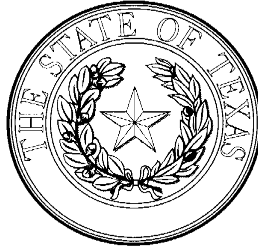
Opinion issued August 24, 2021



In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00695-CR

EDIBERTO ANTONIO DELEON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Case No. 83201-CR

MEMORANDUM OPINION

A jury convicted appellant, Ediberto Antonio DeLeon, of the first-degree felony offense of murder[1] and assessed his punishment at confinement for seventy

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[1] *See* TEX. PENAL CODE ANN. § 19.02(b)(1)–(2).

years. In two issues, DeLeon argues that the trial court erred by allowing (1) the unsworn statements of his wife, as recorded in a 911 call, because the statements constituted inadmissible hearsay, and (2) the unsworn statements of his wife—as recorded in a 911 call and in two police body camera videos, and as testified to by witnesses at trial—because the statements violated his constitutional rights of confrontation and cross examination.

We hold that the statements at issue fall within the excited utterance exception to the hearsay rule and, further, are not testimonial. We affirm.

Background

Appellant DeLeon and Brittney Pennington were married. In 2017, complainant Raymond Echard worked with Pennington at a call center in Alvin, Texas. In the latter part of 2017, Echard and Pennington began an affair. At least one co-worker knew of Pennington's relationship with Echard, and Pennington also told a close friend about the relationship.

On the night of November 30, 2017, Pennington and DeLeon picked up two of their friends and drove to a bar in Texas City. After staying at the bar for a couple of hours, the group decided to return to the Alvin home that Pennington and DeLeon shared to continue drinking. When they returned home, Pennington and DeLeon started arguing, and Pennington left the house. She did not return DeLeon's repeated

phone calls, which angered him. DeLeon then left as well, leaving their two friends behind at the house.

DeLeon walked next door to where his sister, Pauline, lived and asked if she could give him a ride. Pauline agreed, and they got into her white Kia Soul. While in the car, DeLeon used a phone app to give Pauline directions to another Alvin house approximately ten or fifteen minutes away. DeLeon told Pauline that Pennington had gotten upset earlier in the evening, and he referred to Pennington using a derogatory term. Eventually, DeLeon told Pauline to stop at a house near West Talmage Street and Second Street in Alvin. Pauline could not see Pennington, but she saw the car that Pennington and DeLeon shared. DeLeon got out of the car. Shortly thereafter, Pauline heard gunshots. Startled, she drove away without DeLeon. He later sent her a text message stating, "Good Sis."

Following the gunshots, multiple people called 911, including Pennington. At trial, Pennington asserted her spousal privilege and did not testify. Defense counsel objected to the admission of Pennington's 911 call on the basis of hearsay and the Confrontation Clause. The trial court overruled the objection and admitted the recordings. Pennington told the dispatcher, "I think my husband just shot someone." She gave Echard's name and admitted that she had been having an affair with him. During the recording, Pennington could be heard banging on the door to Echard's home and begging him to open it. She told the dispatcher that she did not know

where DeLeon had gone. She could not state Echard's address with any precision, but she was able to give the dispatcher a description of Pauline's vehicle. By the end of the recording, police officers had arrived at Echard's house. Pennington stated that "my husband shot my boyfriend."

The State also introduced body camera videos worn by two of the responding officers, Alvin Police Department Officers Robert Vincent and Matthew Brewer.[2] DeLeon again objected on the basis of hearsay and the Confrontation Clause because the recordings contained statements made by Pennington, who was unavailable to testify. The trial court admitted the recordings, concluding that Pennington's statements were "res gestae" and were not testimonial.

Multiple officers met Pennington in front of Echard's house. She told them that she believed Echard had gone inside after the shooting, but when the officers broke down the door to Echard's home, no one was inside. The officers, with Pennington present, searched the front yard and driveway of Echard's house in an attempt to find him. Echard's body was not immediately visible. During this search, Pennington told the officers, "Eddie shot Raymond." In response to questions from the officers, she described some of the events leading up to the shooting, focusing

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[2] The State also offered—and the trial court admitted—a recording from the body camera worn by an Officer Sambrano. This recording did not have audio and therefore contained no statements by Pennington. DeLeon raises no complaint concerning this recording on appeal.

on where in the driveway DeLeon and Echard were located. Eventually, officers found Echard lying face-down in a corner of the front yard. Echard had multiple visible gunshot wounds to his upper torso and arms.[3]

Officers found nine spent cartridge casings on the driveway, in the grass adjacent to the driveway, and in a nearby ditch. No firearm was recovered, but forensic analysis revealed that all the spent cartridge casings were fired from the same weapon. Officers also found a nylon holster in the driveway. A mixture of two DNA profiles was found on this holster, and DeLeon could not be excluded as a contributor to the mixture of DNA profiles. Echard, on the other hand, was excluded as a contributor to the DNA mixture.

