

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRUCE TEMANAHA SAMUELA,

Appellant.

No. 38666-6-II

UNPUBLISHED OPINION

Hunt, J. – Bruce Temanaha Samuela appeals his jury trial conviction for third degree malicious mischief (domestic violence). He argues that (1) the trial court erred in characterizing the non-testifying victim’s recorded 911 call as “non-testimonial”; and (2) admitting this 911 tape violated his right to confrontation under the Sixth Amendment of the United States Constitution and article 1, section 22 of the Washington Constitution. The State conditionally concedes that if the trial court did err, this error was not harmless. We reverse Samuela’s third degree malicious mischief conviction and remand for a new trial.

FACTS

I. 911 Call

At about 2:26 pm, on July 22, 2007, Jan Thomson called 911 to report that her former boyfriend had "tried to hurt" her outside a friend's house and had punctured three of her car's tires and that she had locked herself inside her car. Ex. 1. During this initial portion of the call, roughly 40 seconds, the 911 dispatcher's tone was direct and curt as she questioned Thomson about the immediate situation and learned that the attacker had ridden off on his bicycle.

After determining that Thomson was neither injured (just "shook up," Ex. 1), nor in immediate danger, the dispatcher began to ask Thomson for more details in an apparent attempt to clarify what had happened. Thomson identified her attacker as Bruce Samuela, stated that he had "smacked" at her car windows and "popped out" her tires with some kind of pole. Ex. 1. During this major portion of the call, over two minutes, the dispatcher initiated the questions and often cut off Thomson's answers to seek details about where Samuela had gone; identifying information, including his age, height, weight, build, race, clothing, bicycle color; and exact address. Thomson provided this information. She also told the dispatcher that Samulea had not broken her car's windows but that he threatened her life at the time, had previously left threats on her answering machine, and had threatened to take an ax to her car. During this latter portion of the call, the dispatcher allowed Thomson to speak more freely and to provide much more detail. At the end of the call, the dispatcher told Thomson that the police were on their way, that she should call 911 again if Samuela came back, and that she might want to go back inside the house. Thomson replied that she thought she would.

In response to Thomson's 911 call, Lakewood Police Department Officer Jason Catlett arrived at Thomson's friend's house at about 3:00 pm. Thomson appeared anxious or nervous, and she was looking up and down the street as she spoke with Catlett. Three of her car's tires had been flattened by a knife or something similar used to puncture the tires' sidewalls. Catlett noted no visible damage to the car's windows. Thomson told Catlett that Samuela had "popped" the tires. II Verbatim Report of Proceedings (VRP) at 73. Catlett provided Thomson with a domestic violence pamphlet and had her complete a written statement.

II. Procedure

The State charged Samuela with felony harassment (domestic violence) and third degree malicious mischief (domestic violence). It later amended the information to include two bail jumping charges.

When it became clear that Thomson was not going to testify at the trial, the State asked the trial court to rule on the admissibility of the 911 tape. Samuela argued that Thomson's statements were inadmissible because (1) they were hearsay; (2) they did not fall under the excited utterance exception to the hearsay rule (ER 803(a)(2)); and (3) they were "testimonial" in nature, I RP at 4, and, therefore, not admissible under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), because Thomson would not be subject to cross examination. After listening to the 911 tape, the trial court ruled that the entire taped call was non-testimonial (and therefore admissible under *Crawford*) and that Thomson's statements on the tape were all excited utterances and, therefore, admissible under this exception to the hearsay rule.

The trial court later ruled that Thomson's statements to Catlett were not admissible under

Crawford unless Thomson testified. But Officer Catlett was the State's only witness for the harassment and malicious mischief charges; Thomson did not testify.¹ Over Samuela's renewed objection, the trial court played for the jury the entire tape recording of Thomson's 911 call, which was just over three minutes long. Catlett then testified about his contact with Thomson, including her statements to him, as described above. Samuela did not object to this testimony, move to strike it, or move for a mistrial.²

Samuela testified that (1) he had bought the car, for which Thomson was supposed to pay him; (2) she had never paid him for the car, which was, therefore, still his; (3) Thomson took the car, without his permission, and some money from him the day before, when she had stopped by to borrow money; (4) he and a friend had tracked Thomson and the car to her friend's house and had ridden their bicycles over there to confront Thomson; and (5) during this confrontation, Thomson had punctured the car's tires when she backed over his bicycle's trailer. He admitted that as Thomson was backing up, he had "put [his] finger on her"³ and said, "Give me my money and get out of my car, and do it right now." II RP at 125. He then clarified that he had not actually touched Thomson because she was inside the car, and he asserted that he had never threatened to kill her.

During its deliberations, the trial court twice allowed the jury to listen to the 911 tape.

¹ The State presented other witnesses related to the bail jumping charges, which Samuela does not challenge on appeal.

² Samuela does not argue on appeal that Catlett's testimony about Thomson's statements was reversible error.

³ The record does not explain the meaning of this phrase.

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The jury found Samuela guilty of third degree malicious mischief and two counts of bail jumping⁴ but not guilty of felony harassment.

Samuela appeals his malicious mischief conviction.

