

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2006-0185
Plaintiff-Appellant,	:	On Appeal from the Ashland
v.	:	County Court of Appeals
BRIAN K. SILER,	:	Fifth Appellate District
Defendant-Appellee.	:	Court of Appeals
	:	Case No. 02 COA 028

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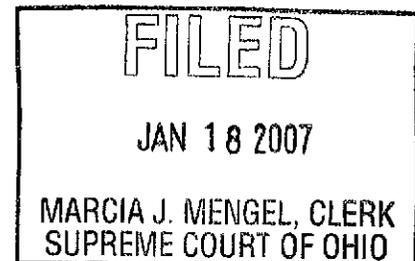


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INTRODUCTION

On remand from the United States Supreme Court, the Court of Appeals for Ashland County correctly ruled that testimonial hearsay was admitted at trial against Brian Siler, in violation of his rights guaranteed by the Sixth Amendment Confrontation Clause. That error was not harmless beyond a reasonable doubt. *State v. Siler II*, 164 Ohio App.3d 680, 2005-Ohio-6591. The correctness of the appellate court's decision was reinforced by the United States Supreme Court's subsequent decision in *Davis v. Washington* (2006), 547 U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224, which applied *Crawford v. Washington* (2004), 541 U.S. 36, 38, 124 S.Ct. 1354, 158 L.Ed.2d 177, to two different forms of police interrogation. In *Davis*, the Court held that hearsay statements are testimonial, and thus cannot be introduced at trial without violating the Confrontation Clause "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." *Davis v. Washington*, 126 S.Ct. at 2273-74. Here, the "primary purpose" test set forth in *Davis* mandates a finding that the child's hearsay statement—as the product of extended police interrogation—was testimonial and, thus, could not properly be used at trial.

The State's attempts to distinguish this case from *Davis* and place it under this Court's recent decision in *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, are misguided. *State v. Stahl* is inapposite, as it involved statements made to a nurse, not to a police detective.

Additionally, the State's claim that what transpired here between the detective and the hearsay declarant was not testimonial fails. A review of the objective circumstances indicates that the emergency was past, the scene was secured, and the statements were in response to structured questioning about "what happened," rather than "what is happening." Objectively applying the

Davis test at this juncture, the Court of Appeals correctly characterized the statements as testimonial. Their admission violated the Confrontation Clause.

Amicus curiae, the American Prosecutors Research Institute, and the State urge this Court, in essence, to ignore *Davis*, arguing that a child's statements should be treated differently for Confrontation Clause purposes. According to amicus curiae, a young child's statements are not testimonial and their use does not violate the Confrontation Clause. The objective test in *Davis* proscribes such an approach, as the *Davis* test focuses solely on the objective circumstances of the interrogation, the statements, and the primary purpose of the interrogator.

STATEMENT OF THE CASE

In his direct appeal, Mr. Siler raised numerous assignments of error. His first assignment of error claimed that the trial court's admission of Detective Martin's recollections of Nathan Siler's statements made in response to his extended questioning violated the Confrontation Clause of the United States Constitution. Mr. Siler argued the statements were not excited utterances, nor were they admissible pursuant to *Ohio v. Roberts*. The Court of Appeals overruled the first assignment of error, concluding that the statements were excited utterances and properly admitted. *State v. Siler I*, Ashland App. No. 02-COA-028, 2003-Ohio-5749.

Mr. Siler filed a timely notice of appeal and memorandum in support of jurisdiction in this Court. He again raised the claim that admission of Nathan's statements to police violated his rights under the Confrontation Clause. This Court denied review of Mr. Siler's case without opinion on March 24, 2004. *State v. Siler*, Ohio Supreme Court Case No. 2003-2106, reported at 101 Ohio St. 3d 1489, 2004-Ohio-1293. Reconsideration was sought in light of *Crawford v. Washington* (2004), 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177, but that motion was denied

on May 26, 2004. *State v. Siler*, Ohio Supreme Court Case No. 2003-2106, reported at 102 Ohio St. 3d 1462, 2004-Ohio-2569.

Mr. Siler filed a timely petition for writ of certiorari in the United States Supreme Court, arguing that the Court should vacate the decision and remand to the Court of Appeals for further consideration in light of the decision rendered in *Crawford*. The questions presented to that Court were as follows: 1) “Are an accused’s rights under *Crawford* and the Confrontation Clause violated when state courts characterize statements that are the end result of a one and a half-hour police interview as an excited utterance?” and 2) “Under the rule set forth in *Crawford v. Washington*, 124 S.Ct. 1354 (2004), does the Confrontation Clause allow the admission into evidence of a statement made by a purported eyewitness in response to police questioning when the eyewitness is three years old, incompetent to testify, and thus unavailable for confrontation?”

On December 6, 2004, the United States Supreme Court granted the petition, vacated the appellate court’s prior judgment, and remanded for further consideration in light of *Crawford v. Washington*. *Siler v. Ohio* (Dec. 6, 2004), 543 U.S. 1019, 125 S.Ct. 671, 160 L.Ed.2d 494.

On remand, Mr. Siler raised the following error:

The trial court erred in permitting Nathan Siler’s hearsay statements to Detective Martin to be admitted as excited utterances, thereby depriving Mr. Siler of his right to confront witnesses, as guaranteed by the 6th and 14th Amendments, U.S. Const.

The Ashland County Court of Appeals concluded that “Detective Martin’s questioning of the child, although resulting in allowable ‘excited utterances’ under the Ohio Rules of Evidence, was nonetheless a structured police interrogation as envisioned in *Crawford*, and therefore constituted testimonial evidence.” *State v. Siler II*, 164 Ohio App. 3d 680, 2005-Ohio-6591, ¶ 49. The appellate court found that the error was not harmless beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.

The State of Ohio sought this Court's review, which Mr. Siler opposed. This Court granted the State's request and stayed briefing pending this Court's outcome in *State v. Stahl*. Mr. Siler now urges this Court to affirm.

STATEMENT OF THE FACTS

Brian Siler and Barbara Keener married in 1988, and had their only child, Nathan, in 1998. The couple first experienced serious marital difficulties in 1997, when there was a two-day separation between the two. In the spring of 2001, marital tensions again arose, primarily due to an affair between Mrs. Siler and a co-worker.

After a two-week separation in the first half of July, the couple separated permanently on July 30, 2001, immediately following a domestic dispute that initially resulted in no charges against either Mr. or Mrs. Siler. Mr. Siler went to live at his brother and sister-in-law's house, while Mrs. Siler remained in the marital residence with their son, Nathan.

On September 20, 2001, Mrs. Siler's body was found hanging in her garage. The house showed signs of forced entry. Nathan was present at the house, sleeping in his bed, when the body was discovered at approximately 2 p.m. Mr. Siler was interviewed by sheriff's deputies that same day, having initially waived his Miranda rights. He stated that he had no knowledge of, or involvement in, Mrs. Siler's death. He recounted that he had spent the prior evening with his brother finishing some drywall, went to bed, saw his sister-in-law in the middle of the night after he used the bathroom, and arose early the next morning for a job interview in Columbus, which he arrived at no later than 9:20. T. 2551-55. Accordingly, Mr. Siler filed a notice of alibi at trial.

Twenty minutes after Deputy Singleton arrived and found Mrs. Siler, Ashland County Sheriff's Detective Larry Martin arrived at the scene. Detective Martin first spoke to Nathan

Siler at around 2:20 p.m. on September 20, 2001, more than eight hours after the latest possible time of death established by the coroner. T. 1796. By that time, Deputy Singleton and Captain Richert had secured the scene and ensured the safety of people present. T. 1762-1763. Already several law enforcement personnel were on site conducting the investigation and taking photographs. T. 1698-1701, 1731-32. Upon Detective Martin's arrival, he was briefed by Captain Richert. Detective Martin then viewed and photographed the scene. T. 1794, 1796. Notably, he started questioning Nathan approximately 20 minutes after he arrived at the scene.

Sheriff's Deputy Ron Singleton had already attempted to talk to Nathan without success. T. 1795. Nathan also initially did not want to talk to Detective Martin. T. 1796. According to Detective Martin, Nathan did not appear to be in any distress, was not excited, did not appear to be nervous, and was not upset. T. 1826, 1828. Detective Martin agreed that Nathan appeared "at ease." T. 1828. Detective Martin initially questioned Nathan for 30-45 minutes. T. 1824. After questions about Nathan's interests and his going to the fair the night before, Detective Martin asked him if "after he got home, did anything scare him," T. 1802, "how daddy scared him," T. 1803, and "did anything else scare him." Id.

After 30 to 45 minutes of questioning, Terrie Cato took Nathan from the scene and bought lunch for him. T. 1804. When Mrs. Cato returned with Nathan, Detective Martin resumed questioning for another hour while Nathan intermittently played with other children. T. 1824-26. An Ashland County Children's Services investigator, Jenny Taylor, was now at the scene. T. 1806. Detective Martin repeated the questions about what had scared Nathan after the fair. T. 1807. He then asked "where they were fighting at, who was hurting mommy." Id. Detective Martin next handed a teddy bear to Nathan and asked him if he could show Detective Martin "by using the teddy bear how daddy was hurting mommy," which Nathan did not do. T.

1808. Then Detective Martin began holding Ms. Taylor in “different positions, grabbing her wrist, her arms, bear hug,” to demonstrate how Mr. Siler might have hurt Mrs. Siler. T. 1809. After demonstrating numerous positions, Detective Martin put his arm around Ms. Taylor’s neck, and asked Nathan “like that?”;Nathan is said to have responded yes and began to cry. T. 1810. Finally, Detective Martin asked Nathan “who put the yellow thing around mommy?”; Nathan is said to have responded Daddy. T. 1811.