The trial court also admitted video recordings of DeLeon's two custodial interrogations. In the interrogations, DeLeon stated that, a few days before the shooting, he saw an unfamiliar address—Echard's house—in the maps app of Pennington's phone. Pennington admitted to DeLeon that she was having an affair. On the night of the shooting, Pennington abruptly left their house, and DeLeon correctly suspected that Pennington went to the address that he had found in her phone. After Pennington left, DeLeon asked Pauline for a ride, and he used his phone to direct her to Echard's house. He stated that when he saw Pennington sitting in her

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[3] Dr. Yoshiyuki Kikuchi, who performed the autopsy on Echard, testified that Echard had a total of twelve gunshot wounds to the torso and the extremities.

car and speaking to Echard, he was so mad he did not know what to do. DeLeon admitted that he had an argument with Pennington and Echard and then shot Echard multiple times. DeLeon stated that he threw the gun away in the woods before running home.[4]

The jury found DeLeon guilty of the offense of murder. After finding the allegations in an enhancement paragraph true, the jury assessed his punishment at confinement for seventy years. This appeal followed.

Hearsay

In his first issue, DeLeon contends that the trial court abused its discretion by admitting State's Exhibit 58—a recording of 911 calls—into evidence because the accompanying business records affidavit was defective. He also argues that Pennington's unsworn statements to the 911 dispatcher constituted inadmissible hearsay.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018); *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its

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[4] The trial court admitted a video recording of DeLeon accompanying the officers on a search for the firearm. DeLeon stated that he threw the firearm in water. There are two canals or bayous in between Echard's house and DeLeon's house. Alvin Police Department officers dredged both bodies of water, but they were unable to recover the firearm.

discretion when its decision falls outside the zone of reasonable disagreement. *Henley*, 493 S.W.3d at 83. Before we may reverse the trial court's decision admitting or excluding evidence, we "must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Id.* (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)); *see Beham*, 559 S.W.3d at 478.

B. Preservation of Authenticity Argument

On appeal, DeLeon argues that Exhibit 58 is inadmissible in part because the business records affidavit accompanying the exhibit was defective and therefore did not properly authenticate the exhibit. Specifically, DeLeon argues that the affidavit avers that it was in the regular course of business of the Alvin Police Department for an employee of the department "with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record," but no employee of the Alvin Police Department had knowledge of the acts or events recorded. Instead, Pennington was the person with knowledge of the acts or events recorded.

To preserve a complaint for appellate review, the record must demonstrate that the complaining party made a timely request, objection, or motion that stated the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. TEX. R. APP. P. 33.1(a)(1)(A); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim.

App. 2015). Requiring a specific objection has two main purposes: (1) to inform the trial court of the basis for the objection so that it has an opportunity to rule on the objection, and (2) to allow opposing counsel to remedy the error. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). "[A]ll a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Douds*, 472 S.W.3d at 674 (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)).

A complaint will not be preserved for appellate review "if the legal basis of the complaint raised on appeal varies from the complaint made at trial." *Lovill v. State*, 319 S.W.3d 687, 691–92 (Tex. Crim. App. 2009); *see Clark*, 365 S.W.3d at 339 ("The point of error on appeal must comport with the objection made at trial."); *Edwards v. State*, 497 S.W.3d 147, 162 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) ("If the correct ground for exclusion [of evidence] was obvious to the trial court and opposing counsel, waiver will not result from a general or imprecise objection.").

Here, prior to the testimony of Officer Vincent, one of the responding officers, the parties and the trial court discussed the admissibility of the body camera videos. DeLeon objected to the admission of any out-of-court statements by Pennington on

the recordings on the basis of hearsay and violations of the Confrontation Clause. Specifically, defense counsel argued that Pennington's statements on the recordings could not be considered either a present sense impression or an excited utterance. During this discussion, defense counsel also mentioned that with advances in body camera technology, police officers can "turn on and record and turn off at will," and counsel requested that "the analysis be revisited to take in light of that fact because now the police have the ability to decide when, where, and how they make the State—they gather this evidence." The trial court, which had already reviewed the body camera videos, did not rule on the hearsay or Confrontation Clause objections at this time, but indicated that it would not find that Pennington's statements on the videos were testimonial.

