



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-16-00378-CR

LILLIAN GILBERT, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the County Criminal Court No. 4
Denton County, Texas
Trial Court No. CR-2016-00926-D, Honorable Joe Bridges, Presiding

October 25, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

Appellant, Lillian Gilbert, was convicted of the offense of driving while intoxicated. Appellant now presents a single issue for our consideration, contending that the trial court violated her right of confrontation by admitting a 911 recording at a motion to suppress hearing. We will affirm.

Factual and Procedural Background

Around 8:50 p.m. on June 2, 2015, Officer Darren Simmons of the Flower Mound Police Department received a dispatch call regarding unsafe driving. The 911 caller

had reported to the dispatcher that she had observed a white BMW jump a curb and weave along the roadway. The caller provided the vehicle's license plate number and reported that the vehicle was stopped in the parking lot of the Wellington Amenities Center.

Simmons arrived at the Center within minutes and observed only one white BMW in the parking lot. He watched as the vehicle's driver, appellant, got out of the car and walked toward a trash can. He noticed that appellant walked with unsteady balance. As appellant was returning to the vehicle, Simmons approached her. He eventually performed a DWI investigation and then arrested appellant for driving while intoxicated. According to Simmons, the basis for his initial stop was the 911 report and his observation of appellant's unsteady gait when she exited the vehicle.

Appellant filed a motion to suppress the evidence obtained as a result of the detention, and the trial court conducted a hearing on the motion. At the hearing, appellant objected to Simmons's testimony regarding what the 911 caller reported to the dispatcher and the 911 tape itself on the basis that they violated her right to confront the witness. The trial court overruled appellant's objections and denied the motion to suppress.

Appellant subsequently entered a plea of guilty. The trial court sentenced her to 300 days in jail and a fine of \$500.00, with the jail time suspended and appellant placed on community supervision for eighteen months. This appeal followed.

Appellant's sole issue is whether the trial court erred by admitting into evidence at the pretrial suppression hearing a 911 call made by a person who did not testify at

the pretrial hearing, thereby depriving appellant of her right of confrontation in violation of the Sixth Amendment to the Constitution of the United States.

Law and Analysis

When reviewing a claim that the admission of evidence violates an appellant's right of confrontation, we apply a *de novo* standard of review. See *Moore v. State*, 169 S.W.3d 467, 474 (Tex. App.—Texarkana 2005, pet. ref'd).

In *Crawford v. Washington*, the United States Supreme Court held a defendant's right to confrontation under the Sixth Amendment is violated when a witness is permitted to relate out-of-court "testimonial" hearsay statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. See *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). However, the admission of non-testimonial hearsay does not violate the Confrontation Clause. *Sanchez v. State*, 354 S.W.3d 476, 485 (Tex. Crim. App. 2011). Therefore, the threshold inquiry for any purported Confrontation Clause violation is whether the admitted statement is testimonial or non-testimonial in nature. *Id.*; see also *Woodall v. State*, 336 S.W.3d 634, 642 (Tex. Crim. App. 2011) ("In accordance with *Crawford*, we must first determine whether the Confrontation Clause is implicated in this case before deciding if the constitutional guarantee was violated"). Whether an out-of-court statement is testimonial is a question of law subject to *de novo* review. *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008); *Hereford v. State*, 444 S.W.3d 346, 350 (Tex. App.—Amarillo 2014, no pet.).

We disagree with appellant's argument that the question of whether the statements were testimonial "need not be addressed" by this Court. If the challenged

statements are non-testimonial, appellant's rights under the Confrontation Clause are not implicated. If appellant's constitutional rights are not implicated, the ultimate issue on which appellant seeks to have us opine (i.e., the applicability of the Confrontation Clause at pretrial suppression hearings) would have no bearing on the disposition of this case. See *United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 859 (Tex. 1965) (Texas courts may not issue advisory opinions).

In determining whether a hearsay statement is testimonial, the primary focus is on the objective purpose of the statement, not upon the declarant's expectations. *De La Paz*, 273 S.W.3d at 680. Generally, "a hearsay statement is 'testimonial' when the surrounding circumstances objectively indicate that the primary purpose of the interview or interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* (citing *Davis v. Washington*, 547 U.S. 813, 822-23, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)).

Calls to 911 are commonly intended to describe current circumstances requiring police assistance. Such calls are pleas for help or made for the purpose of providing information to enable officers to end a threatening situation. See *Flores v. State*, No. 07-15-00075-CR, 2016 Tex. App. LEXIS 1521, at *8-9 (Tex. App.—Amarillo Feb. 12, 2016, pet. ref'd) (mem. op.) (not designated for publication) (store clerk's 911 call following robbery was non-testimonial where defendant employed the use of a deadly weapon, implicating the threat of harm to the public and first responders, and clerk was concerned about whether he should close the store); see also *Cook v. State*, 199 S.W.3d 495, 498 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (call to 911 to report intoxicated motorist who had just thrown beer bottle at caller's vehicle was non-

testimonial because it reported potential crime in progress); see also *Ford v. State*, No. 08-14-00093-CR, 2016 Tex. App. LEXIS 2496 at *10-16 (Tex. App.—El Paso Mar. 9, 2016, pet. ref'd) (not designated for publication) (statements in 911 call were non-testimonial where primary purpose of call was to report ongoing emergency and to obtain police assistance because defendant was driving while intoxicated). Therefore, 911 calls are largely classified as non-testimonial. However, calls to 911 may become testimonial when made under circumstances which would cause an objective witness to believe there was no ongoing emergency and that the statement was made in the course of an investigation for the purpose of establishing facts relevant to later criminal prosecution. See *Hereford v. State*, 444 S.W.3d at 351-52 (statements made by anonymous caller reporting narcotics trafficking activity in motel room did not evince an ongoing emergency and were therefore deemed testimonial); see also *Davis*, 547 U.S. at 822.

The 911 call at issue was made for the purpose of reporting a perceived ongoing emergency, namely the dangerous driving by appellant. The call was initiated after the caller observed appellant's vehicle jump a curb, narrowly avoid striking a fire hydrant, weave "all over the road," and drive "crazy." The caller continued to observe appellant's vehicle and stayed on the phone until Officer Simmons arrived at the scene. The caller's statements and actions reflect that she felt an ongoing concern for public safety. Additionally, the questions asked by the 911 dispatcher and the answers given by the caller were of the kind necessary to supply the responding officer with the information needed to locate the driver and respond appropriately to the potential threat to safety.

Accordingly, we conclude that the contested 911 statements, when objectively considered, were non-testimonial in nature.

Conclusion

Because we conclude that the 911 call was non-testimonial, the admission of the call did not implicate, and thus could not have violated, appellant's rights under the Confrontation Clause. We affirm the decision of the trial court.

Judy C. Parker
Justice

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