STATE OF MINNESOTA

IN SUPREME COURT

A22-0161

Court of Appeals | Anderson, J.
Dissenting, Chutich, McKeig, Moore, III, JJ.

State of Minnesota,

Appellant,

vs. | Filed: July 26, 2023
Office of Appellate Courts

Michael Bruce Tapper,

Respondent.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Tory R. Sailer, David R. Hackworthy, Justine K. Wagner, Assistant Eden Prairie City Attorneys, Gregerson, Rosow, Johnson & Nilan, Ltd., Minneapolis, Minnesota, for appellant.

Drake D. Metzger, Jasmin Quiggle, Metzger Law Firm, LLC, Minneapolis, Minnesota, for respondent.

Kelly O'Neill Moller, Assistant Hennepin County Attorney, Minneapolis, Minnesota; and

Kelsey R. Kelley, Assistant Anoka County Attorney, Anoka, Minnesota, for amicus curiae Minnesota County Attorneys Association.

Christopher P. Renz, Gary K. Luloff, Nicole J. Appelbaum, Chestnut Cambronne PA, Minneapolis, Minnesota, for amicus curiae Suburban Hennepin County Prosecutors Association.

S Y L L A B U S

The district court did not abuse its discretion in determining that the victim's statements do not qualify as excited utterances under Minn. R. Evid. 803(2) and therefore should be suppressed as inadmissible hearsay.

Affirmed.

O P I N I O N

ANDERSON, Justice.

The State of Minnesota appeals the order of the district court granting respondent Michael Bruce Tapper's motion to suppress statements recorded on a body-worn camera. Law enforcement officers responded to a domestic disturbance 911 call and found an adult female, A.H., locked out of her apartment while Tapper and three of their children were inside. A.H. told the officers that Tapper, her former husband, had allegedly assaulted her, and she then described the current incident as well as past instances of physical abuse by Tapper. The statements were recorded by an officer's body-worn camera.

Based on this investigation, the State charged Tapper with one count of misdemeanor domestic assault under Minn. Stat. § 609.2242, subd. 1(1) (2022). When A.H. failed to respond to the State's subpoena to testify during a pretrial hearing, the State sought to introduce the body-worn camera recording with A.H.'s statements regarding Tapper's physical abuse into evidence. The district court granted Tapper's motion to suppress the body-worn camera recording, concluding both that the statements themselves were inadmissible hearsay and that the admission of A.H.'s statements on the recording would violate Tapper's constitutional right to confrontation. The State filed an

interlocutory appeal of the district court's order. The court of appeals affirmed based on the Confrontation Clause violation only. *State v. Tapper*, No. A22-0161, 2022 WL 3022545, at *4 (Minn. App. Aug. 1, 2022). Because we conclude that the district court did not abuse its discretion in determining that A.H.'s statements do not qualify as excited utterances under Minn. R. Evid. 803(2) and therefore should be suppressed as inadmissible hearsay, we affirm the court of appeals but on different grounds.

FACTS

In the early hours of November 27, 2021, a resident of an Eden Prairie apartment complex called 911 to report a domestic disturbance occurring in a common stairwell of the building. The caller reported that he heard a woman yelling, banging on a door, and saying "something about getting her face smashed in." Eden Prairie Police Officer Carly Johnson responded to the call around 6 a.m. She wore a body camera that recorded her response to the 911 call in full, but only the initial 8 minutes and 17 seconds of the recording are at issue here. The following facts come from our review of the body-worn camera recording.

Officer Johnson entered the apartment building and walked up a common staircase. A.H., the adult female victim, walked down the stairs barefoot, wearing jeans and a sweatshirt and said, "I have no shoes." An officer already present in the apartment building asked Officer Johnson, "Have you dealt with this guy before?" After Officer Johnson responded no, the other officer told her to talk to A.H. As A.H. continued to walk down the stairs, she whispered, "My kids are in there." Officer Johnson followed A.H. to the entryway of the building and asked which unit she lives in. A.H. did not answer the

question but stated, "I am not leaving my kids. He punched me in the face. I don't know if he broke my nose, but he poured hand sanitizer all over my face and eyes." The recording shows A.H. crying, sniffling, and raising her voice. Throughout the interaction between A.H. and Officer Johnson, another officer can be heard in the background loudly knocking on a door and asking Tapper to come out.

The conversation continued with A.H. stating, "I came out to have somebody call the police because I think he took my phone and he won't give it to me. I had nobody to call, I have blood all over me." Officer Johnson asked, "Your blood?" and A.H. responded affirmatively. A significant amount of blood is not visible in the recording. A.H. then stated, "He just . . . he threw me into the fireplace." A.H. continued to sniffle and wipe her nose with her sweatshirt sleeve and said, "I'm going to die this weekend if I don't . . . report." As she made the final statement, A.H. threw her hands up, sniffled, and rubbed her face.

Officer Johnson asked, "Do you want somebody to come check you out to make sure you're okay?" A.H. responded, "Yeah. My head is really messed up. He kicked my head into the wall, and he threw me into the brick fireplace." A.H. looked down and whispered, "My kids are in there. My oldest ones are gone though." Officer Johnson then called for a medic to examine A.H.

Officer Johnson continued to ask A.H. some questions, beginning with, "Is [Tapper] your husband? Your boyfriend?" She also started taking notes. A.H. said, "It's been 20 years, we've been married and divorced, so I say husband but technically we're not legally married anymore." Officer Johnson then asked, "You guys live together and stuff

though?" A.H. replied, "Yeah, and we have five kids together." Officer Johnson also asked A.H. for the spelling of her name, her date of birth, and her phone number. At this point, A.H. spoke softer and was not crying.