At the end of this discussion, one of the prosecutors stated that, with Officer Vincent, he intended to introduce Exhibit 58, which included the 911 call from Pennington. As soon as Vincent was sworn, the State offered Exhibit 58, "a business records affidavit with the 911 calls in regards to this case." When asked whether he had any objections to Exhibit 58, defense counsel stated, "[W]e reurge objections made—previously made, Judge." The trial court stated, "Normally, they're going to be admissible. Is there something special about them?" Defense counsel responded, "There's nothing special about them, Judge. Out of an abundance of caution, I'm going to reurge the motion since we're arguing that, basically, you change the law."

The trial court overruled defense counsel's objection and admitted Exhibit 58. Defense counsel did not object to the authenticity of Exhibit 58 or raise any objection that the accompanying business records affidavit was defective.

At trial, DeLeon objected to the admission of Exhibit 58 on the basis of the Confrontation Clause and hearsay, and he argued that Pennington's statements during the 911 call did not qualify as either a present sense impression or an excited utterance. Defense counsel clearly articulated this basis for objection to the 911 call. DeLeon did not raise an authenticity objection, object that the business records affidavit was defective, or otherwise object that the recording of the 911 call did not qualify as a business record. Because DeLeon did not object before the trial court on these grounds, and these grounds for objection were not obvious from the discussion the parties had with the trial court concerning the 911 call recording, he cannot raise them for the first time on appeal. *See Lovill*, 319 S.W.3d at 691–92; *Edwards*, 497 S.W.3d at 162; *see also Clark*, 365 S.W.3d at 339 ("In determining whether a complaint on appeal comports with a complaint made at trial, we look to the context of the objection and the shared understanding of the parties at the time."); *Buchanan v. State*, 207 S.W.3d 772, 775 (Tex. Crim. App. 2006) ("It is well established that, in order to preserve an issue for appeal, a timely objection must be made that states the specific ground of objection, if the specific ground was not apparent from the context.").

We conclude that, to the extent DeLeon argues that Exhibit 58 is inadmissible hearsay because the business records affidavit was defective, he has not preserved this complaint for appellate review. *See* TEX. R. APP. P. 33.1(a)(1). We now turn to whether the trial court erred in admitting Exhibit 58 over Deleon's objection that Pennington's statements on the recording did not fall with a hearsay exception.

C. Whether 911 Call Constituted Inadmissible Hearsay

Hearsay is a statement other than one made by a declarant while testifying at the current trial or hearing that is offered in evidence to prove the truth of the matter asserted in the statement. TEX. R. EVID. 801(d). Generally, hearsay is not admissible unless the statement fits within one of the exceptions contained in the Texas Rules of Evidence or another rule or statute. TEX. R. EVID. 802.

Under the "excited utterance" exception to the hearsay rule, a statement is not inadmissible hearsay if it relates to a startling event or condition and is made "while the declarant was under the stress of excitement that it caused." TEX. R. EVID. 803(2). For this exception to apply: (1) the statement must be the product of a startling occurrence that produces a state of nervous excitement in the declarant and renders the utterance spontaneous; (2) the state of excitement must still so dominate the declarant's mind that there is no time or opportunity to contrive or misrepresent; and (3) the statement must relate to the circumstances of the occurrence preceding it. *Villanueva v. State*, 576 S.W.3d 400, 406 (Tex. App.—Houston [1st Dist.] 2019, pet.

ref'd); *Amador v. State*, 376 S.W.3d 339, 344 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). The statement "must be 'given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy.'" *Ritcherson v. State*, 476 S.W.3d 111, 129–30 (Tex. App.—Austin 2015) (quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990)), *aff'd on other grounds*, 568 S.W.3d 667 (Tex. Crim. App. 2018); *Oveal v. State*, 164 S.W.3d 735, 740 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) ("[T]he statement is trustworthy because it represents an event speaking through the person rather than the person speaking about the event.").

