Affirmed and Memorandum Opinion filed February 9, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00146-CR

EMMANUEL ALBERT EGBOANI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1476635

M E M O R A N D U M O P I N I O N

Appellant Emmanuel Albert Egboani appeals from a conviction for assault of a family member as a second offender. *See* Tex. Pen. Code § 22.01(b)(2)(A) (West 2015). Appellant brings two issues on appeal: (1) the trial court erred in admitting statements from the non-testifying complainant, and (2) the trial court erred in admitting the 9–1–1 audio recording into evidence. We overrule these challenges and affirm the judgment.

I. BACKGROUND

An unidentified female called 9–1–1. The caller reported that a female, later identified as complainant, complained that "her husband just beat her." The dispatcher asked questions regarding complainant's current location and race; appellant's name, race, and location; and whether medical assistance was necessary. The caller answered the dispatcher's questions by repeating the questions to complainant and repeating complainant's answers.

Neither the 9–1–1 caller nor complainant testified at trial. The State's only witness was Deputy Sheriff James Vuong. Vuong was dispatched to the scene and located complainant alone and near the entrance of an apartment complex. Vuong testified that blood trickled down a scratch on complainant's nose and that she was crying and appeared to be under duress. Voung also testified that appellant arrived on scene and had a strong odor of alcohol on his breath and exhibited other signs of having consumed alcohol. Based on complainant's injuries and the versions of events she and appellant gave, Vuong decided to arrest appellant for assault of a family member.

At trial, the State asked Vuong to recount the assault. Vuong testified as to what the complainant told him about the assault. He stated that appellant came home from work, started drinking alcohol, accused complainant of cheating, and assaulted her with a closed fist on her face and body. Appellant twice objected at trial on grounds that this testimony was testimonial hearsay and violated his Sixth Amendment right to confrontation.[1] The first objection occurred during this

[1] Appellant's trial counsel objected specifically on hearsay grounds, but also mentioned "Crawford." The case *Crawford v. Washington*, 541 U.S. 36 (2004), is a seminal case regarding an accused's right to confront witnesses against him under the Sixth Amendment. Taken in the context of this case, we conclude the trial court understood appellant's reference to this case as an objection on the basis that the hearsay testimony violated his Sixth Amendment right to confrontation. *See* Tex. R. App. P. 33.1(a).

exchange:

> [State]: After you see the injuries on her what do you do then?
>
> [Vuong]: I asked her what happened and she said—stated—
>
> [Defense counsel]: I object to any hearsay.
>
> THE COURT: Overruled.
>
> . . .
>
> [Defense counsel]: I want to establish whether or not this is testimonial.
>
> THE COURT: It's one of the foundations.
>
> [Defense counsel]: Agreed that doesn't trump Crawford because it's–
>
> THE COURT: It's overruled.
>
> . . .
>
> [Defense counsel]: Please note our objection.

Appellant did not request a running objection. The State repeated the question:

> [State]: After you see injuries on her what do you do?
>
> [Vuong]: I asked her what happened and she stated that her husband assaulted her.
>
> [State]: Did you ask her any follow-up questions?
>
> [Vuong]: Yes, sir. I asked her, you know, what happened. She stated her husband came home from work and drank a couple beers . . . got upset at her . . . and he started assaulting her physically with a closed fist on her face and body.
>
> . . . .
>
> [State]: Take it back and go step by step. She said she was assaulted by her husband?
>
> [Vuong]: Yes, sir.

The State continued asking similar questions to which Vuong gave similar and more detailed answers.

At the end of Vuong's testimony, appellant objected again and cited a case

about testimonial hearsay.[2] Appellant moved to strike the hearsay statements given during Vuong's testimony. The trial court overruled appellant's objection.

A jury convicted appellant for the felony offense of assaulting a member of his family. The trial court assessed punishment at five years' confinement in the Institutional Division of the Texas Department of Criminal Justice and probated the sentence for five years. Appellant filed a timely notice of appeal.

II. DISCUSSION

A. Testimony regarding non-testifying complainant's statements

Appellant contends that the trial court's admission of Vuong's testimony regarding non-testifying complainant's testimonial statements is a violation of his right to confront witnesses against him under the Sixth Amendment. U.S. Const. amend. VI. The State argues that appellant failed to preserve this issue for appeal. We agree.

The traditional and preferred procedure for a party to voice its complaint has been; (1) to object when it is possible, (2) to request an instruction to disregard if the prejudicial event has occurred, and (3) to move for a mistrial if a party thinks an instruction to disregard was not sufficient. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004).

