In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00075-CR

ANTHONY FLORES, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 364th District Court
Lubbock County, Texas
Trial Court No. 2012-434171; Honorable Bradley S. Underwood, Presiding

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February 12, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

After being granted an out-of-time appeal by the Court of Criminal Appeals,[1] Appellant, Anthony Flores, appeals the assessment of a fifty-year sentence imposed by the jury following his conviction for the offense of aggravated robbery, enhanced by a

[1] *Ex parte Flores,* No. WR-82,625-01, 2015 Tex. Crim. App. Unpub. LEXIS 71 (Tex. Crim. App. Jan. 28, 2015, orig. proceeding).

prior felony conviction.[2] By a single issue, Appellant contends the trial court erred by admitting testimonial statements contained in a 911 call, even though the caller never testified and was not subject to cross-examination at trial. Finding the contested evidence constituted admissible non-testimonial hearsay statements, we affirm.

BACKGROUND

On February 14, 2012, Lamar Johnson pulled into a convenience store to get some gas. Johnson pulled up next to a gas pump and then walked inside the store to request that the clerk, Robert Wiggins, turn on the pump. Evidence at trial indicated that, as Johnson was walking into the store, Appellant pulled up in a white vehicle. As Johnson was exiting the store, Wiggins asked him whether he would be paying by cash or credit. Johnson responded by flashing a wad of currency he was carrying in his pocket. At that point, Appellant exited the store behind Johnson, pulled an object from the trunk of his vehicle, approached Johnson, pointed the object at his head, and demanded he hand over the money in his pocket. Johnson complied, handing over approximately $5,000.[3] Appellant then ran to his vehicle, threw the object back into the back of the vehicle, and sped away.

Despite having a cell phone in his car, for various reasons, Johnson did not call the police. Instead, he struggled with the gas pump for a while before he abandoned his intention to personally pursue the robber. Approximately six minutes after the robbery was committed, Wiggins called 911 to report that a customer had been robbed

[2] TEX. PENAL CODE ANN. § 29.03(a)(2) (West 2011). An offense under this section is a felony of the first degree. *Id.* at § 29.03(b). Enhanced by a prior felony conviction, the offense was punishable by confinement for life, or for any term of not more than 99 years or less than 15 years, and by a fine not to exceed $10,000. *Id.* at 12.42(c)(1) (West Supp. 2015).

[3] While Johnson testified that he was carrying approximately $7,500, he contends he only handed over $5,000 during the robbery.

by a Hispanic male with a shotgun.[4] Although it is unclear whether Wiggins personally witnessed the robbery, the 911 call clearly indicates that Wiggins reported that a robbery had occurred and that a shotgun had been used. A second 911 call was immediately initiated by the 911 dispatcher after Wiggins hung up or was disconnected. At that time, Wiggins answered questions concerning a description of the robber's vehicle, his physique, the color of shirt he wore, the fact that a shotgun was used but never fired, the amount of money stolen, and the direction the vehicle took after the robbery. He was unable to identify the exact make of the vehicle or the kind of pants the robber wore. After the 911 calls were over, Wiggins could be heard on the surveillance video wondering aloud whether he should close the store.

On February 23, 2012, a Lubbock police officer spotted a vehicle matching the description of the vehicle involved in the February 14 robbery.[5] A stop of that vehicle led to a consent to search and to the discovery of a spent shotgun shell casing. The investigation also led police officers to suspect Appellant as the possible perpetrator of that offense. The next day, Appellant was arrested. He waived his *Miranda* rights and agreed to give a statement to the police concerning his involvement in the robbery.

In his statement, Appellant admitted he was the person seen in the surveillance video from the convenience store. He also admitted that he had demanded Johnson's money and later fled in his own vehicle. Appellant insisted, however, that the object he used during the robbery was a stick that might appear to be a shotgun because it was

[4] In his excited state, Wiggins initially reported that fifteen minutes had elapsed between the robbery and the 911 call. A review of the convenience store surveillance video showed that the robbery occurred at approximately 3:12 a.m., while the dispatch records indicate that the first 911 call was at 3:18 a.m.

[5] The police were looking for "a white Crown Vic or Lincoln Grand Marquis with – with rims on it."

wrapped in tape.[6] In response to questioning by the police, Appellant stated that he would never admit to possessing a firearm "because it would be a federal offense."

RIGHT OF CONFRONTATION OF WITNESSES

Appellant contends his constitutional right of confrontation of witnesses was violated when the trial court allowed the admission of a recording of two 911 calls pertaining to the robbery. Appellant contends there was no ongoing emergency because sufficient time had elapsed between the commission of the offense and the report to ameliorate any emergency.