The main factor that renders an excited utterance reliable is the spontaneous nature of the statement, and thus the statement "must have been made before the declarant's excitement caused by the startling event or condition has abated." *Sandoval v. State*, 409 S.W.3d 259, 284 (Tex. App.—Austin 2013, no pet.). "The critical determination regarding the excited utterance exception is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event or condition at the time he or she made the statement." *Villanueva*, 576 S.W.3d at 406; *Amador*, 376 S.W.3d at 344; *Dixon v. State*, 244 S.W.3d 472, 485 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). We may consider the time that has elapsed between the event and the statement and whether the statement was made in response

to questioning, "but these factors are not necessarily dispositive." *Amador*, 376 S.W.3d at 344; *see also Apolinar v. State*, 155 S.W.3d 184, 187 (Tex. Crim. App. 2005) (listing, as additional factors trial court may consider, "the nature of the declarant" and "whether the statement is self-serving"). "Ultimately, we must determine whether the statement was made under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection." *Villanueva*, 576 S.W.3d at 406; *Amador*, 376 S.W.3d at 344; *see also Apolinar*, 155 S.W.3d at 186 ("The exception is based on the assumption that the declarant is not, at the time of the statement, capable of the kind of reflection that would enable him to fabricate information.").

Pennington called 911 at approximately 1:08 a.m. When asked by the dispatcher for the location of her emergency, Pennington responded, "I think my husband just shot someone." When asked for the address, Pennington did not immediately know, and she had to search for an address. While trying to determine the address, she stated, "Please don't hang up, I think he just shot someone." Eventually, she was able to state that she was around Second Street in Alvin, although she could not provide a precise street address. When asked if someone tried to go into her home, Pennington responded, "No, I'm seeing another man, and my fucking husband just showed up and shot him." Pennington did not know if Echard was conscious or breathing. She said, "I don't know. I took off. I'm so scared."

Pennington continued to search for an address so she could tell the dispatcher where exactly she was located. While she was doing this, she said, “Oh my God, please, please, please be okay, please be okay.” She stated that she did not know where her husband was, but she knew he used a handgun. She could provide Echard’s full name and license plate number to the dispatcher,[5] but she could not provide Echard’s street address, stating that he “has no address right now” because “his house was messed up from the hurricane,” referring to Hurricane Harvey. Pennington repeatedly called out for Echard, pounding on his door and begging him to open it. Pennington told the dispatcher the make, model, and color of her car, as well as DeLeon’s.

Near the end of the call, Pennington stated that she could see the lights from the responding patrol cars. When asked if she was east or west of the officers’ current location, she frantically stated, “I just see the lights. I don’t know the directions.” She started running towards the officers and was able to provide the name of a cross street and street addresses near Echard’s house. She repeatedly stated, “Please, come now, come now.” When asked if Echard was opening the door for her, Pennington stated, “No, he’s not opening the fucking door!” Pennington stated that she was able

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[5] In his second issue concerning the Confrontation Clause, DeLeon states that Pennington “was able to tell the dispatcher the license plate number of her husband’s car.” On the recording, Pennington states, “My boyfriend’s license plate is” and then provides a number. Echard’s car was parked in his driveway, and Pennington was at Echard’s house for at least a portion of the 911 call.

to see police, and she started shouting, "Come now! Now, now, now, now, now, this way! This way!"

On the recording, police officers could be heard asking Pennington questions, although the exact questions they asked were indecipherable. Pennington stated, "My husband left. He left. I don't know where he—he's in a white Kia Soul. My husb—my boyfriend, I was cheating on my husband, and and he fucking caught us together, me and my boyfriend, my husband shot my boyfriend." Pennington told the officer Echard's name. When asked which way DeLeon went, she stated, "I don't know which way my husband left." The entire call lasted five minutes and forty-nine seconds. Officer Vincent, one of the responding officers, arrived while Pennington was still on the phone with the dispatcher. He testified, "She was very distraught, kind of being loud and hollering. We had to get her to—trying to get her to calm down to explain to us what was going on."

Although the record does not indicate the precise time that the shooting occurred, Pennington's statements indicate that she called 911 immediately after the shooting and DeLeon's flight from the scene. She stated multiple times that DeLeon "just shot someone," indicating that a short period of time had elapsed when she called 911. *See Amador*, 376 S.W.3d at 344 (considering, among other factors, amount of time that had elapsed between exciting event and statement); *see also Villanueva*, 576 S.W.3d at 406 (concluding that trial court did not abuse its discretion

in admitting statements under excited utterance exception when witness made statements approximately nine minutes after witnessing assault).

Many of Pennington's statements throughout the call were made in response to questioning by the 911 dispatcher, but she started the call by spontaneously stating, "I think my husband just shot someone." *See Villanueva*, 576 S.W.3d at 406 (stating that we may consider whether statement was made in response to questioning, but this factor is not necessarily dispositive). A review of the recording reflects that Pennington was extremely excited and frantic throughout the nearly six-minute 911 call, occasionally shouting, stammering, pleading, and crying. *See Apolinar*, 155 S.W.3d at 190 (stating that relevant factor to consider includes "the demeanor of the declarant"). Pennington apparently believed that Echard was inside his house, and she could be heard on the recording banging on the front door to his house and begging for him to open the door. She was not aware of whether he was conscious. She also stated that DeLeon had a gun, that she "took off" because she was scared before returning to Echard's house to check on him, and that she did not know where DeLeon had gone. Officer Vincent, who encountered Pennington while she was still on the phone with the dispatcher, testified that she appeared distraught.