Defense counsel objected to Detective Martin’s testimony about Nathan’s responses to Detective Martin’s questions. T. 1797. This objection renewed the standing objections made during the testimony of Deputy Singleton concerning any of Nathan’s statements. T. 1715, 1721. The court overruled the renewed objection, explicitly relying on its earlier ruling that Nathan’s statements were excited utterances. T. 1721, 1797-98. At the conclusion of Detective Martin’s testimony, defense counsel moved for a mistrial, citing the prejudice resulting from the erroneous admission of Nathan’s hearsay statements. T. 1839-40. The court summarily overruled the motion. T. 1840. (See also *State v. Siler II*, 164 Ohio App. 3d 680, 2005 Ohio 6591, ¶¶ 13-49 for the Court of Appeals rendition of the facts.).

Forensic pathologist Dawn McCollom testified for the State as to cause of death, opining that Mrs. Siler died of cervical compression, inconsistent with hanging. Dr. John Pless, a former county coroner and a professor of pathology at Indiana University’s medical school, testified that Mrs. Siler had hung herself.

APPELLEE’S PROPOSITION OF LAW

Hearsay statements are testimonial, and thus cannot be introduced at trial without violating the Confrontation Clause, when objective consideration of the circumstances surrounding police questioning results in a conclusion that there was no emergency at the time of the questioning, and that the primary purpose of the interrogation is to further the investigation of a suspected criminal offense.

“Where testimonial evidence is at issue, *** the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” *Crawford v. Washington* (2004), 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177. While the Supreme Court left for “another day any effort to spell out a comprehensive definition of ‘testimonial,’ ... it applies at a minimum to ... police interrogations.” *Id.*

Last year, the United States Supreme Court explored the boundary between police interrogations that result in testimonial statements and those interrogations that produce nontestimonial statements. *Davis v. Washington* (2006), 547 U.S. ___, 126 S. Ct. 2266, 165 L.Ed.2d 224. The United States Supreme Court concluded:

Statements are nontestimonial when made in the court 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 there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to the criminal prosecution.

Davis, 126 S.Ct at 2273-74. Thus, police interrogation “solely directed at establishing facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator” fall squarely within the class of testimonial hearsay subject to the Confrontation Clause. *Davis*, 126 S.Ct. at 2276.

The United State Supreme Court further elaborated on the objective criteria that enable a court to determine whether a statement is testimonial. Objective criteria include but are not limited to:

- 1) whether the interrogation is directed at establishing the facts of a past crime to identify or provide evidence to convict the perpetrator;
- 2) whether an emergency is in progress;
- 3) whether the interrogation seeks to ascertain “what happened,” rather than “what is happening.”

Davis 126 S. Ct. at 2276-2277. Other courts have expounded on the criteria, adding:

- 1) whether the express purpose of the questioning is to further police investigation; *Oregon v. Pitt* (November 15, 2006), 209 Ore. App. 270, 277-279;
- 2) whether the interviewer is explicitly attempting to solicit information; *id*;
- 3) whether the purpose of the interrogation is to “establish or prove past events potentially relevant to later criminal prosecutions; *id*;
- 4) whether the interrogation is structured. *Id*.

See also *Michigan v. Walker*, (November 11, 2006), Mich. App. LEXIS 3418, *7,8 (statement is testimonial if purpose of questioning is to establish past facts, there is no continuing danger, and a crime is being investigated); *Raile v. Colorado*, 2006 Colorado LEXIS 968 (statement is testimonial if there was no ongoing emergency, officers had control of scene, no threats were being made to declarant when statement made, circumstances not frantic or unstable, primary purpose of questioning was to investigate past events, statements at issue were made in response to police questioning about how past criminal acts began and progressed.)

Application of Objective Criteria Establishes that Nathan’s Statements are Testimonial

Even without the benefit of *Davis v. Washington*’s clear guidance, the appellate court properly applied *Crawford v. Washington* when it determined that Mr. Siler’s Confrontation Clause rights had been violated and that retrial was required. Any result other than retrial and exclusion of the child’s statements would be contrary to *Davis* and *Crawford*.

As recounted by the appellate court in *Siler I*, Detective Martin’s questioning of Nathan lasted between one hour and thirty minutes and one hour and forty-five minutes. *State v. Siler*, 2003 Ohio 5749, ¶ 53; T. 1824-25. Twenty minutes after Deputy Singleton arrived and found Mrs. Siler, Detective Martin arrived at the scene. By that time, Deputy Singleton and Captain Richert had secured the scene and ensured the safety of people present. T. 1762-1763. Already

several law enforcement personnel were on site conducting the investigation and taking photographs. T. 1698-1701, 1731-32.

Detective Martin's primary function when questioning Nathan was to investigate, not to secure the scene. T. 1799-1801. When Detective Martin arrived, he was briefed by Captain Richert. Detective Martin then viewed and photographed the scene. T. 1794, 1796. Critically, Detective Martin started questioning Nathan approximately 20 minutes after he arrived at the scene, which in turn was well after police first arrived on the scene.

The distinction between investigation and security has been determined to be a critical factor in *Davis*. "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. *Davis*, 126 S.Ct. at 2273. In contrast, statements taken by officers whose primary function is to investigate, a responsibility formerly charged to the common-law English magistrates discussed in *Crawford*, 541 U.S. at 51-53, are testimonial for Confrontation-Clause purposes. *Id.* See, e.g., *Commonwealth v. Galicia* (November 30, 2006), 447 Mass. 737, 745-746 (statements to police officers who responded to scene were testimonial because there was no ongoing emergency).

The scene had already been secured by other officers before Detective Martin arrived; thus there was no ongoing emergency. Nathan's statement was the end-product of structured questioning by Detective Martin, and thus falls squarely under the description of which statements are considered testimonial in *Crawford* and *Davis*. Detective Martin was trying to extract information from Nathan to be used in the investigation of Barbara Siler's death and any subsequent criminal proceedings, as is made clear by questions put to Detective Martin by the State during his direct examination. Detective Martin was asked what training he had had "on

how to interview children as a law enforcement officer.” T. 1792. He was asked what techniques he used “to facilitate a conversation with a child to make it easier for a child.” T. 1799. Detective Martin’s questioning was the type of interrogation that *Crawford* and *Davis* found to trigger the protections of the Confrontation Clause.

Detective Martin’s questioning was structured and express. This conclusion is supported by Detective Martin’s testimony concerning:

- 1) why he questioned Nathan;
- 2) the techniques he used to facilitate his interrogation, including the use of props (badges and teddy bears);
- 3) the number and types of questions Detective Martin asked Nathan; and
- 4) the demonstrations Detective Martin performed for Nathan with the assistance of an investigator employed by children’s services when the props and other techniques failed to achieve the desired results.

T. 1791-1839. The systematic nature of the questioning was emphasized when the prosecutor asked Detective Martin what specific training he had with respect to questioning young children. Specific training is not needed to ask casual, preliminary questions of a witness.

A Young Child’s Statements in Response to Police Questioning Are Assessed Using the Same Test and Objective Criteria as All Other Statements

The State wrongly suggests that a young child’s statements in response to police questioning should be deemed reliable because children have no awareness that their words may be used in a court proceeding. This is an amorphous notion of reliability that is fundamentally at odds with the right of confrontation. *Crawford*, 541 U.S. at 61. Again, the State misses the point of *Crawford*: reliability must “be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.*

The brief of the American Prosecutors Research Institute (“APRI”) takes the unsupported position that children of tender years cannot be deemed “witnesses” for Confrontation Clause purposes due to their inability to comprehend that their statements might be used in a court of law. While APRI’s brief cites numerous cases, none is a post-*Davis* case involving extended interrogation of a witness by a police detective. Without legal support, amicus curiae is urging this Court to adopt a novel approach that would circumvent the clear holdings of *Crawford* and *Davis*.

The objective approach called for in *Davis* does not allow for consideration of whether the hearsay declarant is old or young when determining whether a statement is testimonial. The *Davis* formulation is concerned with objective circumstances, not subjective beliefs of the declarant, to determine when police interrogation has produced testimonial statements. *Davis*, 126 S.Ct. at 2273-74 (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.”) Had the United States Supreme Court meant for there to be exceptions to this analysis, it could easily have so noted.

In addition to lacking a legal foundation, the position of the APRI is fundamentally at odds with *Crawford* and *Davis*. Introduction of testimonial evidence produced by police interrogation that does not undergo the rigors of cross-examination was precisely the evil that the Confrontation Clause was intended to combat. Creating the new rule proposed by Amicus Curiae and the State would eviscerate the vital constitutional protections recognized and safeguarded by those two recent landmark cases, *Crawford* and *Davis*. “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because

a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.” *Crawford*, 541 U.S. at 62.

The State and Amicus Curiae argue that this Court should develop a new test to determine if a statement is testimonial – the “perception of the declarant” test or a “reasonable child” test. These “new tests” eschew the *Davis* formulation and lack merit. Recently, this same argument as applied to young children was made and rejected in *Idaho v. Hooper* (August 11, 2006), 2006 Ida. App. LEXIS 83, *17. The *Hooper* court observed that the argument that young children’s statements are not testimonial because they cannot understand these statements would be used at trial has been “discredited by *Davis*.” The court noted that “*Davis* focuses not at all on the expectations of the declarant but on the content of the statement, the circumstances under which it was made, and the interrogator’s purpose in asking questions.” *Id.*

The flaws in the State’s and Amicus Curiae’s arguments are easily identified because they urge this Court to ignore the “primary purpose” test articulated in *Davis*. Instead, they ask this Court to evaluate the subjective intent of the declarant. However, neither *Crawford* nor *Davis* applies a “declarant’s subjective state-of-mind” test to statements that are a result of police interrogation; and neither the State nor amicus can articulate any legal support for their position that post-dates *Davis*.

