IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DARRON VAN DOWNEY, Appellant.	)	No. 66046-2-I DIVISION ONE UNPUBLISHED OPINION FILED: February 27, 2012

Appelwick, J. — Downey was convicted of assaulting his girlfriend, Brooks. Brooks did not testify at trial. But, two police officers, an EMT, an employee in Downey's apartment building all testified about statements Brooks made after the assault. Downey argues that allowing one of the officers and the apartment manager to testify about Brooks' statements violated his constitutional right to confront his accuser. He also argues defense counsel was deficient in stipulating to admission of the apartment manager's testimony. The officer's testimony was harmless, and allowing the apartment manager's testimony was not constitutional error. We affirm.

FACTS

In April 2010, Diane Brooks went to visit Darron Downey, who lived in an apartment building that serves residents dealing with alcohol and substance abuse,

and mental health problems. Brooks and Downey were dating at the time. On her way to his apartment, Brooks met Peggy Collins, who worked in Downey's apartment building.

Later that day, Ms. Collins found Brooks outside her office. Brooks was frightened and crying. She had a laceration on her head that looked like a deep dent. Ms. Collins brought Brooks into her office, locked the door, and called 911. Brooks stated that Downey had hit her.

Emergency Medical Technician (EMT) Eric Lane and Police Officers Ian Birk and William Collins responded to the call. Lane found Brooks in Ms. Collins's office. Brooks told Lane that her boyfriend had hit her.

Meanwhile, Officer Birk detained Downey, and Officer Collins went to speak with Brooks. Brooks told Officer Collins that Downey had been drinking for approximately 12 hours. She said that Downey assaulted her by pushing her head into a window frame.

Later, Officer Birk also spoke to Brooks. Their conversation was brief, but Brooks confirmed that Downey assaulted her.

Downey was charged with assault in the second degree – domestic violence. After it was unable to locate Brooks, the State moved for a pretrial ruling on the admissibility of Brooks' statements to Ms. Collins, Lane, and Officers Birk and Collins. Defense counsel stipulated to the admissibility of Ms. Collins's and Lane's statements. Ultimately, all four witnesses were permitted to testify. Brooks did not testify.

DISCUSSION

The United States constitution guarantees an accused the right to confront the

witnesses against him. U.S. Const. amend. VI. That protection is directed at the improper use of ex parte examinations and ex parte affidavits as substitutes for live witnesses in criminal cases. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A testimonial statement made to a police officer may only be offered when the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. Id. at 68. A statement is 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 prosecutions. Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Downey claims that Brooks' statements to Ms. Collins were testimonial and that defense counsel was ineffective for stipulating to the statements' admission. The State argues that the statements were nontestimonial and that the decision not to object was a legitimate trial strategy.

Downey argues that Brooks' statements to Ms. Collins were testimonial, because a reasonable person in the position of the declarant would realize that the information would likely be used in a criminal investigation or prosecution. In doing so, he relies on State v. Powers, which held that a victim's conversation with a 911 operator was testimonial. 124 Wn. App. 92, 101-02, 99 P.3d 1262 (2004). But, Powers came before Davis, in which the United States Supreme Court articulated that "[s]tatements 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.

Further, in both Powers and Davis, the statements were made to a 911 operator. Davis, 547 U.S. at 817; Powers, 124 Wn. App. at 101-02. The Davis court explicitly considered the 911 operators acts to be acts of the police, and declined to consider whether and when statements made to someone other than law enforcement personnel are testimonial. Id. at 823 n.2.

Here, Ms. Collins testified that she found Brooks in the hall. Brooks was frightened and crying. She was searching for Ms. Collins. Brooks had a visible laceration on her face and stated that Downey hit her. At that point, Ms. Collins had Brooks sit down in her office and locked the door. Ms. Collins decided to call 911, there is no indication that Brooks asked her to call. Because Brooks was seeking help and shelter from Ms. Collins, she told Ms. Collins that Downey hit her. Her statement was for the immediate purpose of getting to safety in an ongoing emergency. Under the test articulated in Davis, this statement would have been nontestimonial if made to a police officer. We hold it was nontestimonial when made to the apartment manager.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both deficient performance and a resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). When the claim is based on a failure to object, deficient performance exists only when the defendant shows that there was no legitimate strategic reason not to object, and that an objection would likely have been sustained. Id. at 336, 337 n.4. Downey cannot show that the trial court would have sustained an objection. His claim for ineffective assistance of counsel necessarily fails.

The State concedes that Brooks' statements to Officer Collins were testimonial, and that the trial court erred in admitting the statements. The State did not concede,

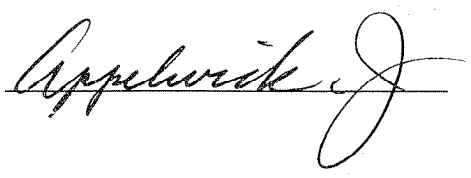
but we will assume for purposes of this opinion, that Brooks' statement to Officer Birk that Downey had assaulted her was also testimonial.

But, a constitutional error does not require reversal if it is proved to be harmless beyond a reasonable doubt. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). Error is harmless if there is no reasonable probability that the outcome of the trial would have been different had the error not occurred. State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003).

Downey argues that the error was not harmless, because Brooks' statements to the officers were the only evidence that her injuries were caused by Downey. That argument is factually incorrect.

Ms. Collins testified that she found Brooks frightened and crying and that Brooks said that Downey hit her. Lane testified that Brooks told him that she was assaulted by her boyfriend. Further, Officer Birk testified that, when he arrived, Downey called out to him that "you're probably looking for me." No evidence suggested a different perpetrator. Brooks' statements to Ms. Collins and Lane, together with Downey's statement that Officer Birk was probably looking for him, were sufficient to prove beyond a reasonable doubt that Downey was the individual who assaulted Brooks. There is no reasonable probability that the outcome of the trial would have been different had the testimony of the two officers not been admitted.

We affirm.



WE CONCUR:

Spearman, J.

Becker, J.