The ultimate question before us is whether Pennington "was still dominated by the emotions, excitement, fear, or pain of the event or condition" at the time she made the statements in the 911 call and that she made the statements "under such

circumstances as would reasonably show that [the statements] resulted from impulse rather than reason and reflection." *See Villanueva*, 576 S.W.3d at 406; *Amador*, 376 S.W.3d at 344. Based on this record, we conclude that the trial court reasonably could have determined that Pennington was still dominated by emotions and excitement following the shooting of Echard when she called 911 and remained excited throughout the length of the call. *See Henley*, 493 S.W.3d at 83 (stating that trial court abuses its discretion when its ruling is outside zone of reasonable disagreement). We hold that the trial court did not abuse its discretion when it admitted Exhibit 58. *See Villanueva*, 576 S.W.3d at 406; *Amador*, 376 S.W.3d at 344.

We overrule DeLeon's first issue.

Confrontation Clause

In his second issue, DeLeon argues that the trial court erred by admitting Pennington's unsworn statements through live witnesses and State's Exhibits 58, 60, and 78—the recording of 911 calls and recordings from the body cameras worn by Officers Vincent and Brewer—because Pennington did not testify at trial and admission of the statements violated his rights of confrontation and of cross-examination.

A. Standard of Review and Governing Law

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. U.S. CONST. amend. VI. The Texas Constitution includes a similar protection. TEX. CONST. art. I, § 10 (providing that in all criminal prosecutions accused "shall be confronted by the witnesses against him"); *see* TEX. CODE CRIM. PROC. art. 1.05 (codifying, among other rights, constitutional right of confrontation).

The purpose of the Confrontation Clause is

> to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Woodall v. State, 336 S.W.3d 634, 641–42 (Tex. Crim. App. 2011) (quoting *Mattox v. United States*, 156 U.S. 237, 242–43 (1895)); *see Johnson v. State*, 490 S.W.3d 895, 909 (Tex. Crim. App. 2016) ("The main purpose behind the Confrontation Clause is to secure for the opposing party the opportunity of cross-examination because that is 'the principal means by which the believability of a witness and the truth of his testimony are tested.'") (quoting *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974)).

To protect a defendant's rights under the Confrontation Clause, testimonial statements of witnesses who do not testify at trial may not be admitted unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). Only "testimonial" statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006); *see Ohio v. Clark*, 576 U.S. 237, 245 (2015) ("[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial."); *Sanchez v. State*, 354 S.W.3d 476, 485 (Tex. Crim. App. 2011) ("The Sixth Amendment does not bar the admission of non-testimonial hearsay."). When a defendant objects on the basis of the Confrontation Clause, the State bears the burden to establish either that the evidence does not contain testimonial statements or that the evidence does, but the statements are nevertheless admissible. *De La Paz v. State*, 273 S.W.3d 671, 680–81 (Tex. Crim. App. 2008). Whether a statement is testimonial or nontestimonial is a question of law that we review de novo. *Id.* at 680; *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006); *Villanueva*, 576 S.W.3d at 403.

The Supreme Court has not defined the outer boundaries of what constitutes a "testimonial" statement. Rather, it has stated that the "core class" of testimonial statements includes ex parte in-court testimony, custodial interrogations, pretrial statements "that declarants would reasonably expect to be used prosecutorially," and

"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." *Crawford*, 541 U.S. at 51–52; *Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013) (stating that testimonial statements "are formal and similar to trial testimony"); *Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010). In *Crawford*, the Court concluded that a witness statement made while the witness—a potential suspect—was being questioned about the offense by detectives while in police custody constituted a testimonial statement. *See* 541 U.S. at 65–68. Because the defendant had not had a prior opportunity to cross-examine the witness, introduction of the statement violated the defendant's Confrontation Clause rights. *See id.* at 68.

