STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2009
v	No. 277172 Saginaw Circuit Court
JERMEY JERMAINE LLOYD, Defendant-Appellant.	LC No. 05-025881-FC ON REMAND

Before: Fitzgerald, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

This case is before us on remand from the Michigan Supreme Court. In our previous opinion,[1] we held that the trial court erred by admitting exhibit 20, a portion of which included the transcript of a 911 call in which the caller identified defendant as the perpetrator of a murder. We affirmed defendant's first-degree premeditated murder and felony-firearm convictions, however, after concluding that defendant had not carried the burden of proving that the error resulted in a miscarriage of justice. The Supreme Court directed us to consider the following questions:

> (1) whether the error in admitting the 911 call set forth in exhibit 20 was constitutional in nature; (2) if so, whether the Court of Appeals therefore erred in failing to apply the "harmless beyond a reasonable doubt" standard that is applied to preserved constitutional error, *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967); and (3) if the incorrect standard was applied, whether the prosecutor has established the error was harmless beyond a reasonable doubt. *People v Blackmon*, 477 Mich 1125; 730 NW2d 475 (2007).

I. Was the error in admitting the 911 call constitutional in nature?

A tape recording of various 911 calls was played for the jury. The call at issue was made almost two hours after the shooting. The pertinent part of the exchange was as follows:

[1] *People v Lloyd*, unpublished per curiam opinion of the Court of Appeals, issued November 13, 2008 (Docket No. 277172).

Q: 911.

A. Yeah, I'm trying to report who done the killing just a few minutes ago out in Townhouse Apartments.

Q: Okay, uh you know who did it?

A: Yeah, they call him Little Calio, he in a white Neon. His girlfriend live out there he out there right now with her.

* * *

Q: And he's in a white Neon?

A: Yeah, and he out there on the (inaudible) right now him and his girlfriend. I don't know which apartment or whatever they stay in, but I'm hearing the kids talking. I'm reporting because he needs to be picked up.

In *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), at issue was the admissibility of a tape-recorded statement by the accused wife, made while she was in police custody in response to often leading questions from police detectives, implicating her husband in the stabbing of a man and arguably undermining her husband's claim of self-defense. *Crawford*, 541 US at 39-40. Although the wife did not testify at trial because of a state marital privilege law, her statement was admitted at trial because the trial court, for several reasons, found the statement reliable. *Id.* at 40, 65. The Supreme Court reversed the conviction, likening the wife's statement to ex parte testimony admitted against a criminal defendant, and ruled that its admission had violated the accused's rights under the Confrontation Clause. *Id.* at 66. The *Crawford* Court held that the Confrontation Clause bars "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." *Id.* at 53-54.

The critical determination under *Crawford* is whether an out-of-court statement is testimonial. The Court explained that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations [conducted by judicial officers] as evidence against the accused." *Id.* at 50. The Court stated that only "testimonial" statements cause a declarant to be a "witness" within the meaning of the Confrontation Clause. *Id.* at 51. The *Crawford* Court explained that a witness is a person who "bear[s] testimony." *Id.* " 'Testimony, in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or disproving some fact.' " *Id.* (Citation omitted). Thus, "[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.*

The Court declined to articulate a comprehensive definition of what is testimonial, but set forth three formulations of "core class" testimonial statements: (1) "ex-parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[;]" (2) "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or

confessions[;]" and (3) " statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *Id.* at 51-52 (quotation marks and citations omitted)(ellipses in original). It stated that the formulations "all share a common nucleus," and held that at "a minimum" the formulations applied to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial[,] and to police interrogations." *Id.* at 52. The Court stated that those kinds of statements were the "closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68. If, however, the statement is nontestimonial hearsay, "it is wholly consistent with the Framers' design to affirm the States flexibility in their development of hearsay law" to such statements that are exempt from Confrontation Clause scrutiny. *Id.*

Two years later, the Supreme Court considered another Confrontation Clause issue. *Davis v Washington,* 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006), involved two consolidated cases asking the Court to determine when statements made to law enforcement personnel during a 911 call and at a crime scene are "testimonial," and thus subject to the requirements of the Sixth Amendment's Confrontation Clause. In *Davis*, a woman made a 911 call while in the midst of a domestic disturbance with her former boyfriend. *Davis*, 547 US at 817. Four minutes after the call, the police found her in a shaken state with fresh injuries on her body and frantically attempting to leave the residence with her belongings and children. *Id.* at 818. At her boyfriend's trial, the victim did not appear and the trial court admitted the tape of her 911 call into evidence. *Id.* at 819. In *Hammon v Indiana*, the police responded to a report of a domestic disturbance and found the victim alone on the porch. Although she appeared "somewhat frightened," she told the police that "nothing was the matter[.]" *Id.* at 819. The police questioned the victim and learned that she and her husband had had a fight. *Id.* at 820. The victim filled out and signed a " battery affidavit" alleging that her husband had physically assaulted her. *Id.* At her husband's trial, the victim did not appear and her affidavit and oral statements to the police were admitted into evidence. *Id.* at 820-21.