Officer Johnson then asked, "So what happened? I mean I didn't get the full story. I know he pushed you and stuff." It is unclear if Officer Johnson continued to take notes during the remaining conversation. A.H. stated, "[inaudible] we've had multiple calls. I've gotten to the point that I don't call much anymore. This time I'm actually like . . . the aggression is . . . yeah, I don't know . . . last time it got amped up." When asked by Officer Johnson, "What started it today?" A.H. replied, "I don't know, it started early today. He dragged me out of the car in the middle of 494." Officer Johnson inquired, "Today?" and A.H. replied, "Yeah, early on. And hit me." A.H. continued, "And I was at my sister's, but there's nowhere to sleep and I didn't want to invade their space, so I came home." She said, "I woke up . . . I think we argued, I woke up . . . and things escalated after he woke me up. We had a friend staying here, his friend's not mentally well." The other officer then came down the stairs, and A.H. told both officers about a back door to the apartment and that it was probably open. In response to a question about whether she thought Tapper left the apartment, A.H. reiterated that she did not have shoes. The other officer stated that more officers were coming. A.H. then described the apartment layout.

When asked by Officer Johnson where Tapper would have gone if he left, A.H. responded, "There's nowhere for him to go. I don't think he left." She continued, "I don't know what's going on. He might have fallen asleep, he was drunk. I just don't see him as running." In response to an inquiry from Officer Johnson about what happened after

Tapper and A.H. returned home, A.H. stated, "We had a little bit of an argument but then he started getting aggressive . . . he's been increasingly aggressive. And that is something I've explained every time that people have come out, that it's increasing." She continued, "I just went to sleep though, like the last thing I wanna do is . . . I mean this time I actually have like, physical . . . sometimes I haven't had anything that I can show . . . it's mostly like back head wounds, like he pushes me into something or my head hits the wall and it isn't bruised up. The one time . . . he was actually taken into custody. And I had the f*cking no contact dropped, and I wish I hadn't. I really wish I hadn't." A.H. continued, "It was because he had gone at me for 2 hours before finally one of my kids called, it had been so long. And my oldest kids weren't there that time either. My oldest kids can usually like get him to stop."

Officer Johnson then asked about the children in the apartment, "So how many kids are in the apartment right now?" A.H. replied, "Three right now." Officer Johnson asked about the age of the children and A.H. responded, "There's five total but 10, 4, and 6." Officer Johnson repeated, "Okay, 10, 4, and 6 are all up in the unit right now. Okay."

Another officer then entered the apartment building. Officer Johnson told the entering officer to "go with [J.]," (presumably the other officer at the scene) and A.H. stated, "[J.]'s been here a few times." After telling A.H. that the officers were going to attempt to enter the apartment and that she should sit in the back of a squad car to stay warm, A.H. repeated that she did not have shoes. Officer Johnson guided A.H. outside and to the back of a squad car. The remainder of the body-worn camera recording (approximately 56 minutes) is not at issue in this appeal.

The State charged Tapper with one count of misdemeanor domestic assault under Minn. Stat. § 609.2242, subd. 1(1). The State filed a notice of its intent to introduce the recording of Officer Johnson's body-worn camera into evidence. Tapper moved to suppress the recording. At a pretrial hearing before the district court, the State confirmed that A.H. had not responded to its subpoena to testify at the hearing. The district court then granted Tapper's motion to suppress the first 8 minutes and 17 seconds of the recording, as described above. The district court found that A.H.'s statements did not fall under the excited utterance exception to the hearsay rule under Minn. R. Evid. 803(2) because A.H., although downcast and sad, was not "agitated, shaky, or afraid," and enough time had passed since the alleged assault by Tapper for A.H. to "conjecture that [Tapper] may have fallen asleep." The district court also found that A.H.'s statements on the recording were testimonial because no ongoing emergency existed at the time she talked to Officer Johnson, so admitting the statements would violate Tapper's constitutional right to confrontation.

The State filed an interlocutory appeal of the district court's suppression order, and the court of appeals affirmed in a nonprecedential opinion. The court of appeals determined that A.H.'s statements on the recording were testimonial because the primary purpose of the recorded exchange was to investigate if Tapper had assaulted A.H., not to address how an ongoing emergency should be resolved. *Tapper*, 2022 WL 3022545, at *4. Because the court of appeals determined that A.H.'s statements on the recording were

testimonial and the admission of those statements would violate the Confrontation Clause, it did not consider whether the statements were also inadmissible hearsay. *Id.* at *4 n.2.

We granted the State's petition for further review.

ANALYSIS

As a preliminary matter, the State may appeal a pretrial ruling only if "the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." Minn. R. Crim. P. 28.04, subd. 2(2)(b). All parties acknowledge that this requirement is met in this case because the suppression of the body-worn camera recording will have a critical impact on the prosecution's case. The court of appeals agreed. *Tapper*, 2022 WL 3022545, at *2. The court of appeals noted that "[w]ithout the recording, there is no evidence identifying Tapper as the assailant." *Id.* Because suppression of this evidence "significantly reduces the likelihood of a successful prosecution," *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quoting *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987)), we agree that the critical impact requirement has been met here.