Additionally, any error in the admission of evidence "is cured where the same evidence comes in elsewhere without objection." *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003); *see also Leday v. State*, 983 S.W.2d 713, 717–18 (Tex. Crim. App. 1998) ("[Texas does not] follow the general rule that the repetition of an objection is needless when the court's ruling has indicated that an

[2] Appellant objected under *Mason v. State*, 225 S.W.3d 902 (Tex. App.—Dallas 2007 pet. ref'd).

objection to such evidence will definitely be overruled.").

Here, appellant objected after the question "After you see the injuries on her what do you do then?" Assuming the trial court erred when it overruled the objection and permitted Vuong to answer, the error was cured because appellant failed to object to the State's other similar questions to which Vuong gave similar answers. *See Valle*, 109 S.W.3d at 509; *Ethington v. State*, 819 S.W.2d 854, 859 (Tex. Crim. App. 1991).

Appellant's other objection at the end of Vuong's testimony was roughly 20 record pages after Vuong relayed complainant's account of the assault—and long after the objectionable testimony was apparent. Appellant has not shown any legitimate reason justifying the delay. This objection was therefore untimely and not preserved for appellate review. *See* Tex. R. App. P. 33.1(a); *see also McFarland v. State*, 928 S.W.2d 482, 512 n.29 (Tex. Crim. App. 1996), *abrogated on other grounds by Mosley v. State*, 983 S.W.2d 249, 264 n.18 (Tex. Crim. App. 1998) (objection at end of witness's testimony untimely); *Dinkins v. State*, 894 S.W.2d 330, 355 (Tex. Crim. App. 1995) ("If he fails to object until after an objectionable question has been asked and answered, and he can show no legitimate reason to justify the delay, his objection is untimely and error is waived.").

Because any error by the trial court in overruling the appellant's objection was not preserved for review, and, in any event, cured when the same evidence was admitted without objection, we overrule appellant's first issue.

B. Admission of the 9–1–1 audio recording

In his second issue, appellant contends that the trial court erred in admitting the 9–1–1 audio recording into evidence over his objection that its admission

violated his rights under the Confrontation Clause of the Sixth Amendment.[3] The State argues that appellant failed to preserve this issue for appellate review based on his general objection at trial. Assuming without deciding that appellant preserved his contention for appellate review, the trial court did not err by admitting the recording into evidence.

i. Standard of review and applicable law

"We review a constitutional legal ruling, including whether a statement is testimonial, *de novo*." *Wilson v. State*, 296 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd); *see also Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006) ("Although we defer to a trial court's determination of historical facts and credibility, we review a constitutional legal ruling, i.e. whether a statement is testimonial or non-testimonial, *de novo*.")

The Confrontation Clause of the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause prohibits the admission of testimonial statements by a witness who does not appear at trial, unless (1) the witness is unavailable to testify, and (2) the defendant had a previous opportunity to cross-examine him. *Wilson*, 296 S.W.3d at 145 (citing *Crawford*, 541 U.S. at 53–54). When, as here, appellant did not have a prior opportunity to cross-examine the non-testifying witness, the admissibility of the witness's statements hinges on the determination of whether the statements are testimonial or nontestimonial. *Vinson v. State*, 252 S.W.3d 336, 338 (Tex. Crim. App. 2008) (citing *Crawford*, 541 U.S. at 68).

The Supreme Court distinguished testimonial and nontestimonial statements:

[3] When the State offered this exhibit into evidence, appellant objected to the entire exhibit. On appeal, appellant similarly challenges the admission of the entire exhibit.

> 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 v. Washington, 547 U.S. 813, 822 (2006). The issue therefore becomes whether "circumstances were present that would objectively indicate the existence of an ongoing emergency." *Vinson*, 252 S.W.3d at 339.

The *Davis* court analyzed a 9–1–1 conversation under the Confrontation Clause, stating "a 911 call[] is ordinarily not designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance." *Davis*, 547 U.S. at 827. However, 9–1–1 conversations may "evolve into testimonial statements" after the operator or officer determines the need for emergency assistance. *See Davis*, 547 U.S. at 828 ("[A]fter the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when [assailant] drove away from the premises).").

To determine whether the statements here were testimonial, we look to the factors the *Davis* court considered. First, whether the caller described events as they "were actually happening," instead of hours later. Second, whether any reasonable listener would recognize that the call was a request for help against a bonafide physical threat. Third, whether the questions elicited statements that were necessary to resolve the present emergency, rather than to learn what happened in the past. Finally, whether the circumstances were informal, such that the caller answered frantically, or in an environment that was neither tranquil nor safe. *Id.* at 827; *see also Santacruz v. State*, 237 S.W.3d 822, 827 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (summarizing and applying *Davis* factors to statements in

