Opinion issued February 27, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00199-CR

NOE ROBLES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 3
Harris County, Texas
Trial Court Case No. 2017372

MEMORANDUM OPINION

A jury convicted appellant Noe Robles of misdemeanor assault of a family member. He was sentenced to a suspended term of one year in jail and placed on community supervision for eighteen months. Appellant asserts two issues on appeal. He argues that the trial court's decision to admit 911 calls into evidence

violated his right to confrontation under the Sixth Amendment. He further contends that because he was indigent, the $25 charge for "Summoning Witnesses/Mileage" that appeared on his cost bill was unconstitutional.

The statements contained in the 911 calls were nontestimonial in nature, and we therefore conclude that the trial court did not err by admitting them. The State concedes that $10 of the court fee was improperly charged. As to the remaining $15, appellant has failed to demonstrate that the statute imposing the court fees is unconstitutional as applied to him in this case. We therefore affirm the judgment, as modified, to correct the amount of fees imposed.

Background

Fifteen-year-old Abdiel Robles called 911, reporting that his father, appellant Noe Robles, had just hit his mother and that they needed police to come to their home. The 911 operator gathered additional information from Abdiel, including his address, a description of appellant, and whether weapons were involved. The operator stated that a police unit would be sent to the home. There were two additional 911 calls from the Robles residence that evening before police arrived—one from appellant's wife, Linda Robles, and another from Abdiel. During the third call, the 911 operator transferred Abdiel to a medical dispatcher.

When Officer Ramos of the Houston Police Department arrived at the Robles home, almost two hours after the initial 911 call, appellant had left. Officer

Ramos observed that both Linda and Abdiel seemed to be upset. Linda's eyes were red, and she appeared to have been crying. Officer Ramos also saw that Linda had a fresh bruise on her right cheek. He then spoke with each of them to get the details of the reported assault and information to help him locate appellant.

After taking a report of the assault, Officer Ramos attempted to call appellant to get his version of what happened, but there was no answer at the number provided by Linda. After a fruitless search in the area surrounding the Robles home, Officer Ramos filed a "to-be warrant" for appellant's arrest.

Several days later, Officer Helton, also of the Houston Police Department, responded to a call that a fire had been set in the front yard of the Robles home. Appellant was present, so Officer Helton arrested him based on the warrant previously filed by Officer Ramos. Prior to trial, appellant was found to be indigent, and he was appointed counsel.

The case was tried before a jury. The three calls to 911 on the night of the charged assault were played in court, and Officers Ramos and Helton testified. Neither Linda nor Abdiel testified at the trial. Appellant was convicted of one count of misdemeanor assault of a family member. In the judgment of conviction, the trial court ordered him to pay court costs which totaled $457, including a $25 fee for "Summoning Witness/Mileage."

Analysis

I. Admissibility of 911 calls

In his first issue, appellant contends that the 911 calls admitted in evidence were testimonial in nature. He argues that because he never had the opportunity to cross-examine either his wife or son on their testimonial statements made in the 911 calls, his Sixth Amendment right to confrontation was violated. We defer to the trial court's factual determinations that are supported by the record. *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006). Taking those facts as settled, we review de novo the legal determination of whether a statement is testimonial. *Id*.

Under the Confrontation Clause, a defendant holds the right to be confronted with any witnesses against him. U.S. CONST. amend. VI.; *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359 (2004). This right extends to defendants in state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 1069 (1965); *see also* TEX. CONST. art. I, § 10. The right of confrontation provides that the testimonial statement of a witness who does not testify at trial may not be admitted into evidence, unless that witness is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 53–54, 124 S. Ct. at 1365.

Whether a statement is testimonial depends upon an evaluation of the circumstances in which it was made to determine the objective purpose of the interview or interrogation that yielded the statement. *Coronado v. State*, 351 S.W.3d 315, 324 (Tex. Crim. App. 2011); *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008) (citing *Davis v. Washington*, 547 U.S. 813, 822–23, 126 S. Ct. 2266 (2006)). If the circumstances objectively indicate that the primary purpose of the interrogation which yielded the statement was to enable police assistance to meet an ongoing emergency, the statement is considered nontestimonial and is not subject to the requirements of Confrontation Clause. *Davis*, 547 U.S. at 821, 126 S. Ct. at 2273. Conversely, a statement is considered testimonial when the circumstances objectively indicated that there was no ongoing emergency, and that the primary purpose of the interrogation was to gather information related to past events that possibly could be used in a later criminal prosecution. *Id*. at 822, 126 S. Ct at 2273–74. This objective evaluation does not take into account the declarant's subjective expectations. *Coronado*, 351 S.W.3d at 324.