Next, we analyze whether the district court abused its discretion in finding that A.H.'s statements were not admissible as excited utterances under Minn. R. Evid. 803(2). We review a district court's evidentiary rulings for an abuse of discretion. *State v. Vangrevenhof*, 941 N.W.2d 730, 736 (Minn. 2020). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (citation omitted) (internal quotation marks omitted). Our resolution of this case turns on this deferential standard of review. *See State v. Berrisford*, 361 N.W.2d 846, 850 (Minn. 1985) (deferring to the district court's determination that the declarant was

under a sufficient aura of excitement); *State v. Daniels*, 380 N.W.2d 777, 783–84 (Minn. 1986) (same).

A hearsay statement, or "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," Minn. R. Evid. 801(c), is inadmissible unless it falls within a hearsay exception. Minn. R. Evid. 803. A hearsay statement is admissible at trial as an excited utterance if it "relat[es] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Minn. R. Evid. 803(2). "[N]o strict temporal guidelines" exist for admitting an excited utterance, but the statement must have been made while the declarant was "under the stress of excitement" from a startling event. *State v. Davis*, 820 N.W.2d 525, 536 (Minn. 2012) (citation omitted) (internal quotation marks omitted). The key consideration is whether the declarant was under an "aura of excitement." *Id.* (citation omitted) (internal quotation marks omitted). This determination is left to the discretion of the district court. *State v. Martin*, 614 N.W.2d 214, 224 (Minn. 2000).

In this case, the district court rejected the application of the excited utterance exception to the hearsay rule for two reasons. First, the district court found that A.H., although downcast and sad, was not "agitated, shaky, or afraid." Second, although it is unclear how long A.H. was locked outside of her apartment, enough time had passed since the alleged assault by Tapper for A.H. to "conjecture that [Tapper] may have fallen asleep," which led the district court to conclude that there was no longer an "aura of excitement" when A.H. made her statements to Officer Johnson.

According to the State, the district court's findings imply that a physical manifestation of stress is required for the excited utterance exception to apply because the district court focused on the physical conduct by A.H. at the time she made the statements to Officer Johnson and relied on legal authority describing circumstances when the declarant showed physical manifestations of stress. The State maintains that this analysis was too narrow because the district court ignored whether the statements had, as the State puts it, "hallmarks of trustworthiness."

In response, Tapper concedes that an assault is a startling event and that A.H.'s statements related to the alleged assault. But Tapper contends that A.H. was no longer under an "aura of excitement" when she spoke with Officer Johnson. He maintains that the district court did not abuse its discretion in excluding A.H.'s statements.

Because there are no "strict temporal guidelines" to evaluate whether statements qualify as excited utterances, district courts are tasked with considering various factors when making these determinations. Factors to consider include "the length of time elapsed, the nature of the event, the physical condition of the declarant, [and] any possible motive to falsify." *Daniels*, 380 N.W.2d at 782–83 (quoting Minn. R. Evid. 803(2) comm. cmt.—1989). Though not necessarily required for the excited utterance exception, our precedent supports that a physical manifestation of stress will often be a key indicator of an aura of excitement. *See Berrisford*, 361 N.W.2d at 850 (determining that the district court did not abuse its discretion by admitting statements of a declarant who appeared "scared," "shaky," and "very upset"); *State v. Bauer*, 598 N.W.2d 352, 366 (Minn. 1999) (holding that the excited utterance exception applied when the declarant was "very upset,"

"extremely agitated," and "very afraid"), *overruled on other grounds by State v. McCoy*, 682 N.W.2d 153 (Minn. 2004).

Here, the State misconstrues the analysis of the district court. The district court concluded that the excited utterance exception did not apply based on A.H.'s "unexcited demeanor" *as well as* the passage of enough time that allowed A.H. to suggest that Tapper may have fallen asleep. The record supports these findings because it is unclear how much time had passed since the alleged assault by Tapper, and A.H. appeared to grow calmer as the interaction with Officer Johnson continued.

The district court also noted that whether a statement is made in response to a question is relevant for an excited utterance analysis. Although we have previously stated that "an excited utterance is not necessarily rendered inadmissible by the fact that the declaration was made in response to a question," that does not preclude this from being a relevant consideration as to "whether the utterance was spontaneous and excited." *See In re Chuesberg's Welfare*, 233 N.W.2d 887, 889 (Minn. 1975). Almost all of A.H.'s statements on the recording are made in response to questions posed by Officer Johnson, even if some of the individual statements are non-responsive to the actual question.

The recording also includes A.H.'s description of events that happened hours previously, including the incident that morning on Interstate 494, past injuries inflicted by Tapper, Tapper's past arrest, and a no-contact order that A.H. allowed to expire. Certainly, the amount of time that had lapsed since those events supports that the district court acted within its discretion in concluding that such statements did not carry "the classic hallmarks of excited utterances." The dissent rejects the analysis and factual findings of the district

court and constructs a sympathetic factual framework supporting the excited utterance exception to the hearsay rule. But here, the State has the burden of establishing the validity of the exception, and the district court concluded it failed to do so. We review that conclusion using an abuse of discretion standard. We have only rarely reversed a court under these circumstances. Further, the dissent argues that "[t]he district court placed too much emphasis on A.H. stating that Tapper may have fallen asleep," *infra* at D-4, and "[n]othing in the record suggests that the passage of time was so great as to create a likelihood of fabrication," *infra* at D-5. To support its contention that the district court weighed too heavily on the passage of time, the dissent cites to our decisions in *Berrisford* and *Daniels*. *Infra* at D-4. It is curious that the dissent, which gives no deference to the district court's view of the facts, would cite to these decisions in which we deferred to the district court's weighing of the evidence. Our deferential standard of review on these matters cuts both ways—whether the district court admits or excludes the evidence.