9–1–1 call).[4]

ii. Analysis

The playing time for the 9–1–1 recording is almost seven minutes. At the start of the recording, the caller told the dispatcher that complainant's husband "just" beat complainant. The dispatcher requested their address, but the caller did not immediately answer and told the dispatcher to "hold on." An entire minute passed, during which the caller told complainant "it's okay" as she wailed and cried in the background. Complainant's wails and cries intensified suddenly, after which the caller asked: "Is that him?" Complainant's replies are indiscernible. The caller then addressed the dispatcher and provided the address of their location, and again told the dispatcher to "hold on" because she had to locate complainant, whom she saw run away after being pursued by her husband. The caller found complainant, and complainant provided the dispatcher with requested information such as: appellant's identity and race, complainant's race, their specific location within an apartment complex, and whether medical assistance was required. After declining medical assistance, the caller stated "but [complainant's] kids are still in the house" and "she's too terrified of her husband" and that she requested help getting her property from her dwelling.[5]

First, only the first statement—that complainant's husband "just" beat

[4] As the *Davis* court did, we presume without deciding that the acts of 9–1–1 operators may be considered to be acts of the police. *Davis*, 547 U.S. at 823 n.2.

[5] A conversation among the caller, complainant, and a third unidentified individual occurs at the end of the call. The dispatcher did not ask any questions to elicit the conversation. During this conversation, the caller expressed displeasure with complainant's apparent wish to not press charges against appellant for the assault. These statements were not relevant to the emergency or the case against appellant, and were not offered for their truth. The statements are not hearsay and do not offend the federal constitution. *See* Tex. R. Evid. 801(d) (testimony not offered for the truth of the matter asserted is not hearsay); *Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010).

complainant—was a description of a past event. Courts have held statements to be nontestimonial even though they were not describing events as they were happening because "the *Davis* court . . . stated that this is only one factor to be considered in determining whether statements were made under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency." *See Santacruz*, 237 S.W.3d at 828–29 (three sentences in 9–1–1 call describing events that occurred about fifteen minutes earlier nontestimonial) (citing *Davis*, 547 U.S. at 826); *Garcia v. State*, 212 S.W.3d 877, 883–84 (Tex. App.—Austin 2006, no pet.) (holding that statements made by wife were nontestimonial, even though they described past events in which her husband had forcibly abducted his child in violation of a court order). The statements that followed either described what transpired as it occurred, or provided basic information (such as their location and identities) to address the present emergency.

Second, any reasonable listener would recognize that complainant was facing an ongoing physical threat. For instance, complainant was crying and complained that appellant just beat her, appellant pursued complainant at the scene, the caller described complainant as "terrified," and complainant requested help removing her property from the apartment.

Third, the elicited statements here, which pertain to location and identification of the individuals involved in the assault, were ascertained to resolve the present emergency. The operator's questions and the caller's answers were necessary to resolve the responding police officers' need to know "'whom they are dealing with in order to assess the situation,' the threat to their own safety, and possible danger to the potential victim." *Santacruz*, 237 S.W.3d at 829 (quoting *Davis*, 547 U.S. at 832).

Fourth, the audio recording reveals that the environment was not tranquil. Complainant was distraught and had difficulty answering the 9–1–1 operator's questions that were relayed to her through the caller. The caller reassured complainant, stating "it's okay" and at one point, searched for complainant after complainant ran away from appellant. Additionally, because of appellant's presence and ongoing pursuit of complainant at the scene, the environment was not safe.

In sum, an objective examination of the 9–1–1 caller's statements indicates that "the primary purpose of the interrogation" was to "enable police assistance to meet an ongoing emergency"—not "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 842.

Appellant argues there was no present emergency here and undertakes to distinguish this case from *Santacruz*. In *Santacruz*, this court held that there was an ongoing emergency and the call was a "cry for help," rendering the statements nontestimonial and therefore admissible. 237 S.W.3d at 828–30. Unlike here, the complainant in *Santacruz* placed the 9–1–1 call, Santacruz had a gun, and the complainant requested an ambulance for her injuries from the attack by Santacruz. *Id.* at 828. Like here, the dispatcher in *Santacruz* obtained basic information such as "identity, location, and circumstances" to address what was a "present emergency." *Id.*

The precise circumstances in *Santacruz* need not be present to conclude that there was an ongoing emergency. *See id.* (explaining factors to consider to determine whether there was an ongoing emergency). Applying the *Davis* factors, we concluded that the call here was a request for help against an ongoing physical threat. What is more, appellant has failed to explain how the caller's identity or appellant's non-use of a weapon in the assault would affect this analysis.

The 9–1–1 caller's statements were nontestimonial hearsay, the admission of which does not offend the federal constitution. *See Crawford*, 541 U.S at 59. We overrule appellant's second issue.

III. CONCLUSION

Accordingly, we overrule appellant's two issues and affirm the trial court's judgment.

/s/ Marc W. Brown
Justice

Panel consists of Chief Justice Frost and Justices Brown and Jewell.
Do Not Publish — TEX. R. APP. P. 47.2(b).