Particularly instructive, and arguably dispositive of the State’s claim regarding a youthful utterance exception to *Crawford* and *Davis*, is Justice Scalia’s discussion of an English case relied upon by the petitioner in *Davis*, namely *King v. Brasier* (1779), 1 Leach 199, 168 Eng. Rep. 202. In that case, the child victim was said to have told her mother, immediately upon returning home, a recounting of what had happened to her. *Davis*, 126 S.Ct. at 2277. Even though the declarant made her statement at the earliest reasonable opportunity after the incident,

Justice Scalia wrote that the case would only have been helpful to Davis “if the relevant statement had been the girl’s screams for aid as she was being chased by her assailant.” *Id.* The United States Supreme Court found no exception for the youth of the child in *Brasier*. Indeed, such an exception would be contrary to *Crawford* and *Davis*. Nonetheless, Nathan’s statements here were the product of extended, after-the-fact police questioning, and thus were far from “screams for aid” that the United States Supreme Court would require before admission under *Davis*.

Despite the United States Supreme Court’s clear command, the State attempts to obfuscate the issue by ignoring one of *Crawford*’s central conclusions, which is that statements which are the product of police interrogations designed to elicit information about past events are testimonial. Ironically, the State fails to mention that the United States Supreme Court repeatedly emphasized the use of absent witness’ statements that are products of police interrogation without confrontation is one of the primary evils the Sixth Amendment guards against. “In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.” *Crawford*, 541 U.S. at 53. Or, as stated earlier in *Crawford*, “[r]egardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing. Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England.” *Id.*, at 52. Thus, the only question to be answered here, vis-à-vis *Crawford* and *Davis*, is whether structured police questioning that lasts over 90 minutes can properly be considered something other than an interrogation. *Crawford* and *Davis* answer that question with a resounding no.

Subsequent to *Davis*, courts around the country have emphasized the objective nature of the *Davis* inquiry. See *Commonwealth v. Galicia* (November 30, 2006), 447 Mass. 737. Virtually all cases cited by the State and Amicus Curiae pre-date *Davis*, and the two cases amicus cites that post-date *Davis* fail to apply *Davis* in their reasoning. Therefore, they offer little, if anything, to this Court's resolution of Mr. Siler's case. For example, a decision post-dating *Davis* is *State v. Krasky* (Minn. App. Ct., October 3, 2006) 721 N.W. 2d 916, review granted on December 20, 2006 in *State v. Krasky*, 2006 Minn. LEXIS 9011. On remand from the Minnesota supreme court, the Minnesota appellate court noted the questionable validity of *State v. Bobadilla* (Minn. Sup. Ct., 2006), 709 N.W. 2d 243 and *State v. Scacchetti* (Minn. S.Ct., 2006), 711 N.W.2d 508, cases relied on by amicus, in light of the United States Supreme Court's decision in *Davis* and its subsequent remand of *State v. Wright* (Minn. S.Ct., 2005), 701 N.W.2d 802, remanded, 126 S.Ct. 2979 (June 30, 2006), the case upon which *Bobadilla* and *Scacchetti* were based.

Likewise, the age difference between Amy Hammon in *Davis* and Nathan here is of no constitutional significance. Yet the State would have this Court use a test other than *Davis* because an adult was not the hearsay declarant. Nothing in *Davis* or *Crawford*, either explicitly or implicitly, tolerates such a result. Objective circumstances determine whether a statement is testimonial, not subjective state-of-minds. The subjective state-of-mind of the declarant should never be the controlling consideration when determining whether there has been a Confrontation Clause violation. See *In re E.H.* (2005), 355 Ill.App.3d 564, 823 N.E. 2d 1029, 1037 (“[I]t is our opinion that the declarant’s state of mind is hardly a consideration when determining whether there has been a confrontation violation. If that were the case, the right of the accused to

confrontation would be contingent upon the state of mind of the declarant. The State’s argument is incompatible with the holding in *Crawford* and the confrontation clause.”)

The holding in *Davis* could not have been more clear: statements made under circumstances that “objectively indicate” that the “primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution” must not be presented to the jury by the prosecution. *Davis*, 126 S.Ct. at 2273. Because Detective Martin was attempting to “establish or prove past events,” Nathan’s hearsay statements were testimonial and admitted in violation of the Confrontation Clause.

A Statement Deemed an Excited Utterance can also be Testimonial

Consistent with the appellate court decisions, the State characterizes Nathan’s statements—the products of over 90 minutes of questioning by a detective—as “excited utterances.” But just as Justice Scalia stated in *Davis* that the prosecution’s “saying that an emergency exists cannot make it be so,” here the State’s and appellate court’s characterization of Nathan’s statements as excited utterances does not make the Confrontation Clause violation go away. If a statement is testimonial by virtue of its being a product of police interrogation, it is irrelevant whether it could be deemed to be an excited utterance. Indeed, the Supreme Court noted that “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.” *Crawford*, 541 U.S. at 56, fn. 7.

To determine if the statement is testimonial, analysis must focus on the “content of the statement, the circumstances under which it was made, and the interrogator’s purpose in asking questions,” not on the “expectations of the declarant.” *Idaho v. Hooper*, 2006 Ida. App. LEXIS 83, *18.

Certainly a statement can be testimonial and have the characteristics of an excited utterance.¹ This conclusion has been reached by courts before and after *Davis*. For example, both *Lopez v. State* (Fla. Ct. App. 2004), 888 So. 2d 693, and *Stancil v. United States* (D.C. Ct. App. 2005), 866 A.2d 799, expressly rejected the conclusion that an excited utterance cannot be a testimonial statement. As stated in *Stancil*,

“[s]ome excited utterances are testimonial, and others are not, depending upon the circumstances in which the particular statement was made. Especially in light of the apparent expansion in recent years of the kinds of statements which fall under the rubric of the hearsay exception for excited utterances, we conclude that such utterances cannot automatically be excluded from the strictures of *Crawford*.”

Stancil, 866 A.2d at 809. Here, for all the reasons stated earlier, Nathan’s statements are testimonial. Whether any court characterizes Nathan’s statements as excited utterances is moot, because *Crawford* forbids their use at trial precisely because of their testimonial nature. Just as there is no “youth of the declarant” exception, there is no expansive excited utterance exception to the Confrontation Clause required by the Sixth Amendment as announced in *Crawford*.²

Again, the United States Supreme Court calls for an objective view of the encounter between the declarant and the interrogator. Here, objectively, Deputy Singleton testified that

¹ The Court of Appeals has determined that Nathan’s statements were excited utterances. Mr. Siler respectfully continues to assert the position taken in his original appeal—that the circumstances surrounding his statements were such that the statements did not bear the indicia of an excited utterance.

² *Crawford* observed that *White v. Illinois* (1992), 502 U.S. 346 is “arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial, ... which involved, *inter alia*, statements of a child victim to an investigating police officer admitted in spontaneous declarations. [Emphasis added, cite omitted]. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791 In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. [Cite omitted]. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. We [took] as a given .. that the testimony properly falls within the relevant hearsay exceptions.” [Emphasis sic, cite omitted]. *Crawford*, 541 U.S. at 58, fn 8.

Nathan's initial response was that his father was not at the house the night before. Detective Martin then testified about his interview with Nathan. He noted that while Nathan had the usual amount of physical energy one might expect of a three-year-old, he was not nervous or anxious or upset until the end of the questioning, when Detective Martin asked questions that forced Nathan to picture his mother hanging in the garage.

State v. Stahl Does Not Address Statements Made by a Declarant Pursuant to Police Questioning

The State also attempts to use one of this Court's two *Crawford*-related decisions to date, *State v. Stahl*, to argue for reversal of the appeals court's decision. But that case does nothing but support Mr. Siler's position. The only statement that was at issue in *Stahl* was the statement made to a DOVE unit nurse, and not in response to police questioning. *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, ¶ 10. The statements made by the *Stahl* declarant to a police officer were excluded as being testimonial. *State v. Stahl*, Summit App. No. 22261, 2005-Ohio-1137, ¶ 12. Here, Nathan's statement was made to a police detective and was the product of police interrogation, and thus was of the type that was excluded in *Stahl* and never at issue there. The following language from *Stahl* demonstrates that it is inapposite to the instant case.

{¶ 18} In sharp contrast with the prosecution in *Crawford*, the state in the instant case seeks to introduce a statement made by a victim to a *medical professional* during an emergency-room examination identifying a person who allegedly raped her. Though made in the presence of a police officer, the identification elicited during the medical examination came to a medical professional in the ordinary course of conducting a medical examination, and no *Miranda* warnings preceded its delivery. Unlike *Crawford*, this case does not involve police interrogation. The court in *Crawford* concluded that the term "testimonial statement" applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68, 124 S.Ct. 1354, 158 L.Ed.2d 177. Mazurek's statements to Markowitz do not fall within any of these specific examples, and we decline to expand that list to include statements made to a medical professional for purposes of receiving medical treatment or diagnosis.

Id., at ¶ 18. Further, *Stahl* acknowledges the focus in *Davis* on police interrogation, viewed objectively, not subjectively, with an emphasis on the primary purpose of the interrogation.

{¶ 22} The United States Supreme Court has provided additional guidance regarding testimonial statements in two recent companion cases dealing with the excited-utterance exception to the hearsay rule, *Davis v. Washington* and *Hammon v. Indiana* (2006), ___ U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224. Both cases instruct that a court should view statements *objectively* when determining whether they implicate Confrontation Clause protection pursuant to *Crawford*.