The district court, given the victim's statement that Tapper might have fallen asleep, had a basis for crediting that statement and reasoned that sufficient time had passed to conclude that the State had not carried its burden to establish the excited utterance exception to the hearsay rule. On this record, we cannot say that the district court abused its discretion.

Likewise, the dissent notes that the district court could have parsed the statements and admitted a more limited segment into evidence. *Infra* at D-5 n.3. But the State made no effort to separate the recording into segments or argue that only some of A.H.'s

statements should be admitted under the excited utterance exception. The district court is a neutral arbiter, not an advocate, and it is the State that bears the burden of proof here.

We conclude that the district court did not abuse its discretion by excluding the body-worn camera recording containing all of A.H.'s statements as inadmissible hearsay. Because the statements are inadmissible hearsay, we need not decide whether the admission of the statements would violate Tapper's constitutional right to confrontation. *See, e.g.*, *Bernhardt v. State*, 684 N.W.2d 465, 475–76 (Minn. 2004) (ending analysis without reaching the appellant's Confrontation Clause claim because the statements were inadmissible hearsay).

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals but on different grounds.

Affirmed.

DISSENT

CHUTICH, Justice (dissenting).

In the pre-dawn hours of a November day, a resident of an apartment complex called 911 to report that a domestic dispute was occurring in a nearby stairwell. The caller reported that a woman was knocking on an apartment door, saying "something about getting her face smashed in." The first 8 minutes of a responding officer's body-worn camera captured the following statements, among others, of A.H., the alleged victim: "My kids are in there." "I'm going to die this weekend if I don't . . . report." "I am not leaving my kids." "He punched me in the face. I don't know if he broke my nose, but he poured hand sanitizer all over my face and eyes." "He kicked my head into the wall, and he threw me into the brick fireplace." At issue here is whether the recording with those statements would be admissible at a trial charging her ex-husband, Michael Bruce Tapper, with domestic abuse after A.H. did not respond to the State's subpoena. A majority of this court concludes that A.H.'s statements are inadmissible hearsay and does not reach respondent's Confrontation Clause claim. Because I believe that A.H.'s statements meet the excited utterance exception to the hearsay rule, and because, under a Confrontation Clause analysis, a totality of the circumstances shows that the primary purpose of these statements was not to create an out-of-court substitute for trial testimony, I respectfully dissent.

I.

The court's analysis rests solely on the hearsay issue, so I address the applicability of the excited utterance exception first. A hearsay statement is admissible at trial as an excited utterance if it "relat[es] to a startling event or condition made while the declarant

was under the stress of excitement caused by the event or condition." Minn. R. Evid. 803(2). The excited utterance exception "stems from the belief that the excitement caused by the event eliminates the possibility of conscious fabrication, and insures the trustworthiness of the statement." *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986) (quoting Minn. R. Evid. 803(2) comm. cmt.—1989); *see also Idaho v. Wright*, 497 U.S. 805, 820 (1990) (noting that the basis for the "excited utterance" exception in the analogous Federal Rules of Evidence "is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation").

In *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992), we determined that the district court abused its discretion in finding that a child's statements on a 911 call to report her sexual assault and her statements made when police officers arrived at the scene a short time later were not excited utterances. In so concluding, we set forth three considerations to evaluate whether a statement is an excited utterance: "(a) that there be a startling event or condition, (b) that the statement relates to the event or condition, and (c) that the statement is made under the stress caused by the event or condition." *Id.*

Here, Tapper conceded the first two *Edwards* factors, agreeing that "[a]n assault is a startling event" and that A.H.'s statements "related to the alleged assault." He disputed whether A.H. was under an "aura of excitement" when she spoke with Officer Johnson. The district court found that A.H.'s statements were not excited utterances because of "A.H.'s unexcited demeanor" and because enough time had passed for A.H. to suggest that Tapper may have fallen asleep. The evidence here, however—body-worn camera footage clearly depicting the entire interaction between A.H. and Officer Johnson—does not

support this finding, so I would hold that the district court abused its discretion. *See State v. Vangrevenhof*, 941 N.W.2d 730, 736 (Minn. 2020) ("A district court abuses its discretion when its decision . . . is against logic and the facts in the record.").

First, the record does not support that A.H. had an "unexcited demeanor," particularly throughout the first 3 minutes of the 8-minute segment of the recording. The 911 caller described A.H. as knocking on a door and saying that her face had been smashed in. When law enforcement officers responded around 6:00 a.m., A.H. was locked out of her apartment with her three young children and the alleged assailant inside, she was barefoot in a common stairwell, and without a coat in late November. She accused Tapper of violently assaulting her before locking her out. Many of A.H.'s statements were voluntary and not made in response to any particular question. Her statements were made when the police were still trying to gain entry to the apartment, had not located Tapper yet, and had not ascertained the status of the children. A.H.'s voice was raised when she initially began talking, and at times her voice was shaky. A.H. was sniffling. She threw her arms up as she spoke. She said that *she's going to die this weekend* if she doesn't report and described the violent assault. Considering the context, her appearance, and her actions, A.H. was not "reasonably calm" or "matter of fact" throughout this encounter.[1] To say otherwise ignores the circumstances of her recorded interactions with the officer.