Post-*Crawford*, the Supreme Court has provided guidance on when statements made to police officers may be considered testimonial or nontestimonial. Statements made to police officers 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." *Davis*, 547 U.S. at 822. Statements to officers 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.* In *Davis*, the Court held that

statements made during a 911 call reporting a domestic disturbance were nontestimonial because the declarant "was speaking about events *as they were actually happening*, rather than 'describ[ing] past events'"; the declarant was facing an ongoing emergency and was making "a call for help against [a] bona fide physical threat"; the statements were "necessary to be able to *resolve* the present emergency," rather than simply learn what had happened in the past; and the declarant was providing frantic answers to the 911 dispatcher in an environment that was not tranquil or safe. *See id.* at 827 (contrasting 911 call at issue with statement made by declarant in *Crawford*).

Davis also involved a companion case—*Hammon v. Indiana*—in which officers arrived at the scene of a domestic disturbance, no emergency was in progress, there was no immediate threat to the declarant, and the declarant made the challenged statements the second time officers questioned her. *Id.* at 829–30. The Court concluded that the statements in the companion case were testimonial, noting that, "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." *Id.* at 830.

The U.S. Supreme Court reiterated its primary-purpose focus in *Michigan v. Bryant*. 562 U.S. 344 (2011). There, the Court emphasized that "the most important instances in which the [Confrontation] Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court

interrogation of a witness to obtain evidence for trial." *Id.* at 358. By contrast, when the "primary purpose" of an interrogation is to respond to an "ongoing emergency," its purpose is not to create a record for trial and the statements do not fall within the scope of the Confrontation Clause. *Id.* (holding that shooting victim's statements identifying and describing shooter were made with primary purpose to allow police to respond to ongoing emergency when victim made statements immediately after shooting; shooter was armed; and shooter's whereabouts were unknown).

When determining whether the "primary purpose" of an interrogation is to enable the police to meet an ongoing emergency, we must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *Id.* at 359; *see Davis*, 547 U.S. at 826 (stating that question before Court "is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements"). The relevant inquiry is not the subjective or actual purpose of the individuals involved in an encounter, "but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Bryant*, 562 U.S. at 360. Whether an ongoing emergency exists is important and relevant to determining the primary purpose of the interrogation "because an emergency focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecution.'" *Id.* at 361 (quoting *Davis*, 547

U.S. at 822). Instead, an ongoing emergency focuses the participants "on end[ing] a threatening situation.'" *Id.* (quoting *Davis*, 547 U.S. at 832).

Relying on *Davis*, the Court of Criminal Appeals has articulated a non-exhaustive list of factors to consider in determining whether statements were made during an ongoing emergency, including: (1) whether the situation was still in progress; (2) whether the questions sought to determine what is presently happening as opposed to what has happened in the past; (3) whether the primary purpose of the interrogation was to render aid rather than to memorialize a possible crime; (4) whether the questioning was conducted in a separate room, away from the alleged attacker; and (5) whether the events were deliberately recounted in a step-by-step fashion. *Vinson v. State*, 252 S.W.3d 336, 339 (Tex. Crim. App. 2008) (citing *Davis*, 547 U.S. at 830); *Gutierrez v. State*, 516 S.W.3d 593, 597 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd).

Similarly, we have previously stated that "the following principles are useful" when determining whether a statement is testimonial or nontestimonial:

> (1) testimonial statements are official and formal in nature, (2) interaction with the police initiated by a witness or the victim is less likely to result in testimonial statements than if initiated by the police, (3) spontaneous statements to the police are not testimonial, and (4) responses to preliminary questions by police at the scene of the crime while police are assessing and securing the scene are not testimonial.

Villanueva, 576 S.W.3d at 405; *Amador*, 376 S.W.3d at 342; *Cook v. State*, 199 S.W.3d 495, 497–98 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

B. Analysis

1. Statements during 911 call

DeLeon contends that Pennington's statements during the 911 recording were testimonial, arguing that the intent of the 911 dispatcher "was to get as much information as they could" from Pennington "to be used immediately and in any future trial concerning the murder which had occurred." He further argues that he had left the scene by the time of the 911 call, and Pennington, who had driven her car away from Echard's house when the shooting started, returned to his house immediately before or during the call, indicating that she no longer believed that she was in any danger. According to DeLeon, a reasonable person in Pennington's shoes "should have perceived that the statements she made would be used later in the criminal case."