The United States Supreme Court in *Davis v. Washington* distinguished between statements made in response to interrogations by law enforcement in *Crawford*, and statements made during 911 calls or initial interrogations following up on 911 calls. 547 U.S. 813, 126 S. Ct. 2266. The Court noted its conclusion in *Crawford* that interrogation questions intended to establish the facts of a past crime

for the purpose of identifying or collecting evidence to convict the perpetrator produced statements which were categorically testimonial. *Davis*, 547 U.S. at 826–27, 126 S. Ct. 2276 (citing *Crawford*, 541 U.S. at 53, 124 S. Ct. 1354). In contrast, the Court concluded, statements made during 911 calls or in response to follow-up questions on 911 calls ordinarily describe an ongoing situation requiring police assistance. *Id.* Thus statements made during 911 calls generally have been considered nontestimonial in nature. *See, e.g.*, *Cook v. State*, 199 S.W.3d 495, 497–98 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The factors considered in *Davis*, while not necessarily conclusive, provide guidance on the case-by-case analysis of the testimonial nature of statements made during 911 calls. The statements made to a 911 operator by a domestic violence victim were held to be nontestimonial because:

> 1) the caller was describing events as they were happening, rather than describing past events; 2) any reasonable listener would recognize that the caller was facing an ongoing emergency; 3) the questions asked of the caller elicited information necessary to resolve the present emergency, rather than information about what had already happened; and 4) the statements were not made in a formal setting.

Davis, 547 U.S. at 827–28, 126 S. Ct. at 2276–77.

A. First call at 8:47 p.m.

Abdiel made the first call to 911. He told the operator that appellant just hit his mother, and the operator asked if he needed medical or police assistance.

Abdiel responded that he needed the police. The operator asked several follow-up questions, including Abdiel's name and telephone number, as well as the home address. The operator also asked if appellant had any mental-health issues and whether there were any weapons involved. Abdiel reported that there were no weapons involved, but that appellant might have mental issues. Abdiel cooperated by providing all requested information, including appellant's name and a description of his race and clothing. The operator further inquired as to whether appellant was still there, to which Abdiel responded, "Yes. They're arguing right now." The operator confirmed that a police unit would be dispatched to the address.

Appellant argues that because Abdiel spoke in the past tense about the assault on his mother, and he requested police but no medical assistance, there was no ongoing emergency. Appellant thus contends that the statements made in the call were testimonial. However, the facts that the assault was not happening as the 911 call took place, and that medical assistance was refused, are not determinative of whether the emergency had abated. *See, e.g.*, *Dixon v. State*, 244 S.W.3d 472, 484–85 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). In this case, the trial court could have determined that while Abdiel did not seem frantic or hysterical, he nevertheless described an episode of family violence in progress, which indicated that the conflict was ongoing at the time of the call. The trial court

reasonably could have determined that continued argument following an assault might have led to a further physical altercation. The assault did not have to take place at the same time as the 911 call to qualify as an ongoing emergency. *See id.* The questions asked by the operator and answers given did not indicate that the primary purpose of any question was to gather information to be used for a later prosecution. For the remainder of the call, the operator's questions to Abdiel focused on determining the extent of the emergency—whether appellant was still there, whether weapons were involved, and whether he had any known mental health issues—and gathering information necessary to safely dispatch officers to the location.

B. Second call at 8:55 p.m.

In the second call to 911, Linda told the 911 operator: "I need someone to come down here. My husband just . . . I just want somebody to get him out of my home. He threatened me and I have my children here at the house. He doesn't want to leave. I just want him to get out." When the operator asked if her husband lived there, she stated, "Yes, but he's been very abusive. I've been trying to work this out, but it's getting worse." After getting the address, the 911 operator asked Linda if she had already called, and she responded that she believed her son had called. The operator confirmed that they already had the report and that they were waiting on a unit to respond.

Linda's statements to the 911 operator objectively communicated her desire for assistance in an ongoing emergency. She asked the operator to send someone to remove appellant from the home. She mentioned that he had threatened her and been "abusive," and that children were present. This information objectively communicated an emergency domestic scenario involving a history of abuse, ongoing threats, the presence of children, and the context of the previous report of physical violence. The operator did not request more specific information about the assault, which would have been consistent with gathering information for possible future legal action. Instead, he asked for the address and confirmed that they were waiting on police to respond to the location. This exchange did not demonstrate an intent to gather information for a future prosecution, as the information requested and provided did not even describe the offense. Further, the trial court could have determined that Linda sounded upset during the call, which further demonstrated its nontestimonial nature. *See Davis*, 547 U.S. at 827, 126 S. Ct. at 2277 (finding caller's "frantic answers" during exchange with 911 operator indicative of nontestimonial statements); *see also Dixon*, 244 S.W.3d at 484 (identifying the fact that caller was "highly distressed" when speaking with 911 operator as a compelling factor in determination that statements were nontestimonial).