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[1] As Amicus Curiae Minnesota County Attorneys Association aptly notes, victims may display unexpected responses to trauma. Following trauma, victims may come across as "unemotional" or as having a "flat affect." Susan Ayres, *Trauma-Informed Advocacy: Learning to Emphasize with Unspeakable Horrors*, 26 Wm. & Mary J. Race, Gender & Soc. Just. 225, 252–53 (2020). Further, "[p]eople react differently to trauma. Lack of or

Second, the district court found that, while it was unclear how much time had passed since Tapper had allegedly assaulted A.H., "it was long enough for [A.H.] to conjecture" that Tapper may have fallen asleep. "Lapse of time between the startling event and the excited utterance is not always determinative." *Daniels*, 380 N.W.2d at 783. A key consideration in the timing inquiry is whether the passage of time was so great "as to create a likelihood or opportunity of fabrication." *In re Welfare of Chuesberg*, 233 N.W.2d 887, 889 (Minn. 1975). In *State v. Berrisford*, 361 N.W.2d 846, 850 (Minn. 1985), we held that statements made 90 minutes after a murder were admissible under the excited utterance exception. *See also Daniels*, 380 N.W.2d at 783 (determining that statements made an hour after the startling event were admissible); *State v. Crowhurst*, 470 A.2d 1138, 1145 (R.I. 1984) (holding that statements made 3 hours after an assault were admissible as excited utterances).

The district court placed too much emphasis on A.H. stating that Tapper may have fallen asleep to reach a conclusion about how long A.H. had been locked outside her apartment after the alleged attack. A.H.'s full statement was "I don't know what's going on. He might have fallen asleep, he was drunk."[2] A.H. made this statement to assist the officers in assessing the situation that was unfolding in real time and in response to an officer's question of whether Tapper could have fled. A statement made in response to a

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the presence of emotion is not an indicator of the legitimacy of the incident that occurred." Int'l Ass'n of Chiefs of Police L. Enf't Pol'y Ctr., *Domestic Violence* 3 (Mar. 2018).

[2] Of course, common knowledge suggests that it is difficult to predict how fast or slowly a drunken person may fall asleep.

question does not render the statement inadmissible, so long as the declarant was still in an excited state. *See Chuesberg*, 233 N.W.2d at 889. To find that a declarant was no longer under an aura of excitement just because some unknown time had passed since the startling event undercuts the rationale of the excited utterance exception—whether the declarant had the opportunity to fabricate statements. Nothing in the record suggests that the passage of time was so great as to create a likelihood of fabrication.

In sum, the recording of the encounter supports a finding that A.H.'s statements were excited utterances. A.H. did not have a calm demeanor based on her raised and shaky voice, sniffling, and the surrounding circumstances of A.H. being locked out of her home in the early morning hours without shoes or a coat while her young children remained inside with the perpetrator of an alleged violent assault against her. Although it is unclear how much time had passed since the assault, the situation remained fluid and frantic, and A.H. was still in an excited state without the opportunity to fabricate statements about Tapper. I would therefore hold that the district court abused its discretion in excluding the statements as inadmissible hearsay.[3]

II.

Because I would conclude that the statements in the recorded segment were not inadmissible hearsay, I next turn to the issue of whether A.H.'s statements to Officer

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[3] Even if the district court believed that the entire proposed 8-minute segment did not qualify as an excited utterance, it had the ability to further redact the recording and admit a more limited portion of the recorded statements. *See Davis v. Washington*, 547 U.S. 813, 829 (2006) (noting, in a Confrontation Clause case, that district courts possess the ability, through in limine procedure, to redact or exclude portions of statements as they do "with unduly prejudicial portions of otherwise admissible evidence").

Johnson were testimonial under the Confrontation Clause. Applying recent Supreme Court precedents refining the Confrontation Clause analysis, I believe that the admittance of A.H.'s statements would not violate Tapper's right to confrontation. I would therefore reverse the decision of the court of appeals.

A.

The Confrontation Clause, found in the United States and Minnesota constitutions, provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[4] U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also Pointer v. Texas*, 380 U.S. 400, 400–08 (1965) (making the protections of the Confrontation Clause applicable to the States under the Due Process Clause of the Fourteenth Amendment).

The Confrontation Clause prohibits the admission of a statement into evidence if: "the statement in question was testimonial, the statement was admitted for the truth of the matter asserted, and the defendant was unable to cross-examine the declarant." *State v. Sutter*, 959 N.W.2d 760, 765 (Minn. 2021) (citation omitted) (internal quotation marks omitted). We review de novo the question of whether the admission of evidence violates the Confrontation Clause. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

In cases following *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court has "labored to flesh out what it means for a statement to be 'testimonial' " and has "further

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[4] The relevant language of the federal and state Confrontation Clauses is identical, and neither party argues for a more expansive reading of the Minnesota Constitution. Applying United States Supreme Court precedent to analyze the Confrontation Clause issue is therefore appropriate. *State v. Tate*, 985 N.W.2d 291, 297 n.5 (Minn. 2023).

expounded on the primary purpose test." *Ohio v. Clark*, 576 U.S. 237, 244 (2015). To understand the current standard that separates testimonial statements from nontestimonial statements, a brief summary of Supreme Court precedents is helpful.