ANALYSIS

The central issue is whether Thomson's statements during her 911 call were "testimonial." We conclude that most of her statements were "testimonial" and, therefore, inadmissible under *Crawford*. Because admission of these statements was not harmless, we reverse.

I. Admission of 911 Tape

Samuela argues that the trial court erred in determining that Thomson's 911 call statements were "non-testimonial" and that admission of these statements violated his constitutional right to confront the key witness against him. We agree.

We review alleged confrontation clause violations de novo. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), *cert. denied*, 128 S. Ct. 2430 (2008), *overruled on other grounds by Giles v. California*, ___ U.S. ___, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008). Under the Sixth Amendment, an accused has a right to confront witnesses against him. *Crawford*, 541 U.S. at 51. Unless the witness is unavailable to testify and the defendant had a prior opportunity to cross examine the witness, the confrontation clause prohibits admission of "testimonial" statements of a witness who does not take the witness stand at trial. *Crawford*, 541 U.S. at 53-54.

Although "nontestimonial" hearsay is admissible under the Sixth Amendment, subject to

⁴ The bail jumping convictions rendered on the same day are not at issue in this appeal.

the rules of evidence,⁵ the predominant portion of Thomson's statements on the 911 call were "testimonial."

As the [United States Supreme] Court explained in *Davis*, statements made in the course of a police interrogation are nontestimonial if they were made under circumstances objectively indicating that *the primary purpose of interrogating the speaker* was "to enable police assistance to meet an ongoing emergency." But they are testimonial if circumstances "objectively indicate that there [wa]s no such ongoing emergency" and "*the primary purpose of the interrogation* [wa]s to establish or prove past events potentially relevant to later criminal prosecution."

The Court adopted four factors that help to determine whether the primary purpose of police interrogation is to enable police assistance to meet an ongoing emergency or to establish or prove past events: (1) whether the speaker is speaking of events as they are actually occurring or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and (4) the level of formality of the interrogation.

State v. Pugh, 167 Wn.2d 825, 832, 225 P.3d 892 (2009) (some alterations in original; emphasis added) (citing *Davis v. Washington*, 547 U.S. 813, 821-22, 827, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

When Thomson's 911 call began, the dispatcher was clearly attempting to determine whether there was an ongoing emergency, not to obtain information to prove past events. Thus, consistent with the trial court's ruling, this first short portion of the 911 call was not "testimonial" and was also admissible under the excited utterance exception to the hearsay rule.⁶ As the call progressed, however, it soon became clear that Samuela had left the immediate area and that

⁵ *State v. Pugh*, 167 Wn.2d 825, 831-32, 225 P.3d 892 (2009) (citing *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

⁶ ER 801(a)(2).

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Thomson was not in immediate danger.

The dispatcher's focus then shifted to gathering information about past events and obtaining other information to help police locate Samuela and to ensure Thomson's continued safety. Primarily in response to the dispatcher's specific questions during this part of the call, Thomson provided more detailed information, such as Samuela's name, description, and address, and additional details about his recent attack and other threats he had made in the past. At this point, there was no ongoing emergency and no immediate danger. Instead, the purpose of the 911 call was to gather detailed information to use to apprehend and, potentially, to prosecute Samuela, as reflected in the more formal information-seeking tone of the dialogue between Thomson and the dispatcher. Thus, this latter major portion of the call was "testimonial" under *Crawford*.

Not only was this portion of the call "testimonial" under *Crawford*, but also Thomson refused to testify at trial and to be subject to cross examination by Samuela. Accordingly, we hold that the trial court should have ruled this latter portion of the 911 call inadmissible and excluded it from the jury's consideration.

II. Prejudicial Error

The State concedes that Samuela is entitled to a new trial if the trial court erred in admitting the 911 call tape. Having held that the trial court's admission of the latter portion of the 911 call was error, we agree with Samuela and the State that such error was not harmless.

"[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). In the context of a confrontation clause violation, "[i]f the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless." *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009); *see also State v. Ohlson*, 162 Wn.2d 1, 19 n.4, 168 P.3d 1273 (2007) (citing *Davis*, 154 Wn.2d at 305).

The predominant evidence of Samuela's guilt was drawn from Thomson's statements to the 911 operator and her nearly contemporaneous hearsay statements to Officer Catlett. There was no additional corroborating testimony from any other witnesses and no testimony from Thomson herself. Although Catlett had observed that Thomson's car tires appeared to have been flattened by a knife or something similar, there was no physical evidence, such as a knife or other object, supporting Catlett's conclusion, which might have allowed the jury to infer that Samuela had maliciously⁷ damaged the tires. Additionally, Samuela provided an alternate explanation for how the tires were flattened when he explained that Thomson had run her car over the trailer that he had been towing with his bicycle. Moreover, Samuela's trial testimony contradicted

⁷ To establish third degree malicious mischief, the State had to prove that Samuela knowingly and maliciously damaged the tires. RCW 9A.48.090(1)(a).

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Thomson's out-of-court statements both on the erroneously admitted 911 tape and to Catlett. Thus, we cannot say that there was overwhelming untainted evidence that would have necessarily led to a guilty verdict.

Accordingly, we reverse Samuela's third degree malicious mischief conviction and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, PJ.

Quinn-Brintnall, J.