C. Third call at 9:37 p.m.

When police failed to arrive for almost an hour after Abdiel's first call, he called again and asked for police assistance. The operator again requested the address and Abdiel's name and number. The conversation continued as follows:

> [Abdiel]: I'm reporting my father. He previously hit my mom. Just like six minutes ago. I was calling earlier and my dad has previously been abusive with my mom, and I had called earlier, but . . . .
>
> [911 Operator]: [unintelligible] . . . we're still waiting on a police unit to be dispatched to the location.
>
> [Abdiel]: Yes, and he's like . . . right now, he had just took off. And I don't know if y'all still have a way to get a hold of him.
>
> [911 Operator]: Do you know what kind of vehicle he's in?
>
> [Abdiel]: Yes, he's in a . . .
>
> [crosstalk]
>
> [911 Operator]: One moment . . . one moment. . . . Okay, go ahead.
>
> [Abdiel]: It's a 2000 Suburban Z71.
>
> [911 Operator]: What color is it?
>
> [Abdiel]: Black with black rims . . . has the police twister in the front.
>
> [911 Operator]: Okay. Do you have a license plate number?
>
> [Abdiel]: Yeah, hold on. Give me a sec . . . [talking in background] . . . FGF2801.

[911 Operator]: FGF? 'F' as in Frank, 'G' as in George, 'F' as in Frank?

[Abdiel]: Yeah. 2801.

[911 Operator]: And is this a Texas plate?

[Abdiel]: Yeah. It's Texas plates. 2801.

[911 Operator]: Okay, sir. I'll go ahead and let them know you're still waiting for police and that your dad left in the vehicle.

[Abdiel]: Yes.

[911 Operator]: Okay.

[crosstalk]

[911 Operator]: Go ahead.

[Abdiel]: My mom, she's in like, in real pain.

[911 Operator]: So, is medical assistance needed?

[Abdiel]: I don't know. Her face, she said it hurts really bad.

[911 Operator]: Ok is medical assistance needed?

[Abdiel]: I'm not really sure.

The 911 operator then transferred Abdiel to the dispatcher for medical assistance.

Based on this call, the trial court could have concluded that Abdiel described his mother being hit a second time, six minutes before initiating the call, and that she was in "real pain." Once the 911 operator transferred Abdiel's call to the dispatcher for emergency medical assistance, he stated that medical assistance was

not really needed, but he explained that appellant hit his mother on the right side of her face. The operator again confirmed the address and Abdiel's name and number, and she then inquired about the injury, asking whether Linda was awake, if she was complaining of a headache where she was hit, whether there was any sexual assault, and whether appellant was still present. All of these questions indicated that the operator's purpose was to determine the extent of injuries and the need for emergency medical personnel. Abdiel answered her questions, describing his mother's physical condition, and he added that he gave his mother something from the freezer to put on her face. The operator then instructed Abdiel to keep Linda's airway open, not to allow her to eat or sleep, and not to move her. She also let him know that emergency personnel would be sent. The instructions on how to care for his mother while waiting for emergency medical personnel further confirmed that the purpose of the call was to determine need for and to provide medical assistance.

* * *

All three 911 calls were initiated by either Abdiel or Linda, and they were informal. The first two calls occurred while appellant was still in the home, and the statements made by Abdiel and Linda described an ongoing situation and need for an immediate police response. *See, e.g.*, *Cook*, 199 S.W.3d at 498 (holding that statements were nontestimonial when made during a 911 initiated by a witness to

report a potential crime in progress). The multiple calls when police failed to respond immediately further suggested that the emergency was ongoing. The third 911 call occurred "six minutes" after appellant hit Linda, while she was in "real pain." Each operator's questions gathered information about the situation in order to resolve it, rather than evincing a purpose to memorialize information relevant to a future prosecution. *See, e.g.*, *Dixon*, 244 S.W.3d at 484–85 (complainant's statements to 911 operator made when she was "not presently being assaulted," were nontestimonial where complainant initiated call and the primary purpose of operator's questions "was to determine if [complainant] was physically injured," if she needed medical assistance, and "the potential for a continuing threat to [her] safety or the safety of the responding officer").