{¶ 23} In *Davis*, the court held that a 911 telephone call made to seek protection from immediate danger did not constitute a testimonial statement for Sixth Amendment purposes. In contrast, the court in *Hammon* held as testimonial a victim's statement to a police officer after the officer arrived at the home in response to a report of domestic disturbance. In its analysis, the court explained 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." (Emphasis added.) ___ U.S. ___, 126 S.Ct. at 2273, 165 L.Ed.2d 224. Conversely, the court stated, statements "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." (Emphasis added.) Id., at ___, 126 S.Ct. at 2273-2274, 165 L.Ed.2d 224. With respect to *Davis*, the court reasoned that "the nature of what was asked and answered [during the 911 call] * * *, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." (Emphasis sic.) Id. at ___, 126 S.Ct. at 2276, 165 L.Ed.2d 224. Moreover, the call "was plainly a call for help against bona fide physical threat" and involved "frantic answers" given "in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." Id. at ___, 126 S.Ct. at 2276, 2277, 165 L.Ed.2d 224.

{¶ 24} Unlike the officers in *Davis*, the interrogating police officer in *Hammon* elicited the victim's statements at the scene *following* the alleged crime. At the time of the interrogation, any emergency had ceased, and "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime — which is, of course, precisely what the officer *should* have done." (Emphasis sic.) Id. at ___, 126 S.Ct. at 2278, 165 L.Ed.2d 224. The Court also noted the similarity between *Crawford* and *Hammon*, stating, "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct * * * ." Id.

{¶ 25} *Davis* and *Hammon* are factually distinguishable from this case. They involve statements made to law-enforcement officers, while the statement at issue here covers one made to a medical professional at a medical facility for the *primary* purpose of receiving proper medical treatment and not investigating past

events related to criminal prosecution. It is true that the DOVE unit gathers forensic evidence for potential criminal prosecution, but its primary purpose is to render medical attention to its patients. Furthermore, the definition of “testimonial” in *Davis* and *Hammon* involves the excited-utterance exception to the hearsay evidence rule as well as other statements made during – and in response to – an emergency, and we are not confronted with a claim of excited utterance in this case.

Id., at ¶¶ 22-25. Detective Martin’s purpose in interrogating Nathan Siler for over 90 minutes was to investigate a possible homicide. Thus, applying the objective test set forth in *Davis*, the statement he obtained from Nathan was testimonial and could not be presented to a jury without violating the Confrontation Clause.

Additionally, two particular assertions made by the State in its merit brief cannot be allowed to stand without comment and brief analysis. First, without a citation to a particular page in the Court’s opinion, the State asserts that the *Davis* Court “quickly found that the adults in question understood that their statements could be used in court and moved on to the second step of deciding the primary purpose of the police officer.” State’s Brief, at p. 7. Nothing in *Davis* supports the assertion that the Court found, or even assumed, that the declarants were aware that their statements could be used in court. That was never even a consideration of the Court—the *only* analysis was regarding the circumstances of the interrogation and the primary purpose of the interrogator. No “first step” established that either declarant in *Davis* “understood” that her statement could be used in court. To suggest otherwise is highly misleading.

The second erroneous assertion is that the appellate court “held that Nathan’s statements were testimonial *solely* because the statements were made to a police officer.” State’s Brief, p. 16 (emphasis added). Exactly to the contrary, the appeals court explicitly stated that Nathan’s statement was the product of “a structured police interrogation as envisioned in *Crawford* and

therefore constituted testimonial evidence.” *State v. Siler II*, 164 Ohio App.3d 680, 2005-Ohio-6591, ¶ 49.

The State elsewhere in its brief argues a “fallback” position, that even if the portion of Nathan’s statements after he returns from lunch at Wendy’s must be excluded, the statements before that time were somehow nontestimonial. No objective circumstances support that distinction. Objectively viewed, Detective Martin’s interrogation had one purpose, which was to obtain information from Nathan regarding possible past criminal conduct. That purpose did not come about only after Nathan ate, nor is there any way to argue that the circumstances surrounding the questioning, viewed objectively, changed after lunch. This is not a situation that could fairly be characterized as “an interrogation to determine the need for emergency assistance” that can be said to “evolve into testimonial statements.” *Davis*, 126 S.Ct. at 2277. Nothing in *Davis* suggests that Nathan’s pre-meal statements are any more admissible than his post-meal statements.

The Admission of These Statements Was Not Harmless

Because Nathan’s statements were admitted in violation of *Crawford*, the judgment of conviction must be reversed unless this Court “is able to declare a belief that the error was harmless beyond a reasonable doubt.” *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. Several factors inform a court’s analysis to determine if a Confrontation Clause violation is harmless. *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674. These factors include, but are not limited to: “(1) the importance of the testimony in the prosecution’s case; (2) whether the testimony was cumulative; (3) the presence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of

cross-examination otherwise permitted, and (5) the overall strength of the prosecutor's case.”

Madrigal v. Bagley (6th Cir. 2005), 413 F.3d 548, 551.

The Court of Appeals applied the proper analysis when it concluded that the admission of Nathan's statements was not harmless beyond a reasonable doubt. *Siler II*, ¶¶ 49-50. Indeed, the trial court left no doubt as to the impact of Nathan's statements on the jury, stating: “*** [Y]oung Nathan's words through the testimony of an officer have convicted his father.” T. 3298.

The importance of the testimony is evident -- the improper admission of statements by the sole individual purported to be an eyewitness to what transpired at Mrs. Siler's house on the night of September 19, 2001 was not harmless error. The testimony was not cumulative. No other evidence suggested the presence of Mr. Siler at Barb Siler's house on the night of her death. No forensic evidence was found under Mrs. Siler's fingernails or otherwise on her body to link Mr. Siler to her death. No other eyewitness claimed to have seen Mr. Siler choke Mrs. Siler and hang her body from the garage door track. The other evidence adduced by the State tended to show merely that Mr. Siler could be a violent person, and that he was deeply upset by the failure of his marriage. The trial court affirmatively stated on the record that Nathan's statement led directly to Siler's conviction. The impact of Nathan's statement on the trial far exceeded the “might have contributed to the conviction” standard. The admission of Nathan's hearsay statement was not harmless error.

CONCLUSION

The Ashland County Court of Appeals properly analyzed the Confrontation Clause error pursuant to *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. On June 19, 2006, the United States Supreme Court issued *Davis v. Washington* (2006), 547 U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224, which further clarified “interrogation” for purposes of the

Sixth Amendment's Confrontation Clause. Based on *Davis v. Washington*, the only conclusion this Court could reach is that the child's statements at issue are testimonial and barred under *Crawford* and the Confrontation Clause:

[Statements] 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.

Davis, 126 S.Ct. at 2273-74.

Here, no ongoing emergency existed. The primary purpose of the interrogation was to prove past events. Therefore, before the State could have admitted the child's statements against Mr. Siler, unavailability and prior cross-examination were necessary requirements. Because *Davis* answers all remaining questions for this case consistent with the Court of Appeals decision, Nathan's testimonial hearsay statements were improperly admitted. Mr. Siler was deprived of his right to confront the witnesses against him, as guaranteed by the Sixth and Fourteenth Amendments. Such improper admission was not harmless beyond a reasonable doubt.

Mr. Siler's convictions must be reversed, and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Merit Brief of Appellee Brian Siler was forwarded by regular U.S. Mail, postage prepaid to the office of Ramona F. Rogers, Ashland County Prosecuting Attorney, 307 Orange Street, Ashland, Ohio 44805 this 18th day of January, 2007.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2006-0185
Plaintiff-Appellant,	:	
	:	On Appeal from the Ashland
v.	:	County Court of Appeals
	:	Fifth Appellate District
BRIAN K. SILER,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 02 COA 028

**APPENDIX TO
MERIT BRIEF OF APPELLEE BRIAN SILER**

LEXSEE 2006 IDA. APP. LEXIS 83

STATE OF IDAHO, Plaintiff-Respondent, v. DARREN B. HOOPER, Defendant-Appellant.

Docket No. 31025, 2006 Opinion No. 55

COURT OF APPEALS OF IDAHO

2006 *Ida. App. LEXIS 83*

August 11, 2006, Filed

NOTICE: [*1] PURSUANT TO RULE 118 OF THE IDAHO APPELLATE RULES, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE 21 DAY PETITION FOR REHEARING PERIOD.

PRIOR HISTORY: Appeal from the District Court of the Third Judicial District, State of Idaho, Payette County. Hon. Stephen W. Drescher, District Judge.

DISPOSITION: Judgment of conviction for lewd conduct with a minor child under sixteen, vacated, and case remanded.

COUNSEL: Molly J. Huskey, State Appellate Public Defender; Paula M. Swensen, Deputy Appellate Public Defender, Boise, for appellant. Paula M. Swensen argued.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cude, Deputy Attorney General, Boise, for respondent. Rebekah A. Cude argued.

JUDGES: LANSING, Judge. Judge GUTIERREZ and Judge Pro Tem WALTERS CONCUR.

OPINION BY: LANSING

OPINION: LANSING, Judge

Darren B. Hooper appeals his conviction for lewd conduct with a minor. His primary argument is that the *Confrontation Clause* was violated when the district court admitted a videotaped interview of the child victim after the court found that the child was unable to testify at trial. Applying the United States Supreme Court's analysis in recent decisions interpreting the *Confrontation Clause*, we hold that admission of [*2] the videotape was error, and we therefore vacate the conviction and remand for further proceedings.