In *Crawford*, the Supreme Court rejected the previous test of whether a statement was admissible under the Confrontation Clause, namely, whether the declarant was unavailable and the statements had a sufficient "indicia of reliability." 541 U.S. at 68. Instead, the Court stated that for testimonial statements to be admissible, the Sixth Amendment "demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* The Court defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (alteration in original).

Crawford declined to "spell out a comprehensive definition of 'testimonial,' " but stated that the label "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. Applying that definition to the facts there, the Supreme Court held that statements made by a defendant's wife were testimonial. *Id.* The statements were made and recorded while she was in police custody at a station house, after she had been given *Miranda* warnings as a possible suspect. *Id.* at 38–40, 53 n.4.

In *Davis v. Washington*, the Supreme Court tried "to determine more precisely which police interrogations produce testimony" under the Confrontation Clause. 547 U.S. 813, 822 (2006). *Davis* considered two consolidated domestic violence cases: *State v. Davis*, 111 P.3d 844 (Wash. 2005) and *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005). In

what has become known as the "primary purpose" test, the Court discussed the concept of an ongoing emergency:

> 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 (emphasis added).

The Supreme Court determined in *Davis* that the primary purpose of the statements was to assist law enforcement in responding to an ongoing emergency, so the statements were nontestimonial. *Id.* at 828. The statements were made during a 911 call, and the victim was calling for help from a domestic assault as it was happening. *Id.* at 827. The Court observed that the "elicited statements were necessary to be able to *resolve* the present emergency" and that the statements were not taken in a formal setting. *Id.*

The Supreme Court concluded that the statements to law enforcement in *Hammon* were testimonial, however, noting that "they were not much different from the statements [the Court] found to be testimonial in *Crawford*." *Id.* at 829. There, when police officers responded to a domestic disturbance call at a home, the victim was alone on her front porch and appeared frightened, but she told the officers that "nothing was the matter." *Id.* at 819. The officers interviewed the victim in a separate room from the alleged perpetrator, and her statements were memorialized in a "battery affidavit," describing the defendant's attack on herself and her daughter. *Id.* at 820. The Court found that there was no ongoing emergency when the officers arrived, and the officers sought to find out what had

happened, not what was *happening*. *Id.* at 829–30. The setting was sufficiently formal, and the police questioning took place "some time after the events described were over." *Id.* The primary purpose of the interrogation, therefore, was to investigate a possible crime, making the statements testimonial. *Id.* at 830.

Following *Davis*, we considered whether statements were testimonial in a domestic violence context in *State v. Wright*, 726 N.W.2d 464, 472–73 (Minn. 2007). In *Wright*, we determined that statements made on a 911 call were nontestimonial, but later statements to responding officers were testimonial because the emergency had ended. *Id.* at 475–76. In another case that same year, we set forth four factors to determine whether statements were made to meet an ongoing emergency in *State v. Warsame*, 735 N.W.2d 684, 690 (Minn. 2007):

> (1) the victim described events as they actually happened and not past events; (2) any "reasonable listener" would conclude that the victim was facing an ongoing emergency; (3) the questions asked and answers given were necessary to resolve a present emergency, rather than only to learn what had happened in the past; and (4) there was a low level of formality in the interview because the victim's answers were frantic and her environment was not tranquil or safe.

Warsame was the last time we examined the Confrontation Clause in a domestic violence context. The Supreme Court has since then provided significantly more guidance on the contours of testimonial statements.

For example, 4 years after our *Warsame* decision, the Supreme Court further refined the primary purpose test in *Michigan v. Bryant*, 562 U.S. 359 (2011). Notably, the Court emphasized that the primary purpose inquiry must consider "all of the relevant circumstances," *id.* at 369; "whether an ongoing emergency exists is simply one

factor—albeit an important factor" to be considered. *Id.* at 366. According to the Court, "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.* at 358.

These factors include the formality of the encounter between the victim and the police, the statements and actions of the declarant and interrogators, and other contextual factors such as the medical condition of the victim, particularly injuries that require immediate attention, and the type of weapon used. *Id.* at 358–59, 364–65. The Court noted that police officers often ask questions such as "what had happened" to assess the situation and any threats to the victim, others, or themselves. *Id.* at 376. Because the purpose is to assess the situation, initial inquiries by officers "*often* . . . produce nontestimonial statements." *Id.* at 377 (citation omitted) (internal quotation marks omitted).

The Supreme Court further stated that trial courts can determine when nontestimonial statements turn testimonial and exclude the parts of any statement that have become testimonial. *Id.* at 365–66. But the Court cautioned district courts not to use hindsight when assessing the existence of an ongoing emergency, noting that the emergency "must be objectively assessed from the perspective of the parties to the interrogation at the time." *Id.* at 360, 361 n.8.

Applying these factors, the Supreme Court concluded that statements to police officers made by a gunshot victim who was bleeding profusely, and later died, were nontestimonial. *Bryant*, 562 U.S. at 374–75. An ongoing emergency existed because the perpetrator was armed and remained at large. *Id.* at 374. The responding officers asked

questions in their initial inquiry about what happened, who had shot the victim, and where the shooting had occurred to assess the situation and meet the ongoing emergency. *Id.* at 376. The informality of the encounter also supported the Court's determination that the statements were nontestimonial because the situation was "fluid and somewhat confused." *Id.* at 377.

