings are at issue. In the first recording, the caller states, “[I]t looks like there was an altercation between a guy and a girl.” The caller further states, “Um, she’s

crying and . . . she's bloody." After the caller explains where she is located, she confirms that "this is an assault" and then tells the operator that people in a "grey Dodge . . . are trying to take off with her." The caller stays on the line as the "patient" is taken away and tries to report to the operator what she sees, stating, "I'm trying to watch them to see where they go." Finally, the caller tells the operator, "There is blood spilled in the parking lot . . . [i]f anybody wants to come look at that." Shortly thereafter, the call ends.

In the second recording, the caller states, "I need the police and the ambulance." The caller can be heard telling someone other than the operator, "Stay down, ma'am, your nose is all bust up." The caller explains to the operator, "[W]e were standing out here on lunch . . . and I see this man, just hit this woman and knock her on the floor, on the ground. And then both of them started, you know, he started beating her ass right here. And now there's blood all on the floor, and she, her nose is all busted." A woman can be heard crying in the background. When asked if the patient is awake, the caller responds, "She's awake, I mean, but she's . . . I guess she's scared. She in shock right now." The caller further explains, "I mean, this man was really hitting her, ma'am. I mean, he beat the shit out of her She's breathing, but she . . . blood just falling everywhere." The operator asks the caller when the incident occurred, and the caller responds, "Right now, like, right now." When asked whether the assailant is still present, the caller answers, "Nah, that, that mofo burned off." The caller then describes the direction in which the assailant headed and reports that the patient has been taken away in a Dodge. After the caller answers a few more questions, the call ends.

We conclude that the callers made these 911 calls primarily to seek help in an emergency. The assault had just taken place, the victim was injured, the callers did not know the

whereabouts of the assailant, and the callers were either explicitly requesting law enforcement and medical personnel or implying that they should quickly come to the scene. In both calls, the operator terminates the call shortly after learning that both the assailant and victim have departed.

Because the primary purpose of these calls was to seek emergency assistance, we conclude that the recordings were not testimonial in nature. *See Davis*, 547 U.S. at 822; *Hernandez*, 2017 WL 3429414, at *2; *Walls*, 2014 WL 1208017, at *7. Accordingly, we further conclude that the trial court did not err in overruling Rosenbusch’s Confrontation Clause objections, and we overrule Rosenbusch’s sole point of error. *See Avant*, 499 S.W.3d at 126 (“The Confrontation Clause, however, only attaches to statements that are testimonial in nature.”).

CONCLUSION

Having overruled Rosenbusch’s sole point of error, we affirm the trial court’s judgment of conviction.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Toth

Affirmed

Filed: December 28, 2018

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