Appellant relies on *Gutierrez v State*, 516 S.W.3d 593 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd), to argue that the questions asked by operators during the calls were not focused on resolving an ongoing emergency, and that failure to request medical assistance is evidence of a nonemergency situation. He contends that questions asking about his race, age, and description of clothing are not relevant to providing medical assistance or dealing with an ongoing emergency. *Gutierrez* held that "focus on details that were not immediately necessary weighs against a finding . . . [of] an ongoing emergency." 516 S.W.3d at 599. However, the court was referring to a 911 call in which, despite the operator's insistence that

the license plate number of the perpetrator's vehicle was unnecessary, the complainant "spent some time going through pictures on her phone to find the license plate number and give it to the operator." *Id*. at 598–99. By contrast, in *Davis* the Court found that an operator's effort to establish the identity of a perpetrator could be necessary to resolve an ongoing emergency, as the information could inform responding officers that they would be encountering a violent felon. *Davis*, 547 U.S. at 827, 126 S. Ct. at 2276.

The objective circumstances of these 911 calls included the operators' questions requesting appellant's name, age, race, and a description of his clothing. The operators also asked about the presence of weapons and the possibility of mental illness. These circumstances objectively demonstrated a purpose to assess the situation for particular dangers and to provide responding officers with information necessary to assist them and ensure their safety. *See Taylor v. State*, No. 01-15-01090-CR, 2017 WL 2980164, at *5 (Tex. App.—Houston [1st Dist.] July 13, 2017, no pet.) (mem. op., not designated for publication); *see also Reyes v. State*, 314 S.W.3d 74, 79 (Tex. App.—San Antonio 2010, no pet.).

We conclude that the circumstances of each of the 911 calls objectively indicated that the primary purpose of the operators' questions in each case was to facilitate police or medical assistance to meet an ongoing emergency, and therefore they were nontestimonial in nature. We overrule appellant's first issue.

II. Constitutional challenge to court fee

Appellant argues that the statute authorizing the $25 court fee imposed in this case for "Summoning Witness/Mileage" is unconstitutional as applied because the mandated costs thwart his ability to defend his constitutional rights.

The imposition of court costs is mandatory upon conviction unless the only punishment is a fine. TEX. CODE CRIM. PROC. art. 42.16. In relevant part, the Code of Criminal Procedure requires that a person convicted of a felony or a misdemeanor must pay a fee of $5 for the summoning of a witness. *See* TEX. CODE CRIM. PROC. art. 102.011(a)(3). The $25 witness fee assessed in this case represented a charge of $5 each for the State's subpoena requests for five witnesses. However two subpoenas were never served, and the State concedes that $10 of the $25 fee is not justified. We agree that the fee of $10 for witness subpoenas that were never served was not permissible. *See id*. art. 103.002 (providing that a cost cannot be imposed for a service not performed). We review the remaining costs of $15 as an as-applied challenge to the statute's constitutionality.

When analyzing the constitutionality of a statute, "we presume that the statute is valid and that the Legislature has not acted unreasonably or arbitrarily." *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002) (citing *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978)). In an "as applied"

challenge, the litigant concedes the general constitutionality of the statute, but asserts that it "is unconstitutional as applied to his particular facts and circumstance." *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011). The burden falls on the challenger to establish that, in its operation, the statute was unconstitutional as applied to him. *Id*. Correspondingly, the court must evaluate the statute based on how it was actually applied to the challenger in the particular case at hand. *Id*. at 912. Arguments based on the statute's hypothetical application or on its application to a similarly situated individual are not sufficient in establishing an as-applied challenge. *Id*.

Appellant broadly argues that because of his indigence, constructive notice (by statute) of the court costs was a hindrance to his rights because he could not bear the costs associated with his defense—in particular, the costs of compulsory process and costs of exercising his right to confront witnesses. He does not identify additional witnesses he could or would have called but for the fee. Appellant provides no reason that the statute is unconstitutional as applied to him in particular, and therefore he did not meet the required burden of an as-applied challenge. *See London v. State*, 526 S.W.3d 596 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). We overrule appellant's as-applied challenge to the constitutionality of the fees.

"An appellate court has the power to correct and reform a trial judgment to make the record speak the truth when it has the necessary data and information to do so." *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *see also* TEX. R. APP. P. 43.2(b). The record shows that the $25 fee assessed to appellant for "Summoning Witness/Mileage" included $10 of charges for witness subpoenas which were never served, and therefore the record supports modification of the judgment. Accordingly, we modify the trial court's judgment to reflect a "Summoning Witness/Mileage" fee of $15, and a total amount assessed of $447.

Conclusion

We affirm the judgment as modified.

Michael Massengale
Justice

Panel consists of Justices Higley, Massengale, and Lloyd.

Do not publish. TEX. R. APP. P. 47.2(b).