We disagree and conclude that the primary purpose of the "interrogation" that occurred during the 911 call was to resolve an ongoing emergency. Generally, statements made to police during contact initiated by a witness at the beginning of an investigation, such as a 911 call, are not considered testimonial. *Cook*, 199 S.W.3d at 498; *see Davis*, 547 U.S. at 827 (stating that 911 call and "initial interrogation conducted in connection with a 911 call" is "ordinarily not designed

primarily to ‘establis[h] or prov[e]’ some past fact, but to describe current circumstances requiring police assistance”). Statements made in a 911 call “under circumstances objectively showing that the primary purpose of the call was to enable police assistance for an ongoing emergency” are not testimonial. *Ramjattansingh v. State*, 587 S.W.3d 141, 159 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

Here, Pennington had been sitting in her car when DeLeon arrived at Echard’s house. When he started shooting, she backed her car up and drove slightly down the street because she was scared. She quickly returned to the scene, but she did not know where Echard was or whether he was badly injured. As we have recounted above, Pennington made her 911 call shortly after DeLeon fired multiple gunshots at Echard. Although the shooting had finished by the time of the call, this is not a situation in which her statements were made hours after the events. *See Davis*, 547 U.S. at 827 (considering fact that 911 caller “was speaking about events *as they were actually happening*, rather than ‘describ[ing] past events’” and contrasting that case with testimonial statement by declarant in *Crawford*, which “took place hours after the events she described had occurred”); *see also Bryant*, 562 U.S. at 374 (statements were nontestimonial when made shortly after shooting had occurred).

Pennington had witnessed gunshots fired in Echard’s direction. Throughout the 911 call, Pennington was searching for Echard but could not find him, and she believed that he needed medical assistance. She repeatedly pounded on the front

door to his house and called out for him, begging him to open the door, but he did not answer. DeLeon, meanwhile, had fled the scene in an unknown direction while in possession of a firearm. Pennington informed the dispatcher (and the responding officers when they arrived near the end of the recording) that DeLeon was armed with a handgun, that he had arrived in a white Kia Soul, and that he had left the scene.

Viewing the questions asked by the dispatcher and the officers and the answers provided by Pennington objectively, the statements "were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *See Davis*, 547 U.S. at 827; *see also Bryant*, 562 U.S. at 363–64 (considering fact that perpetrator who fled scene had used firearm, instead of his fists, during assault of declarant, and stating that "[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue"); *Lopez v. State*, 615 S.W.3d 238, 268 (Tex. App.—El Paso 2020, pet. ref'd) (considering, when holding that statements made by witness to officer responding to "shots fired" call were nontestimonial, that case "involved an emergency situation with a yet-to-be apprehended gunman who had fired multiple shots in an area occupied by a large crowd").

Furthermore, Pennington's statements during the 911 call were made in an informal setting. She was not providing information to police officers during an interview at the police station, responding calmly to questions asked in an orderly manner. *See Davis*, 547 U.S. at 827 (contrasting level of formality in *Crawford*—where declarant "calmly" responded to series of questions at stationhouse while officer taped interview and took notes—with case at issue, in which 911 caller provided "frantic answers" in "environment that was not tranquil, or even . . . safe"). Instead, her responses to the dispatcher's questions were often frantic.

When considering all the circumstances, we conclude that the primary purpose of the "interrogation" of Pennington that occurred during the 911 call "was to enable police assistance to meet an ongoing emergency." *See id.* at 828. We further conclude that, in making the statements during the 911 call, Pennington was not "acting as a witness" and her statements were not "a weaker substitute for live testimony at trial." *See id.*; *see also Bryant*, 562 U.S. at 370 ("The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation."). Instead, she was seeking medical assistance for Echard, the victim of a violent attack. The information that

she provided on the recording of the 911 call was necessary to obtain that assistance and to assist responders in assessing whether a threat remained. We therefore conclude that Pennington's statements during the 911 call were nontestimonial, and we hold that the trial court did not err by overruling DeLeon's Confrontation Clause objection to Exhibit 58. *See Davis*, 547 U.S. at 829.

2. Statements during body camera recordings

DeLeon also objected on Confrontation Clause grounds to the admission of recordings of the footage from body cameras worn by two officers who responded to the scene of the shooting: Exhibit 60, the body camera of Officer Vincent, and Exhibit 78, the body camera of Officer Brewer.

On Exhibit 60, Pennington stated, "I was right here by my car, and I tried to take off, and fucking Eddie shot Raymond. I seen it. I fucking seen it. And Raymond is gone." Pennington told the officers that DeLeon was in a white Kia Soul, and she provided their home address. She told the officers that Echard was in the driveway when he was shot. After Officer Vincent stated to another officer that they had kicked in the door to Echard's house, but he was not inside and no blood was visible outside the house, Pennington stated, "Raymond and Eddie were right here, I swear to God." Officer Vincent acknowledged on the recording that police had received multiple reports of shots fired. Pennington stated, "Okay, Eddie has a fucking gun," but she was not able to state what type or model. Pennington then said, "I can't

believe this fucking happened, where is Raymond?" Officer Vincent asked, "You're saying Eddie shot Robert, right?" Pennington responded, "Eddie shot Raymond." When asked where DeLeon had been standing, Pennington gestured and stated, "Eddie pulled up right here, right here, on the side of the road. Pulled up, my car was—pulled in this way, I backed up, I seen the shots and I took off. I didn't want to get fucking murdered so I took off." When informed that Echard's body had been found, Officer Vincent walked Pennington away from the location. She stated that she wanted a cigarette and that she could not believe what had happened.