I.

FACTUAL & PROCEDURAL BACKGROUND

Hooper was convicted of lewd conduct with a minor under the age of sixteen, *Idaho Code* § 18-1508, for anal/genital contact with his daughter, six-year-old A.H. Shortly after the alleged molestation, A.H. told her mother of it, and her mother called the police. A responding officer conducted an initial investigation and arranged for A.H. and her mother to go to a Sexual Trauma Abuse Response (STAR) Center for an examination and further interview.

At the STAR Center, a doctor conducted a physical examination, which yielded some physical evidence. A nurse then conducted an interview with A.H., which was videotaped, while a police officer watched from another room. During that interview, A.H. described the details of the alleged molestation. At trial, the State attempted to call A.H. as a witness, but she was too frightened to take the oath or testify. Over Hooper's objection, the trial court admitted the videotaped interview in lieu of her live testimony.

II.

ANALYSIS

A. The *Confrontation Clause* [*3]

Hooper asserts that admission of the videotape of A.H.'s STAR Center interview violated his right to confront adverse witnesses under the *Sixth Amendment's Confrontation Clause*. n1 This is a question of law over which we exercise free review. *Doe v. State*, 133 Idaho 811, 813, 992 P.2d 1211, 1213 (Ct. App. 1999); *State v. Guerrero*, 130 Idaho 311, 312, 940 P.2d 419, 420 (Ct. App. 1997).

n1 Hooper has argued on appeal that his right of confrontation was also violated by the introduction of a police officer's testimony about A.H.'s affirmative nod in response to a question about the alleged molestation. Because there was no objection to this testimony at trial, however, the issue was not preserved for appeal and we therefore do not address it.

The United States Supreme Court's recent decision in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) marked a significant shift in *Confrontation Clause* jurisprudence. n2 It held that the *Confrontation Clause* [*4] precludes admission at trial of a witness's out-of-court "testimonial" statements unless the accused had an opportunity to cross-examine the witness when the statement was made and the witness is unavailable to testify at trial. *Id.* at 53-54. Before *Crawford*, the *Clause* had been interpreted to allow admission of an unavailable witness's out-of-court statement if it was accompanied by adequate indicia of reliability--that is, if it fell within a firmly rooted hearsay exception or possessed other particularized guarantees of trustworthiness. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). The *Crawford* Court rejected the *Roberts* analysis as incompatible with the framers' vision and intent. *Crawford*, 541 U.S. at 59-68. After tracing the historical underpinnings of the right to confrontation, the Court said:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the *Clause's* ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that [*5] reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *The Clause* thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Id. at 61.

n2 The *Crawford* decision was issued a month after Hooper's trial. Nevertheless, we must apply the *Crawford* decision on this appeal be-

cause when the United States Supreme Court applies a rule of federal law to the parties before it, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). See also *State v. Odiaga*, 125 Idaho 384, 387-88, 871 P.2d 801, 804-05 (1994).

Since *Crawford*, the threshold question in *Confrontation Clause* analysis is whether the out-of-court statement was "testimonial." [*6] " *Crawford* tells us that testimonial hearsay encompasses more than just prior in-court testimony. The Court did not offer a comprehensive definition of testimonial hearsay, but held that statements made in response to police interrogations "qualify under any definition." *Id.* at 52.

Very recently, in *Davis v. Washington*, U.S. , 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), and a companion case, *Hammon v. Indiana*, which was consolidated with *Davis*, the Supreme Court built upon the *Crawford* analysis and addressed more precisely the type of police interrogations that produce "testimonial" hearsay. n3 The Court held in *Davis* that a domestic violence victim's 911 call for help and her responses to the emergency operator's questions were nontestimonial, whereas in *Hammon*, a police interview of the victim conducted at her home when police responded to a report of a domestic disturbance did produce testimonial statements subject to the *Confrontation Clause*. The Court differentiated the hearsay in *Davis* from that in *Crawford* and *Hammon* by distinguishing between law enforcement officers' dual roles as [*7] emergency responders and as criminal investigators:

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.

Id. at , 126 S. Ct. at 2273-74. Thus, statements to police are nontestimonial, the Court said, when a reason-

able listener would recognize that the declarant is facing an ongoing emergency and making a call for help against a bona fide physical threat. *Id.* at , 126 S. Ct. at 2276. Such dialogues are not conducted primarily to establish some past fact, but to ascertain present circumstances requiring police assistance, and the interrogation and responses are necessary to resolve the emergency. *Id.* at , 126 S. Ct. at 2269, 2276. In this emergency context, [*8] the Court said, the declarant is not acting as a witness and is not *testifying*, and what the declarant says is not "' a weaker substitute for live testimony' at trial." *Id.* at , 126 S. Ct. at 2277 (quoting *United States v. Inadi*, 475 U.S. 387, 394, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986)).

n3 *Davis* also answered a question that *Crawford* left open--whether the *Confrontation Clause* still bars nontestimonial statements if they do not satisfy the "indicia of reliability" test of *Roberts*, 448 U.S. at 66. See *Crawford*, 541 U.S. at 61. Out of caution, in *State v. Doe*, 140 Idaho 873, 103 P. 3d 967 (Ct. App. 2004), we assumed that nontestimonial statements still implicated the *Confrontation Clause*, and we applied the *Roberts* standard to statements that were clearly not testimonial. The *Doe* assumption is no longer appropriate, however, for in *Davis*, the Supreme Court has held that *only* testimonial hearsay is subject to the *Confrontation Clause*, stating, "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the *Confrontation Clause*." *Davis*, U.S. at , 126 S. Ct. at 2273. The Court also stated, "' The text of the *Confrontation Clause* reflects this focus [on testimonial hearsay]. '... A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter.'" *Id.* at , 126 S. Ct. at 2274 (internal citations omitted). Consequently, after finding that the statement in *Davis* was nontestimonial, the Court did not go on to conduct a *Roberts* analysis.

[*9]

Investigative interrogations on the other hand, are directed at establishing the facts of a past crime in order to identify, or provide evidence against, the perpetrator. *Davis*, U.S. at , 126 S. Ct. at 2276. The product of an investigative interrogation is testimonial in that it is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* The witness typically will be describing past events in response to

questioning designed to elicit what had happened in the past. In the investigative interrogations at issue in *Davis*, the Court said, "the *ex parte* actors and the evidentiary products of the *ex parte* communication aligned perfectly with their courtroom analogues." *Id.* at , 126 S. Ct. at 2277.

Davis also indicates that some level of "formality" is a factor in characterizing a statement as "testimonial." *Id.* at , 126 S. Ct. at 2277-78. Contrasting the level of formality between the victim's statements in *Davis* and the statement given to police interrogators in *Crawford*, the Court noted that the *Davis* victim gave frantic answers [*10] over the telephone in an environment that was not tranquil or even safe, whereas the witness in *Crawford* was responding calmly, at a police station house, to a series of questions while the officer-interrogator taped and made notes of her answers. The statement given to an officer in *Hammon*, the Court determined, possessed sufficient formality to be deemed testimonial. Although the station house setting, tape recording, and *Miranda* warnings n4 that contributed to the formality in *Crawford* were absent in *Hammon*, it was "formal enough" that the interrogation of the *Hammon* victim was conducted in a separate room, away from the perpetrator, with the officer receiving her replies for use in his investigation. *Id.* at , 126 S. Ct. at 2278. n5 Statements elicited during official investigation generally are not made under oath, but they are imbued with solemnity and formality, the Court said, because deliberately lying to an officer would be a criminal offense subject to severe consequences. *Id.* at , 126 S. Ct. at 2276, 2278 n. 5. The Court deemed these statements an "obvious substitute for live testimony, because they do precisely [*11] what a witness does on direct examination; they are inherently testimonial." *Id.* at , 126 S. Ct. at 2278 (emphasis in original).

n4 See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

n5 Even formal interrogation may not be a prerequisite, for the Court disclaimed any implication that statements made in the absence of interrogation are necessarily nontestimonial, noting that the framers of the Constitution "were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation." *Davis*, U.S. at n. 1, 126 S. Ct. at 2274 n. 1.

Turning to the case before us, it cannot be seriously disputed that the interview of A.H. by the STAR nurse

bears far more similarity to the police interviews in *Crawford* and *Hammon* than to the 911 call at issue in *Davis*. A.H. gave her statement several hours after the alleged criminal [*12] event; it was not a plea for assistance in the face of an ongoing emergency, but a recitation of events that occurred earlier that day. A.H. was separated from the perpetrator in a safe, controlled environment and responded calmly to the questions. Although it would not have been a crime for A.H. to lie to the nurse, and the interview therefore lacked one of the formality components present in *Hammon* and *Crawford*, A.H.'s interview did have many trappings of formality, including structured questioning in a closed environment, supervision by a police officer, and recordation by videotape. Perhaps of greatest importance, the statement that A.H. gave was precisely the kind of statement that a witness would give on direct examination at trial. At the outset, the interviewer asked several preliminary questions to ensure that A.H. knew the difference between the truth and a lie, and asked A.H. to correct the interviewer if she said something inaccurate. These questions very much resemble the initial questions a prosecutor would ask when examining a child witness on the stand, and the substantive questioning that followed elicited the details of the crime and the identity of the perpetrator. [*13] A.H.'s statements in the interview "aligned perfectly with their courtroom analogues." *Id. at* , 126 S. Ct. at 2277.