The Sixth Amendment to the United States Constitution, which is binding on the states through the Fourteenth Admendment, guarantees a criminal defendant the right to confront the witnesses against him. U.S. CONST. amend. VI. The Texas Constitution likewise guarantees that an accused "shall be confronted by the witnesses against him." TEX. CONST. art. I, § 10. Texas courts have consistently interpreted this provision of the Texas Constitution as guaranteeing the same rights afforded by the Sixth Amendment. *Gonzales v. State,* 818 S.W.2d 756, 758 (Tex. Crim. App. 1991).

In *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004), the Supreme Court held that, in general, "testimonial" statements of a witness who does not appear at trial and is not, therefore, subject to cross-examination, violate the Sixth Amendment. While the Court did not provide a clear definition of what constitutes a testimonial statement, that term has been interpreted to include "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

[6] The nature of the object used in the robbery is indiscernible from the surveillance video.

trial." *Id.* at 51-52. Statements taken by police officers "in the course of interrogations" have also been held to be testimonial. *Id.* Therefore, generally speaking, statements made to the police, shortly after the commission of an offense and upon the arrival of the police at the scene of a crime, are "non-testimonial" if they are not initiated by the police and lack the structure and formality of an official interrogation. *Kearney v. State,* 181 S.W.3d 438, 442 (Tex. App.—Waco 2015, pet. ref'd) (citing *Ruth v. State,* 167 S.W.3d 560, 569 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd)).

In *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2274, 165 L. Ed. 2d 224 (2006) (involving the statements of a 911 caller reporting an ongoing domestic assault), the Court determined that the Confrontation Clause does not apply to non-testimonial statements made to police during the course of an ongoing emergency. The Court explained that statements are testimonial "when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." The existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public. *Michigan v. Bryant,* 562 U.S. 344, 370-71, 361 S. Ct. 1143, 1162, 179 L. Ed. 2d 93 (2011). In *Bryant,* the Court held that statements made to the police by a victim found next to his vehicle with a gunshot wound to the abdomen were not testimonial, in part, because the zone of potential victims was greater when issues of public safety were implicated by the use of a gun and the violent nature of the offense. *Id.* at 373-74.

An ongoing emergency does not, however, exist forever. The Texas Court of Criminal Appeals has held that "[o]nce the emergency is resolved . . . any continuing or

subsequent interrogation may well provoke a testimonial response for Confrontation Clause purposes because, at that juncture, '[o]bjectively viewed, the primary, if not the sole purpose of the interrogation [has become] to investigate a possible crime . . . .'" *Langham v. State*, 305 S.W.3d 568, 579 (Tex. Crim. App. 2010) (quoting *Davis*, 547 U.S. at 830, 126 S. Ct. at 2278) (statements of a confidential informant to police used to obtain a search warrant held to be testimonial because the primary ("first-in-importance") objective of the police was to investigate a crime).

Like other statements made to the police shortly after arriving on the scene of a crime, statements made during 911 calls are evaluated on a case-by-case basis. Calls to 911 have largely been classified as non-testimonial because a "911 call . . . is ordinarily not designed to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Davis,* 547 U.S. at 827, 126 S. Ct. at 2276. However, 911 calls may become testimonial when they are made under circumstances which would lead an objective witness to reasonably believe there is no ongoing emergency and that the statement was being made in the course of a police investigation for the primary purpose of later use in the prosecution of the offense. 547 U.S. at 822, 126 S. Ct. at 2274. When applying the primary purpose test, factors courts should consider include (1) the existence of an "ongoing emergency," (2) the formality and purpose of the questioning, and (3) the statements and actions of both the declarant and interrogators. *Bryant,* 562 U.S. at 366-67, 361 S. Ct. at 1160.

Here, the scope of the emergency extended beyond the moment the crime was committed because Appellant employed the use of a deadly weapon implicating the threat of harm to the public and first responders. Evidence presented indicated that

Wiggins was concerned about whether he should close the convenience store even after he made the 911 call. From the nature of the statements and tone of his voice, it is reasonable to believe Wiggins was not acting purely as a witness in a police investigation concerning a completed crime with no concern for the ongoing nature of the circumstances surrounding the crime. The use of a deadly weapon during the commission of an offense is critical information necessary for the safety and preparedness of the responding officers. In this case, the questions asked by the 911 dispatcher and the answers given were of the kind necessary to supply first responders with enough information to respond safely and responsibly. Viewing the totality of the circumstances surrounding the 911 call in this case, we conclude its primary purpose of the contested statements was to alert law enforcement authorities concerning a current event involving the use of a deadly weapon and thereby summon immediate police assistance to meet an ongoing emergency involving a threat to the safety of both the public and first responders. As such, the contested statements were non-testimonial hearsay statements admissible under the hearsay exception pertaining to excited utterances. Appellant's issue is overruled.

CONCLUSION

The judgment of the trial court is affirmed.

Patrick A. Pirtle
Justice

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Quinn, C.J., concurring