Exhibit 78 contains most of the statements present on Exhibit 60, but some of Pennington's statements that had not been audible on Exhibit 60 were audible on this recording. Officer Brewer approached Echard's house while Pennington informed the officers already present that DeLeon was in a white Kia Soul. On this recording, before Pennington gave her and DeLeon's address, she could be heard saying, "There's gotta be shots." An officer asked Pennington where the shooting took place. She responded, "Right here in the fucking driveway." The officer told Pennington, "I know you're upset, I know you're angry, but you have to work with us." Pennington's response was not decipherable, but her voice was noticeably raised.

After receiving multiple 911 calls reporting gunshots, Officer Vincent arrived at Echard's house at 1:13 a.m., approximately five minutes after Pennington called

911. As we have discussed with respect to Pennington's 911 call, at the time the officers arrived, DeLeon had left the scene, but he was armed with a handgun and his whereabouts were unknown. Pennington had witnessed DeLeon shooting at Echard, and she called 911 seeking medical assistance for Echard. Echard's whereabouts were also not immediately apparent. Pennington believed that he might be inside his house, but when Officer Vincent kicked in the door, no one was inside and there was no indication that anyone had been shot inside. Officers spoke with Pennington outside, as recorded on the body camera videos, and began searching the yard for Echard or for spent cartridge casings to determine where the shooting had occurred. On the recordings, Pennington described her location, DeLeon's location, and Echard's location at the time of the shooting. Eventually, officers found Echard lying face-down in the corner of the front yard near a fence.

Pennington's statements on these two recordings appear to describe "what had happened in the past." *See Davis*, 547 U.S. at 827. However, when we consider the officers' questions and Pennington's responses in the broader context, we conclude that the primary purpose of these statements was to resolve a present emergency. *See id.* Officers had received multiple reports of gunshots being fired, and Pennington reported that Echard had been shot and that she believed he was inside his house. However, he could not be found. Officers questioned Pennington about what had happened—specifically, where each of the participants had been located at the time

of the shooting—in order to determine where Echard, who potentially required medical assistance, was currently located. *See Lopez*, 615 S.W.3d at 268 (concluding that witness's statements made to police officers at scene were nontestimonial because "the situation here involved an emergency situation with a yet-to-be-apprehended gunman who had fired multiple shots in an area occupied by a large crowd").

Pennington's statements to the officers occurred within minutes of the shooting and her 911 call. On both the 911 call and the body camera recordings, she was concerned about Echard, whom she had not seen since DeLeon started shooting and she briefly drove away from the scene in her car. She was able to answer questions in response to the officers—she described DeLeon's car, she gave their home address, and she briefly described what had happened—but she was agitated, occasionally raising her voice and insisting that DeLeon had shot Echard. The body camera recordings do not include any statements from Pennington after officers found Echard's body.

Under these circumstances, we conclude that, as with the 911 call, Pennington's statements to the officers at the scene were made for the primary purpose of "enabl[ing] police assistance to meet an ongoing emergency," specifically, locating Echard to determine if he required medical assistance and locating DeLeon, who had left the scene but was armed with a handgun. *See Davis*,

547 U.S. at 828; *Vinson*, 252 S.W.3d at 339 (considering, among other factors, whether primary purpose of interrogation was to render aid rather than memorialize possible crime); *see also Clark*, 576 U.S. at 245 ("In the end, the question is 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.'"); *Bryant*, 562 U.S. at 376 ("The questions [the officers] asked—'what had happened, who had shot [the victim], and where the shooting had occurred,'—were the exact type of questions necessary to allow the police to 'assess the situation, the threat to their own safety, and possible danger to the potential victim' and to the public, including to allow them to ascertain 'whether they would be encountering a violent felon.'") (internal citations omitted). We conclude that Pennington's statements contained on the body camera recordings were nontestimonial, and we hold that the trial court did not err by overruling DeLeon's Confrontation Clause objections to Exhibit 60 and 78.

We overrule DeLeon's second issue.

Conclusion

We affirm the judgment of the trial court.

April L. Farris
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Farris.

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