There remains to be considered, however, one distinction between A.H.'s statements and those considered in *Crawford*, *Davis*, and *Hammon*: A.H. was interviewed not by a police officer but by a sexual abuse trauma nurse. Thus far, the only unsworn statements that the Supreme Court has branded as testimonial are statements made during interrogations by law enforcement officers; and the Court has noted that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse" *Crawford*, 541 U.S. at 56 n. 7 (emphasis added). *Davis* suggests, however, that statements made to persons other than law enforcement officers can be testimonial. In *Davis*, the Court assumed, without deciding, that the 911 operator was an agent of law enforcement. Because the statement was nontestimonial in character, regardless of who received it, it was unnecessary for the Court to decide whether statements made to someone other than law enforcement personnel may [*14] be testimonial. *Davis*, U.S. at n. 2, 126 S. Ct. at 2274 n. 2. Nevertheless, the Court also said, "If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers," *id.*, suggesting that statements may be testimonial if the interviewer is acting as an "agent" of the police.

In the present case, it is clear that the interviewer acted in concert with or at the behest of the police. The interviewing nurse described herself as a "forensic interviewer and sexual assault nurse examiner." n6 Police directed the victim's mother to take her to the STAR Center, and an officer watched the interview from another room. Toward the end of the interview, the nurse inquired of the officer whether all the questions that the officer desired had been asked, and then returned to the interview room with several additional queries, apparently at the officer's instruction. In addition, the nurse testified that the purpose of the questioning was in preparation for trial and that she knew the interview would be used in a subsequent criminal prosecution. There is no evidence [*15] that the interview had a diagnostic, therapeutic or medical purpose. The conclusion is inescapable that the nurse was acting in tandem with law enforcement officers to gain evidence of past events potentially to be used in a later criminal prosecution. *Accord*, *State v. Snowden*, 385 Md. 64, 867 A.2d 314, 326-27 (Md. 2005) (Sexual abuse investigator was performing her responsibilities at the behest of law enforcement, rendering the interview a functional equivalent of formal police questioning.); *State v. Mack*, 337 Ore. 586, 101 P. 3d 349, 352-53 (Or. 2004) (Caseworker who interviewed a child so that police officers could videotape the child's statement for use in a criminal proceeding was "serving as a proxy for the police."); *T.P. v. State*, 911 So. 2d 1117, 1123 (Ala. Crim. App. 2004) (Because the child's statements were the result of an interview conducted by a social worker and a police investigator as part of a criminal investigation, the interview was similar to a police interrogation.); *State v. Blue*, 2006 ND 134, 717 N.W.2d 558 (N. D. 2006) (Videotaped interview conducted by a forensic interviewer at [*16] a private child advocacy center while a police officer watched from a different room was testimonial, as the interviewer was either acting in concert with or as an agent of the government.); *In re Rolandis G.* 352 Ill. App. 3d 776, 817 N.E.2d 183, 188, 288 Ill. Dec. 58 (Ill. App. 2004) (Statements to a child advocacy worker were testimonial when they came in response to formal questioning, with a police officer watching through a two-way mirror.); *In re T. T.*, 815 N.E.2d 789, 801-803, 351 Ill. App. 3d 976, 287 Ill. Dec. 145 (Ill. App. 2004) (Where the social worker works at the behest of and in tandem with the State's Attorney with the intent and purpose of assisting in the prosecutorial effort, he is an agent of the prosecution, even in the absence of police officers.). Accordingly, we conclude that the statements given by A.H. during the STAR Center interview were testimonial.

n6 "Forensic" means "of, relating to or denoting the application of scientific methods and

techniques to the investigation of a crime" or "of or relating to courts of law." THE NEW OXFORD AMERICAN DICTIONARY 663 (2001).

[*17]

The State has urged us to hold that A.H.'s interview was not testimonial because a six-year-old child like A.H. would not have understood that her statements would be subject to later use at trial. The State's argument relies upon language from *Crawford* discussing, as testimonial, statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52. The State's argument draws some support from decisions rendered after *Crawford* but before *Davis*, where the courts extracted from *Crawford* a test inquiring whether an objectively reasonable person in the declarant's position--taking into account the declarant's age--would believe that the statement could be used later at a trial. See, e.g., *State v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005) (concluding that *Crawford* would require exclusion of statements only if surrounding circumstances would have led a three-year-old declarant to believe her disclosures would be available for use at trial); *State v. Brigman*, 171 N.C. App. 305, 615 S.E. 2d 21, 25-26 (N. C. Ct. App. 2005) [*18] (holding that five-year-old declarant was unlikely to understand the potential for his statements to be used prosecutorially). We conclude, however, that while these courts' analyses may have represented a reasonable interpretation of *Crawford*, they have been discredited by *Davis*, which focuses not at all on the expectations of the declarant but on the content of the statement, the circumstances under which it was made, and the interrogator's purpose in asking questions.

Adhering, as we must, to the Supreme Court's explanation of the *Confrontation Clause* in *Davis*, we hold that the district court erred in overruling Hooper's objection to the admission of the videotape of the STARS interview. Because A.H.'s responses during the interview bear the indicia of testimonial statements and were given in response to questions by an interrogator acting in tandem with police, we hold that the statements are testimonial hearsay. Their use in evidence against Hooper is therefore barred by the *Confrontation Clause* because Hooper had no opportunity to cross-examine A.H.

The State contends that even if admission of the videotaped interview was in error, the error does not require reversal [*19] of Hooper's conviction. Idaho Criminal Rule 52 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Therefore, a new trial is unnecessary if the error was harmless. *State v. Scovell*, 136 Idaho 587, 593, 38 P. 3d 625, 631 (Ct. App. 2001).

Even a constitutional error can be harmless if it was unimportant or insignificant in the circumstances of the particular case. *Chapman v. California*, 386 U.S. 18, 21-22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). "The test for harmless error ... is whether a reviewing court can find beyond a reasonable doubt that the jury would have reached the same result without the admission of the challenged evidence." *State v. Moore*, 131 Idaho 814, 821, 965 P.2d 174, 181 (1998); *State v. Slater*, 136 Idaho 293, 300, 32 P. 3d 685, 692 (Ct. App. 2001).

The error here cannot be deemed harmless. Although there was other evidence against Hooper, it was not overwhelming. There was physical evidence that A.H.'s anus was enlarged and had suffered some damage, but also evidence that this condition could have been attributable to a medical condition, [*20] constipation, or an accident. Hooper presented rebuttal evidence, including evidence suggesting that A.H.'s mother concocted the story against Hooper for a vengeful purpose, perhaps even hosting a celebratory party after Hooper was arrested. In the videotaped interview, A.H. articulately provided a detailed description of her experience, which Hooper could not meet through cross-examination. Under these circumstances, we cannot confidently conclude that if A.H.'s interview had been excluded, a guilty verdict would nevertheless have been rendered. Accordingly, a new trial must be granted.

The exclusion of videotaped interviews in these circumstances will undoubtedly make it more difficult to prosecute some offenses against children who are too young or frightened to testify in court. In *Davis*, the Supreme Court acknowledged a similar risk of hampering domestic violence prosecutions because the victims often refuse to testify against their abusers. Recognizing that when this occurs, the *Confrontation Clause* "gives the criminal a windfall," the Court nevertheless admonished that courts may not "vitiat[e] constitutional guarantees when they have the effect of allowing the guilty to [*21] go free." *Davis*, U.S. at , 126 S. Ct. at 2280. This is not to say, however, that the only permissible method of child testimony is a live, in-court presentation at trial. What is necessary is an opportunity for cross-examination. Trial courts may be able to formulate alternatives that accommodate a child's capabilities and fears while also protecting the accused's constitutional rights. In this case, however, because Hooper's *Confrontation Clause* rights were violated, his conviction cannot stand.

B. Other Issues

Hooper has raised two additional issues. First, he contends that the prosecutor made impermissible comments during closing argument, although he made no objection at the time. Because this issue was not preserved for appeal by timely objection in the trial court,

and because we are vacating the judgment of conviction for other reasons, we will not address this claim of prosecutorial misconduct.

Second, Hooper argues that the district court gave a jury instruction that impermissibly varied from the charging instrument in the description of the acts constituting the alleged offense, although he did not object to the instruction [*22] at trial. Because any alleged variance can be corrected should this case go to trial again, we do not address it here.

III.

CONCLUSION

Because Hooper's constitutional right to confront adverse witnesses was violated by the admission of the videotaped interview of A.H., the judgment of conviction is vacated and the case is remanded for further proceedings.

Judge GUTIERREZ and Judge Pro Tem WALTERS
CONCUR.

LEXSEE 2006 COLO. LEXIS 968



Positive
As of: Jan 14, 2007

Petitioner: RONNIE RAILE, v. Respondent: THE PEOPLE OF THE STATE OF COLORADO.

Case No. 05SC756

SUPREME COURT OF COLORADO

2006 Colo. LEXIS 968

November 20, 2006, Decided

NOTICE: [*1] THIS OPINION IS NOT THE FINAL VERSION AND SUBJECT TO REVISION UPON FINAL PUBLICATION

SUBSEQUENT HISTORY: Rehearing denied by *Raile v. People, 2006 Colo. LEXIS 989 (Colo., Dec. 18, 2006)*

PRIOR HISTORY: Certiorari to the Colorado Court of Appeals, Court of Appeals. Case No. 03CA1560. *People v. Raile, 2005 Colo. App. LEXIS 1462 (Colo. Ct. App., Sept. 8, 2005)*

DISPOSITION: JUDGMENT AFFIRMED.

HEADNOTES: *Sixth Amendment - Confrontation Clause - Testimonial Statements - Harmless Error.*

SYLLABUS: The Supreme Court reviewed the admissibility at trial of the hearsay statements of an unavailable witness, made during the course of an on-scene police investigation into a domestic disturbance. Applying the analysis used in the recent United States Supreme Court decision *Davis v. Washington*, the Court found the statements made by the unavailable witness were testimonial and therefore subject to the restrictions of the *Sixth Amendment's Confrontation Clause*.

Police were dispatched to a burglary in progress and first contacted the witness alone on the front porch. After securing the scene, the officer took a statement from the witness, who would later be unavailable to testify at trial. Examining the record, the Court determined that the officer's primary purpose for interrogating the witness was to

investigate past events that were potentially relevant to a later criminal prosecution. The Court held that there was no ongoing emergency at the time the statements were made because the [*2] officers had control of the situation, there was no threat to the declarant at the time the statements were made, and the statements were not made in a frantic or unstable situation. The Court held the statements were testimonial and their admission was error.

The Supreme Court then examined the effect of the admission of the statements on the trial and determined that the error was harmless beyond a reasonable doubt because there was no reasonable probability that the defendant could have been prejudiced by the admission of the statements. The court of appeals' decision was affirmed on other grounds.

COUNSEL: Douglas K. Wilson, Colorado State Public Defender, Ned R. Jaeckle, Deputy State Public Defender, Denver, Colorado, Attorneys for Petitioner.

John W. Suthers, Attorney General, Patricia R. Van Horn, Assistant Attorney General, Denver, Colorado, Attorneys for Respondent.

JUDGES: JUSTICE MARTINEZ delivered the Opinion of the Court. JUSTICE EID does not participate.

OPINION BY: MARTINEZ

OPINION:

EN BANC

JUSTICE MARTINEZ delivered the Opinion of the Court.

JUSTICE EID does not participate.

Introduction

We confront for the first time the admissibility at trial of the hearsay statements [*3] of an unavailable witness made during the course of an initial police investigation in light of *Davis v. Washington*. Ronnie Raile was convicted at trial of second degree burglary, violation of a restraining order, and first degree criminal trespass. Raile appealed his conviction asserting that his right to confront and cross-examine witnesses was violated by the trial court's admission of an unavailable witness's testimony. After trial and during his appeal, the Supreme Court of the United States issued *Crawford v. Washington* significantly altering *Confrontation Clause* jurisprudence.

Prior to *Crawford*, the admissibility of testimonial hearsay statements was subject to a reliability test set forth in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). In contrast, *Crawford* held that no testimonial hearsay could be admitted at trial unless the declarant was unavailable and the accused had a prior opportunity to cross-examine the declarant, effectively overruling *Roberts* with respect to the admissibility of testimonial hearsay. *Crawford*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177. Applying *Crawford*, the court of appeals disagreed with Raile, finding that the challenged [*4] statements were not testimonial and thus properly admitted. *People v. Raile*, No. 03CA1560, slip op. at 17 (Colo. App. Sept. 8, 2005) (not selected for publication). Raile appealed and we granted certiorari.

After we granted certiorari, but before oral arguments, the Supreme Court issued *Davis v. Washington*. In *Davis*, the Supreme Court elaborated on the meaning of "testimonial." We now review this case in light of both the *Crawford* and *Davis* decisions. We find that the statements made by the witness to the investigating officer were testimonial and their admission violated Raile's constitutional right to confront witnesses. However, this error was harmless beyond a reasonable doubt. Therefore, we affirm the decision of the court of appeals on separate grounds.

I. Facts and Procedural History

A jury found Ronnie Raile ("Raile") guilty of second degree burglary, violation of a restraining order, and first degree criminal trespass. At the same time, he was acquitted of a harassment charge. During the trial, the court allowed a police officer to testify to the hearsay statements of Justine Cone ("Cone"), an unavailable witness who did not testify and who was [*5] not subject to

cross examination by Raile. The witnesses who did testify described the following events.

During the early morning hours of June 14, 2002, Raile visited a trailer owned by Angela Kent ("Kent"). Raile was there to visit his wife, who, according to her testimony at trial, invited him over to talk that evening. Raile's wife left the back door unlocked so he could come in that night. Along with Kent and Raile's wife, also in the trailer were Raile's stepdaughter, his wife's friend Cone and Cone's baby. Raile's wife testified that she was staying in one bedroom, Kent in a second bedroom and Cone was in a third room. At the time Raile visited the trailer, there was a "no contact order" in effect that prevented Raile from having any contact with his wife or stepdaughter. n1

n1 The no contact order was issued pursuant to § 18-1-1001 as part of a separate criminal case.

When Raile entered the back door to the trailer, his wife was already in bed. As Raile went to his wife's room, Cone encountered Raile [*6] in the hallway of the trailer where an altercation between them ensued. Cone then went to Kent's bedroom and said that Kent "needed to call the cops." Kent described Cone as afraid and shaking but not crying when Cone walked into her bedroom.

At trial, Kent testified to the statements that Cone then made to her: that Raile pushed her, knocked her into the wall while she had her baby in her arms, and that he was coming into the house and "hitting people." Kent did not call the police right away. Rather, she left her bedroom and checked the house. Kent then explained that because Cone "was in such a manner that she wasn't comfortable with what was going on," Kent decided to call the police. Cone never testified. The trial court, after hearing Raile's *Confrontation Clause* and hearsay objections, ruled that these statements were admissible under the "excited utterance" exception to otherwise inadmissible hearsay. n2

n2 The admissibility of Cone's statements to Kent is not at issue here.

After Kent testified, Officer [*7] Swisher ("Swisher") took the stand. Swisher testified that Cone told him that Raile did not knock or announce himself, that he had pushed her, that he was screaming and yelling, and that she was scared that Raile was going to

punch her. Swisher described Cone as upset and angry at the time that he spoke with her.

When describing the scene that night, Swisher testified that within five minutes of receiving the dispatch call, he and Officer Parker, both from the Thornton Police Department, arrived. The call was relayed to them as an "in-progress burglary" where the "suspect may still be inside." As a result, they parked their police car down the street and approached cautiously on foot.

At trial, Swisher testified that when he arrived, Cone was standing on the front porch of the trailer and told Swisher "he's around back." Swisher and Parker went to the back of the trailer and spotted Raile bent over looking into a window and yelling. Swisher then confronted Raile, telling him to turn around and put his hands up. Swisher asked Raile what he was doing there. Raile, in compliance with Swisher's request, responded by saying he was "chasing someone away from the home." Not knowing if Raile [*8] was a suspect, Swisher patted him down for weapons and, finding none, led him around to the front of the trailer. Swisher described Raile's demeanor as initially agitated and upset, but very polite and cordial after Raile calmed down.

At some point after bringing Raile to the front of the trailer, Swisher took statements from everyone present including Cone, who made both verbal and written statements to the investigating police officers at the trailer that night. Due to the leading questions of the prosecutor at trial, it is unclear exactly where or how Swisher obtained Cone's statements. n3 However, Kent testified that when the police came in: "they took all our stuff down, we were all in the room writing it down all at the same time." Relying on his previous ruling that Cone's statements to Kent were "excited utterances," the trial court judge also admitted Cone's statements as offered through Officer Swisher. n4

n3 Cone's written statement was not admitted at trial. However, because of the nature of the leading questions of the prosecutor, it is impossible to tell whether the officer was recounting Cone's initial verbal statement or her later written statement. In any event, the difficulty in distinguishing between the verbal and the written statement does not affect our analysis, as both were testimonial.

[*9]

n4 Following the prosecutor's leading questions, Swisher agreed that Cone told him that Raile "didn't knock or announce himself", that he

had "pushed her using his whole body", that he "went to [his wife's room] screaming and yelling", that Cone told him that Raile called Cone names and "told her to stay out of his business," that he yelled at his wife some more, and Raile "started to walk out." Continuing, Swisher agreed that Cone said that Raile "got in her face and told her that he was going to beat her ass," that he "pushed her in the chest" and he "went to fake punch her." Finally, Swisher confirmed that Cone had demonstrated Raile's fake punch.

Raile objected throughout the trial to the admission of Cone's out-of-court statements on both hearsay and *Confrontation Clause* grounds. On appeal, Raile argued that the trial court's admission of Cone's hearsay statements violated his *Sixth Amendment* right to confront witnesses under the newly issued United States Supreme Court opinion *Crawford v. Washington*. n5 The court of appeals, applying *Crawford*, found Cone's statements were nontestimonial [*10] and thus properly admitted under an exception to the hearsay rule that otherwise excludes such evidence. Raile, slip op. at 17. After rejecting Raile's other issues, the court of appeals affirmed Raile's conviction. Id. at 29. Raile petitioned this Court for certiorari to review, among other matters, the court of appeals' finding that Cone's statements to Officer Swisher were nontestimonial.

n5 *Crawford v. Washington* held that testimonial statements by an unavailable witness not subject to cross-examination must be excluded under the *Confrontation Clause of the Sixth Amendment* to the Constitution and overturned the admissibility test used in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

We granted certiorari to review whether Cone's statements to Officer Swisher were testimonial. During the time between certiorari being granted and oral arguments, the United States Supreme Court issued *Davis v. Washington*, U.S. , 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), [*11] addressing the scope and meaning of "testimonial" statements in the context of the *Sixth Amendment* and *Crawford*. Using *Crawford* and *Davis* as our guides, we find that Cone's statements to Officer Swisher were testimonial. However, we also find that the admission of these statements was harmless error. We therefore affirm the court of appeals on other grounds.

II. Analysis

The *Sixth Amendment of the Constitution of the United States* guarantees an accused the right "to be confronted with the witnesses against him." *U.S. Const. amend. VI*. This guarantee applies to state as well as federal prosecutions. *Crawford v. Washington*, 541 U.S. at 42. Raile argues that his right to confront witnesses was violated when the trial court admitted the hearsay statements of an unavailable witness he did not have the opportunity to cross-examine. Applying the precedent established in *Davis v. Washington*, we agree.