Four years later, in *Ohio v. Clark*, the Supreme Court again addressed the primary purpose test and determined that statements a child made to his preschool teacher about his abuser were made during an ongoing emergency, namely, suspected child abuse. 576 U.S. at 246. After reviewing relevant precedents, the Court announced that, "In the end, the question is whether, in light of all of the circumstances, viewed objectively, the primary purpose of the conversation was to creat[e] an out-of-court substitute for trial testimony." *Id.* at 245 (internal quotation marks omitted) (alteration in original) (citing *Bryant*, 562 U.S. at 358).

In an expansion of the ongoing emergency analysis, the Supreme Court determined that, although the child was in a safe space away from his abuser when he spoke, it was unclear who had abused the child, how best to protect the child, or whether any other children were at risk. *Id.* at 247. The Court determined that the primary purpose of the conversation was to *identify* the abuser to protect the child, not to gather evidence for the perpetrator's prosecution. *Id.* The Court said that statements may be deemed nontestimonial even if they might support a defendant's prosecution, and police officers have an obligation to ask questions to resolve emergencies. *Id.* at 250.

Referencing *Bryant* and *Clark*, the State argues here that our precedent places too much emphasis on the presence of an ongoing emergency, treating it as a dispositive factor without considering the other factors articulated by the Supreme Court. I agree. To determine whether a statement is testimonial, courts must make a fact-specific inquiry and consider all relevant circumstances, not just whether an ongoing emergency exists. *Bryant*, 562 U.S. at 369. The critical factors to consider, based on Supreme Court guidance, are: (i) whether an ongoing emergency existed; (ii) whether the nature of the encounter was to resolve that ongoing emergency or for some other permissible purpose; (iii) the statements and actions of the declarant and the interrogator; and (iv) the formality of the encounter. Ultimately, the rule of law announced in *Clark* succinctly captures the inquiry: "whether, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to creat[e] an out-of-court substitute for trial testimony." *Clark*, 576 U.S. at 245 (alteration in original) (internal quotation marks omitted) (citing *Bryant*, 562 U.S. at 358).[5]

B.

Applying these factors to the facts at hand, I first examine whether an ongoing emergency existed. A key consideration is whether Tapper posed a continued threat to A.H. or to others. *See Bryant*, 562 U.S. at 363. To be sure, the immediate threat to A.H. was abated when she made the statements because she was away from Tapper and safely

[5] Although I discuss the application of *Clark*'s clarified guidance in the context of this domestic abuse case, this guidance holds true in all criminal cases, not just those involving domestic abuse.

with police officers. But, as in *Warsame*, the location of the suspect was unknown; it was initially unclear if Tapper remained inside the apartment with the young children or if he had fled the apartment. Tapper was nonresponsive to officers pounding on the door and asking him to unlock it. The objective facts viewed in real time are that young children—ages 10, 6, and 4—were locked in an apartment with a drunken man accused of violently assaulting his partner. A.H.'s description of her medical condition and what Tapper had done to her was important context for the responding officers to evaluate what threats Tapper posed to the children and themselves as they tried to enter the apartment. Just as suspected child abuse amounted to an emergency in *Clark*, young children alone in a locked apartment with a person accused of perpetrating a violent assault similarly presented an ongoing emergency here. *See Clark*, 576 U.S. at 246.

Next, A.H.'s statements support that she was concerned for her children and sought to assist law enforcement officers in ending the emergency. When Officer Johnson arrived, A.H. whispered that her kids are inside and that she is not leaving them, which shows her concern for their welfare. A reasonable parent in these circumstances would undoubtedly have had the same concern for the safety of their young children.

Moreover, A.H.'s injuries should not have been dismissed as non-emergencies solely because they were not readily visible. She stated that her head was "really messed up" and that she was unsure if her nose was broken. A.H. said that Tapper threw her into the fireplace, kicked her in the head, and poured hand sanitizer on her face and eyes. Head injuries can be serious and dangerous, but the victim may not have immediate, outward symptoms. *See* Robert Luce, *Proving A "Mild" Traumatic Brain Injury: A Complex but*

No Longer Impossible Task, 38 Vt. Bar J. 12, 13 (2012). A.H. also expressed concern for her own safety going forward. She explained that Tapper is getting increasingly aggressive towards her. These statements suggest that A.H. was concerned with ending the abuse, not with creating a transcript record to be used to prosecute Tapper.

Further, that A.H.'s statements were excited utterances made in response to an ongoing emergency bolsters the idea that the statements were not fabricated. *See Bryant*, 562 U.S. at 361 (explaining that the "logic" behind deeming statements made in response to an ongoing emergency is similar to that of the excited utterance exception, namely that the "prospect of fabrication . . . is presumably significantly diminished").

Next, the questions asked by the law enforcement "interrogator" here, Officer Johnson, and the answers given by A.H. show that the statements were nontestimonial. *Warsame*, 735 N.W.2d at 693. Rather than Officer Johnson asking leading questions and A.H. providing "yes" or "no" responses, A.H.'s statements are largely unprompted and voluntary. A.H. first described the incident that had just occurred, which was helpful to Officer Johnson in assessing the situation.[6] Officer Johnson's subsequent questions are made to assess the present situation and A.H.'s condition: "your blood?" "do you want someone to come check you out and make sure you're okay?" and "what happened?" Some of A.H.'s statements then describe past events, and Officer Johnson did ask for some

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[6] Minnesota law *requires* law enforcement agencies to implement policies for responding to domestic abuse incidents. Minn. Stat. § 629.342 (2022). Model policies instruct officers to first "ensure all of the occupants are safe" when responding to a domestic disturbance call. Peace Officer Standards & Training Bd., DOMESTIC ABUSE RESPONSE AND ARREST MODEL POLICY 4 (2013).

background information. But these statements and questions are best characterized as Officer Johnson's effort to assess the situation, and A.H. making Officer Johnson aware of Tapper's alleged violent pattern of abuse.