The *Davis* Court clarified that not all statements made during police interrogation are "testimonial." The Court explained that whether statements made during a police interrogation are "testimonial" depends upon the circumstances under which they were given. Statements "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." *Id.* at 822 (footnote omitted). In contrast, 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." *Id.*

The *Davis* Court considered a number of factors in determining the primary purpose of the interrogations at issue, specifically:

> (1) the timing of the statements, *i.e.*, whether the declarant was speaking about actually happening or past events; (2) whether the "reasonable listener would recognize that [the declarant] ... was facing an ongoing emergency"; (3) the nature of what was asked and answered, *i.e.*, whether the statements were necessary to resolve the present emergency or simply to learn what had happened, in the past; and (4) the interview's level of formality.... In assessing formality,

> relevant measures included the interview's location; whether the declarant was actively separated from the defendant; whether "the officer receiv[ed] [the declarant's] replies for use in his investigat[ion]"; and whether the statements "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." [*Davis*, 547 US at 830.]

The *Davis* Court concluded that the interrogation that took place during the 911 call did not produce testimonial statements, while the police interrogation in *Hammon* did. The Court reasoned that the former were not testimonial because the victim was speaking about events as they were occurring, rather than describing past events; that she was facing an ongoing emergency; and that the statements were necessary to resolve the ongoing emergency. *Davis*, 547 US at 827-28. Under these circumstances, the Court explained that the "primary purpose" of the interrogation was to "enable police assistance to meet an ongoing emergency" and in this connection the victim "simply was not acting as a *witness*, she was not *testifying.* What she said was not 'a weaker substitute for live testimony' at trial." *Id.* at 828 (citations omitted)(emphasis in original). In contrast, in *Hammon*, the Court concluded that the statements were testimonial because the interrogation was part of an investigation into possibly past criminal conduct and there was no emergency in progress. *Id.* at 829-30. The Court stated that when objectively viewed, the "primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime-which is, of course, precisely what the officer *should* have done." *Id.* at 830 (emphasis in original).

Since *Davis*, this Court has had the opportunity to discuss the admissibility under the Confrontation Clause of statements made during a 911 call. In *People v Walker (On Remand)*, 273 Mich App 56, 59-60; 728 NW2d 902 (2006), the victim of an alleged felonious assault escaped from her own house and went to the house of a neighbor, who telephoned 911. This Court held that the neighbor's 911 call was a call for help, and that the information elicited was "necessary to resolve the present emergency (the victim's son was still in the home), rather than learn what happened in the past." *Id*. at 63. These statements were therefore nontestimonial. *Id*. at 59. After the police arrived at the scene, however, the victim made additional statements, at least some of which were recorded by the neighbor. *Id*. at 60, 64-65. The Court held that the victim's verbal statements to the police and those recorded by the neighbor were "generally testimonial" under *Davis*. *Walker*, *supra* at 65. It found that although "portions of these statements could be viewed as necessary for the police to assess the present emergency," the primary purpose of the police questioning was investigatory, there was no indication of a continuing danger, and the statements "recounted how [the] potentially criminal past events began and progressed." *Id*. at 65. The Court did not specifically determine whether the neighbor acted as an agent of law enforcement, focusing instead on the purpose of the police officers' questions, the status of the emergency, and the nature of the victim's statements.

In a recent case not involving a 911 call, but involving a shooting victim's statements to police, our Supreme Court held that a shooting victim's statements to the police "constituted inadmissible testimonial hearsay within the meaning of the United States Supreme Court's decisions in *Crawford* [*supra*] and *Davis* [*supra*]" because the "'primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution.'" *People v Bryant*, 483 Mich 132, 134-135; 768 NW2d 65 (2009), quoting *Davis, supra* at 822. In *Bryant*, five police officers found the victim lying on the ground at a gas station.

Id. at 135-136. "The victim had a gunshot wound in his abdomen and appeared to be in considerable pain." *Id*. The officers asked the victim "what had happened, who had shot him, and where the shooting had occurred." *Id*. at 143. The victim stated that the defendant had shot him approximately 30 minutes earlier at the defendant's house, "which was about six blocks away, and that he drove himself to the gas station." *Id*. At the time of his statements, the victim was aware "that emergency medical service (EMS) was on the way." *Id*. at 144. After summarizing the United States Supreme Court's decisions in *Crawford* and *Davis*, our Supreme Court held that the victim's statements were testimonial in nature, stating, in part:

> The circumstances [of the victim's statements], in our judgment, clearly indicate that the "primary purpose" of the questioning was to establish the facts of an event that had *already* occurred; the "primary purpose" was not to enable police assistance to meet an ongoing emergency. The crime had been completed about 30 minutes earlier and six blocks from where the police questioned the victim. The police asked the victim what had happened in the past, not what was currently happening. That is, the "primary purpose" of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator. *Davis* stated that "in the final analysis [it is] the declarant's statements, not the interrogation's questions, that the Confrontation Clause requires us to evaluate. The declarant here (i.e., the victim) made these statements while he was surrounded by five police officers and knowing that emergency medical services (EMS) was on the way. Obviously, his primary purpose in making these statements to the police was not to enable the police to meet an ongoing emergency of the type identified by the United States Supreme Court, but was instead to tell people who had committed the crime against him, where the crime had been committed, and where the police could find the criminal. That is, the primary purpose of the victim's statements to the police was to "establish or prove past events potentially relevant to later criminal prosecution." Further, the officers' actions do not suggest that the officers themselves considered the circumstances at the gas station to constitute an "ongoing emergency," at least not as the Supreme Court defines that term. The primary purpose of the police questioning of the victim at the gas station was to determine who shot the victim and where the shooter could be found so that they could arrest him. [*Bryant*, *supra* at 143-146, (citations omitted).]

Applying the above law to the facts before us, we are persuaded that the caller's statements during the 911 call were testimonial. Unlike *Davis*, the caller was not relaying events to the 911 operator as the events were happening. Like the statements at issue in *Crawford* and *Bryant*, the statement related to a crime that was no longer ongoing. The statement was not intended to aid the police in responding to a continuing emergency. The circumstances showed that the caller's primary purpose was to relate who committed the crime. Indeed, the caller indicated that he was calling "to report who done the killing." The 911 call was placed approximately two hours after the shooting. Moreover, the 911 operator's primary purpose was to identify the perpetrator so that he could be located and apprehended. See 483 Mich at 146-147. In *Bryant*, *supra*, the Court expressly rejected the notion that an emergency could be regarded as ongoing merely because the perpetrator was at large and needed to be apprehended before he hurt someone else. The Court noted that this would "effectively render nontestimonial

all statements made before the offender was placed behind bars." 483 Mich at 147. Although defendant was at large, the information regarding his identity was provided after the crime was completed, not during the ongoing emergency.[2] Accordingly, the caller's statements made to the 911 operator were testimonial.

II. Standard of Review

In *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 Led 2d 705 (1967), the United States Supreme Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The state must demonstrate, beyond a reasonable doubt, that the error "did not contribute to petitioners' convictions." *Id.* at 26. See also *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005)("A constitutional error is harmless if '[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'"). Because the 911 call referenced in exhibit 20 was testimonial, and there was no showing that the declarant was unavailable or ever subjected to cross-examination by defendant,[3] its admission was a violation of the Confrontation Clause of the Sixth Amendment. Accordingly, the prosecutor was required to establish that the error was harmless beyond a reasonable doubt.

III. Application of the "harmless beyond a reasonable doubt" standard

Apart from the 911 call recapped in exhibit 20, the identification of defendant as the shooter came from three witnesses: Desiree Whittington, Lacreda Whittington, and Antonia Watson. The Whittingtons' identifications at trial were unequivocal, while Watson's was less so. Together they provided sufficient evidence to convict. However, the defense in this case hinged on undermining the accuracy of their identifications. A review of the record reveals that, absent the admission of the additional identification made in the 911 call, a jury might reasonably have found the witnesses' identifications suspect.

With regard to Desiree, questions were raised about her opportunity and ability to identify defendant. The defense also exposed inconsistencies between her trial testimony and statements made to the police and at prior hearings. Moreover, she said that any doubts or confusion were probably erased after discussing the incident with Lacreda and "just thinking about it." Also, a defense investigator claimed that Desiree had said she originally identified someone else in a photo lineup.

Lacreda's ability to make a solid identification was also questioned. She indicated she saw defendant driving a white Neon on the day in question, but acknowledged that at the time the driver wore a T-shirt on his head and she was observing him from the passenger side while someone else was talking to the driver from the passenger side. Moreover, she acknowledged

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[2] We do not address whether an identification during an ongoing emergency would have to be redacted.

[3] We note that the declarant was not identified and it is not clear that he even witnessed the shooting.

that she only observed the shooter, who was not wearing a T-shirt on his head, for seconds before the shooting and that she only got a glimpse during the shooting. Finally, she acknowledged that she had expressed indecision between two photographs in a photo lineup.

Watson said she had met defendant three to four years earlier at a party where she spoke to him for minutes, and did not see him again until twenty minutes before the shooting. At that time, he was wearing a T-shirt on his head. She testified that after the shooting she did not remember if she had seen defendant, but when confronted with prior testimony she indicated that she had seen only the back of his head. Moreover, a few days after the shooting she told officers that the people on the street had said a boy in a white shirt "did it". She did not recall if this information influenced her identification.

Given this testimony, the jury could have questioned these witnesses' identification of defendant. The identification of defendant by the caller during the 911 call after the shooting easily could have tipped the scales against defendant in the minds of the jurors. Thus, we cannot conclude that the error was harmless beyond a reasonable doubt.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra