NUMBER 13-16-00207-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

GERMAIN GOSS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 347th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Benavides

By one issue, appellant Germain Goss challenges his conviction for continuous violence against a family member and assault family violence by impeding breath or circulation, both third-degree felonies, enhanced to a minimum term of 25 years to 99 years or life imprisonment under the habitual felony offender statute. *See* TEX. PENAL CODE ANN. §§ 25.11, 22.01, 12.42 (West, Westlaw through Ch. 49, 2017 R.S.).

Appellant alleges the trial court erred in admitting State's Exhibit One, which was a 911 call recording, over his objection that it was hearsay and a Confrontation Clause violation. We affirm.

I. BACKGROUND

At trial, Charles Hoepner, a 911 operator with the Corpus Christi Police Department, testified that he received a call on July 31, 2015, regarding an ambulance being requested at a home. Sophie Cole had placed the call, stating her boyfriend, Germain Goss Jr. (Goss Jr.), could not see and was complaining of his head hurting.

Officer Charles Tanner of the Corpus Christi Police Department responded to Cole's location. There, he testified he encountered Goss Jr., who stated he saw his father, appellant, hit Tamela Goss (Tamela), his mother. Goss Jr. stated he got into a fight with his father, in which appellant pushed him against the wall and started choking him. Appellant was later arrested and charged with three counts: (1) continuous violence against the family and (2) two counts of assault family violence impeding breath or circulation, with Tamela and Goss Jr., as the victims, respectively. *See id*. §§ 25.11, 22.01.

Both Goss Jr. and Tamela were called as witnesses and testified that they had fabricated the story against appellant in retribution for him cheating on Tamela. The State also presented the 911 call to the jury and a jail call in which appellant told Tamela that she needed to have Goss Jr. say he was not choked, and that they should try to sabotage the State's case.

Following the testimony, the jury found the appellant guilty of count one and count three and also found the prior felony enhancements true. Appellant was sentenced to

25 years in the Texas Department of Criminal Justice–Institutional Division as a habitual felony offender. *See id*. § 12.42. Appellant filed a motion for new trial, and after a hearing, the trial court denied his motion. This appeal followed.

II. TRIAL COURT COMMITTED NO ERROR

By his sole issue, appellant argues the trial court erred in admitting the 911 call over his objections on hearsay and the Confrontation Clause grounds.

A. Standard of Review

We review a trial court's decision to admit evidence for an abuse of discretion. *Taylor v. State*, 268 S.W.3d 571, 578–79 (Tex. Crim. App. 2008). In order to reverse a trial court's determination, we must find the trial court's ruling lies outside the zone of reasonable disagreement. *Id*. In applying an abuse of discretion standard, we will not disturb the trial court's evidentiary ruling if it is correct under any applicable theory of law. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

B. Applicable Law and Discussion

Appellant alleges that the admission of the 911 call was a violation of the hearsay rule and violated his Confrontation Clause rights. *See* TEX. R. EVID. 801; *Crawford v. Washington*, 541 U.S. 36, 68 (2004). At trial, the State responded to appellant's objection by stating the 911 call was nontestimonial and that it fell under two exceptions to the hearsay rule: a present sense impression and an excited utterance. *See* TEX. R. EVID. 803. The trial court allowed the 911 call under the excited utterance and present sense impression exceptions.

1. Hearsay

"Our rules of evidence contain many exceptions to the general prohibition against

the use of hearsay at trial." *Reyes v. State*, 314 S.W.3d 74, 77 (Tex. App.—San Antonio 2010, no pet.). The present sense impression is defined as a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. TEX. R. EVID. 803(1). An excited utterance exception is defined as a statement relating to a starling event or condition made while the declarant was under the stress of excitement caused by the event or condition. TEX. R. EVID. 803(2).

2. Confrontation Clause

Appellant also argues his right to confrontation was violated by the admission of the 911 call because he did not have a prior opportunity to cross examine the caller, the State did not show the caller was unavailable to testify, and the recording was testimonial. *See Crawford*, 541 U.S. at 68.

The United States and Texas Constitutions guarantee the right to confront witnesses. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. The admission of testimonial hearsay violates that right. *See Crawford*, 541 U.S. at 68.

> 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.

Reyes, 314 S.W.3d at 79 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). In *Vinson v. State*, the court of criminal appeals suggested a non-exhaustive list of factors to consider in determining if statements were testimonial:

> (1) whether the situation was still in progress; (2) whether the questions

> sought to determine what is presently happening as opposed to what 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.

252 S.W.3d 336, 339 (Tex. Crim. App. 2008) (citing *Davis*, 547 U.S. at 829–30). We conduct a *de novo* review to determine whether a statement is testimonial or nontestimonial. *See Reyes*, 314 S.W.3d at 79.

3. Discussion

The 911 call introduced into appellant's trial was relatively short. The caller, Cole, who was Goss Jr.'s girlfriend, asked for an ambulance to be sent because Goss Jr. was complaining of lost vision. Cole also stated she was scared that Tamela would be hit and appellant was still present at the scene. Cole repeatedly asked the dispatcher to hurry and send someone, and moaning and crying could be heard in the background.

Based on the actual information relayed, we conclude that the call was nontestimonial because the incident was still in progress, the dispatcher was trying to determine what was occurring and attempting to render the appropriate aid, and specific facts and details of what occurred were not discussed. *See Vinson*, 252 S.W.3d at 339. Therefore, there was no violation of the Confrontation Clause by the admission of the 911 call.

Additionally, because the events were still in progress at the time of the call and Cole admitted to being scared, present sense impression and excited utterance exceptions to the hearsay rule were applicable, and the trial court did not abuse its discretion by admitting the call into evidence. *See* TEX. R. EVID. 803(1)(2).

We overrule appellant's sole issue.

III. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

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

Delivered and filed the
13th day of July, 2017.