Lastly, the informality of the encounter supports a determination that A.H.'s statements were nontestimonial. The conversation between A.H. and Officer Johnson took place in a common entryway of an apartment complex in a disorganized fashion. This situation was very different from the formal, station-house interrogation of *Crawford* or the battery affidavit in *Hammon.*[7]

Viewing the circumstances as a whole, the primary purpose of A.H.'s statements was not to create an out-of-court substitute for trial testimony. An ongoing emergency existed when three young children were locked in an apartment with a drunken man accused of recently perpetrating a violent assault. A.H. described her medical condition as being serious even though her injuries were not outwardly visible. She was concerned for her children and provided Officer Johnson with relevant context as responding officers attempted to enter the locked apartment. A.H.'s statements during the informal encounter allowed the officers to assess the threat that Tapper posed to the children and to themselves. A.H.'s statements were therefore nontestimonial, and their admittance would not violate Tapper's constitutional right to confrontation.

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[7] Only later when A.H. was in an ambulance, did Officer Johnson take a formal statement from her for the police report.

C.

Lastly, I dissent to highlight the crisis that is domestic violence in Minnesota. One in every three women in Minnesota will experience violence, rape, or stalking by an intimate partner in their lifetime, a shocking reality. *Domestic Violence in Minnesota*, Nat'l Coal. Against Domestic Violence (2020). And at least 26 out of the 201 people murdered in Minnesota in 2021 were killed by their intimate partners. *2021 Homicide Report: Relationship Abuse in Minnesota*, Violence Free Minn. 2; *2021 Uniform Crime Report*, Minn. Bureau of Crim. Apprehension 7.[8] Moreover, domestic assaults pose a grave risk to responding officers nationwide. *See* Nick Bruel & Desiree Luongo, *Making It Safer: A Study of Law Enforcement Fatalities Between 2010–2016* 24 (Dec. 2017) ("The strong connection between law enforcement deaths and . . . domestic-related call[s] for service, is undeniable.").

Domestic violence is a crime that is "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." *Davis*, 547 U.S. at 833. "Victims may not report a crime for a variety of reasons, including fear of reprisal or getting the offender in trouble, believing that police would not or could not do anything to help, and believing the crime to be a personal issue or too trivial to report." *See* Alexandra

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[8] In 2017, almost one-fourth of all murders in Minnesota were attributable to domestic violence. *See 2017 Femicide Report: Domestic Violence Homicide in Minnesota*, Violence Free Minn. 4; *2017 Uniform Crime Report*, Minn. Bureau of Crim. Apprehension 20. Violence Free Minnesota's Homicide Report shows that homicide victims of intimate partner violence are overwhelmingly women. *See 2021 Homicide Report*, Violence Free Minn. 4, 6. The same report also reflects that, although victims of homicide attributable to domestic violence are disproportionately women, children, bystanders, and intervenors are also killed due to domestic violence. *See id*.

Thompson & Susannah N. Tapp, *Criminal Victimization* 2021, U.S. Dep't of Just. Bureau of Just. Stat. 5 (Sept. 2022). Given this grim reality, it is no surprise that less than half of domestic abuse incidents are even reported. *Id.* But the failure to intervene can have fatal consequences. Women who report an increase in the severity of the violence against them, as A.H. did here, are five times more likely to be murdered than those who do not report such an increase. Minn. Dep't of Health, *Report: Hospital Treated Intimate Partner Violence in Minnesota* 1 (Mar. 2019).

In the face of such prevalent and corrosive domestic violence in Minnesota, judges must take care not to view the facts of these alleged assaults with the benefit of hindsight. In other words, we must not unconsciously sanitize these encounters because we have after-the-fact knowledge that the victim's injuries were not severe, that the children were not actually harmed, or that the victim continues to live with her alleged abuser. When courts fail to evaluate the circumstances as a whole, as the incident was playing out in real time, victims face an unreasonable burden of saying *exactly* the right thing, with *exactly* the right amount of emotion, at *exactly* the right time. When courts require that level of precision from persons experiencing trauma, the critical evidence needed to prosecute alleged abusers is deemed inadmissible and alleged abusers walk free without facing a fair trial and just consequences if convicted.

I acknowledge that the Confrontation Clause is a foundational constitutional right. Recent guidance from the Supreme Court, however, allows district courts to consider factors in addition to whether an ongoing emergency exists to evaluate testimonial versus nontestimonial statements. To make any progress in ameliorating and ending the crisis of

domestic abuse, those recent precedents must not be applied in a rigid or restrictive fashion. When the totality of the circumstances shows that the primary purpose of an alleged victim's statements is not to create an "out-of-court substitute" for trial testimony, the statements must be admissible. Admission of these statements better comports to the guidance announced by the Supreme Court in recent years and will help ameliorate our state's domestic violence crisis. Victims of domestic abuse in Minnesota deserve that help.

For these reasons, I respectfully dissent.

McKEIG, Justice (dissenting).

I join in the dissent of Justice Chutich.

MOORE, III, Justice (dissenting).

I join in the dissent of Justice Chutich.