A. Testimonial Hearsay Statements under Davis

Under the *Sixth Amendment to the United States Constitution*, testimonial hearsay must be excluded when the declarant is unavailable and there has been no prior opportunity for cross-examination [*12] by the defendant. *Crawford*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177; *People v. Vigil*, 127 P.3d 916, 921 (Colo. 2006). n6 It is the testimonial nature of the statement that subjects some hearsay statements to exclusion under the *Confrontation Clause*, while others are merely subject to the rules of evidence. *Davis*, 126 S. Ct. at 2273. Certain "core" testimonial statements are always subject to the limitations of the *Confrontation Clause*. n7 These core statements also form the "perimeter" of what may be considered "testimonial" statements for *Confrontation Clause* purposes. *Id.* at 2274.

n6 We note that *People v. Vigil* was decided before this Court had the benefit of the *Davis* decision and that we are bound to follow later decisions by the United States Supreme Court.

n7 The "core classes" of testimonial statements are: 1) *ex parte* in-court testimony or its equivalent, 2) extrajudicial statements contained in formalized testimonial materials, and 3) statements that were made under circumstances such that an objective witness would believe that the statements would be used at a later trial. *Crawford*, 541 U.S. at 51-52.

[*13]

Testimonial statements subject to exclusion under the *Sixth Amendment* include statements taken by police officers during the course of interrogations, such as the statements at issue in *Crawford* itself. n8 *Id.* at 2273. *Crawford* used "police interrogation" in a broad colloquial sense, rather than a technical legal sense. *Id.* However, it is the statements themselves and not the interrogator's questions that must be evaluated to determine whether a statement is testimonial in nature. *Id.* at 2274 n.1.

n8 The statements at issue in *Crawford* were taken while the declarant was in police custody as a possible suspect, under interrogation, and after *Miranda* warnings were given. *Crawford*, 541 U.S. at 38-39.

To determine the nature of hearsay statements, the context and circumstances under which the statements are made are highly relevant. See *Davis*, 126 S. Ct. at 2273-74 (noting that the primary purpose of the statements, as determined by an objective view [*14] of the circumstances, generally determines whether or not statements are testimonial); see also *Harkins v. State*, 143 P.3d 706, 2006 WL 2884802, at *7 (Nev. 2006) (noting that when determining whether a statement is testimonial, it is necessary to look at the totality of the circumstances surrounding the statement); *State v. Blue*, 2006 ND 134, 717 N.W.2d 558, 562-63 (N.D. 2006) (noting that whether a declarant was acting as a witness and in essence testifying should be determined by the surrounding circumstances).

When circumstances objectively indicate that the primary purpose of the interrogation is either to elicit statements that establish or prove past events, or to elicit statements that are potentially relevant to a later criminal prosecution, the statements elicited are testimonial. *Davis*, 126 S. Ct. at 2273-74. On the other hand, statements made during an ongoing emergency to assist police officers in their efforts to assess the present situation are nontestimonial. *Id.* Further, it is not relevant to the analysis whether the interrogating police officer either thought there was an ongoing emergency [*15] or acted as if responding to an ongoing emergency. See *Davis*, 126 S. Ct. at 2279 n.6 (noting "[a police officer] saying that an emergency exists cannot make it be so . . . neither can police conduct govern the *Confrontation Clause*; testimonial statements are what they are."). The proper perspective is whether there was an ongoing emergency from the point of view of an objective reasonable witness. *Id.* at 2276. The question then becomes whether, from the point of view of an objective reasonable witness, the declarant's statements were made in response to that ongoing emergency. *Id.*

In two companion cases decided in the same opinion, the Supreme Court in *Davis* explored the boundary between police interrogation resulting in testimonial statements and an interrogation producing nontestimonial statements made during an ongoing emergency. The Court conducted a general inquiry that explored how the statements were made, what the statements were to be used for, whether there was an ongoing emergency, the formality of the interrogation, and what the statements

themselves describe. *Id.* at 2276-80. In a fact-specific analysis, each [*16] case yielded a different result.

The lead case, *Davis v. Washington*, n9 involved statements made during a recorded 911 emergency call where portions of the recording were played to the jury. The Supreme Court, per Justice Scalia, determined that the admitted statements from the 911 call were nontestimonial but other statements made during the same call could be readily described as testimonial. *Davis*, 126 S. Ct. at 2276-77. The nontestimonial statements were the initial statements made at the beginning of the 911 call. *Id.* However, the emergency ended when Davis drove away and the operator took control by telling the declarant to be quiet and answer questions. *Id.* The declarant's statements thereafter took on a testimonial nature "not unlike the structured police questioning that occurred in Crawford." *Id.* (internal quotations omitted).

N9 No. 05-5224 (2006).

In determining that the initial statements were nontestimonial, the Court considered a number of circumstances and characteristics. [*17] First, the Court noted that the declarant described events as they were actually happening, rather than past events. *Davis*, 126 S. Ct. at 2276. The declarant told the 911 operator "[h]e's here jumpin' on me again" and "[h]e's usin' his fists." *Id.* at 2271. Second, the statements were made during an ongoing emergency. *Id.* at 2276. As the Court explained, the declarant's call was "plainly a call for help against bona fide physical threat." *Id.* Third, the statements were necessary to resolve the present emergency, not to learn what happened in the past. *Id.* The operator asked "what's going on?" and then asked the declarant if she was in a house or apartment, if there were any weapons, and was the assailant drinking. *Id.* at 2271. The operator's questions, and the declarant's answers, were all in the present tense. *Id.* Fourth, the Court considered the level of formality of the questions and answers, noting that the declarant provided "frantic answers" in an unstable or even unsafe environment. *Id.* at 2277. The Court concluded that the primary purpose of the initial questions posed by the [*18] 911 operator were to enable the police to meet an ongoing emergency. *Id.* Under these circumstances, the initial 911 statements were nontestimonial. *Id.*

We note that the *Davis* decision does not stand for the proposition that all 911 calls are nontestimonial or even that all parts of a 911 call are nontestimonial. In *Davis*, the tipping point from when the nontestimonial statements became testimonial was reached when the 911 operator took control of the situation and cut off the declarant, telling her to "stop talking and answer my ques-

tions." *Davis*, 126 S. Ct. at 2271. At that point in the conversation, the questions changed from gathering information about the emergency to gathering information about the suspect. *Id.* Thus, the Supreme Court in *Davis* clearly indicated that statements beginning as nontestimonial statements can later become testimonial. See *id.* at 2277 (noting that "trial courts will recognize the point at which . . . statements . . . become testimonial, as they do . . . with unduly prejudicial portions of otherwise admissible evidence"); see also *State v. Kirby*, 280 Conn. 361, 908 A.2d 509, 2006 WL 2913089, at *8 (Conn. 2006) (finding statements made to a 911 operator by a woman who had just escaped from a kidnapping and assault were testimonial because she had already escaped, despite the fact that she might have needed emergency medical assistance at the time she made the 911 call); *State v. Mechling*, 633 S.E.2d 311 (W.Va. 2006) (holding that once it becomes objectively apparent the emergency has passed, police questions are likely to elicit testimonial statements subject to the *Confrontation Clause*).

After concluding the initial statements in *Davis* were nontestimonial, the Court then examined the admitted hearsay statements in *Hammon v. Indiana*, n10 and, in contrast, found them to be testimonial. *Hammon* presented an entirely different factual situation from *Davis*. *Hammon* involved statements made by a declarant who was initially contacted by police alone on the front porch. *Davis*, 126 S. Ct. at 2272. The declarant appeared frightened, but she told the police nothing was the matter and gave them permission to enter the home. *Id.* Inside, the police saw flames coming out of a gas heating unit and broken glass on the floor. [*20] *Id.* The defendant was inside the kitchen. *Id.* The police kept the two separated and began to question the declarant about "what had occurred." *Id.* Determining that the declarant's statements were testimonial under these circumstances was "a much easier task" for the Supreme Court. *Id.* at 2278.

n10 No. 05-5705 (2006).

In contrast to the statements in *Davis*, the Court's examination of *Hammon* noted that there was no emergency in progress despite the fact that there were flames coming out of a gas heater and that during the questioning of the declarant, the defendant became angry and even tried to "participate" in the police interrogation of the declarant. *Davis*, 126 S. Ct. at 2278. The Court also noted there was no immediate threat to the declarant's person. *Id.* In addition, the officer's questions elicited statements about what happened, not what was occurring at that moment. *Id.* The Court determined that, viewed

objectively, the primary purpose of the [*21] interrogation was to investigate a possible crime. Id.

The Court continued its analysis and noted that, though it was an on-scene investigation, the declarant's interrogation was conducted in a separate room away from the defendant. *Davis*, 126 S. Ct. at 2278. The declarant's responses were for the officer's use in the investigation. Id. The declarant even made a formal written statement. Id. However, both the verbal and written statements were made "in response to police questioning [about] how potentially criminal past events began and progressed." Id. The interrogation was "formal enough" that the statements were testimonial and thus subject to the limitations of the *Confrontation Clause*. Id. "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial." Id. (emphasis in original); see *Kirby*, 280 Conn. 361, 908 A.2d 509, 2006 WL 2913089, at *9 (holding that when police interview a victim in her home who reported that she was just kidnapped and assaulted, the statements are testimonial because they are investigatory); [*22] *Blue*, 717 N.W.2d at 564 (holding that videotaped testimony of a child victim of sexual assault by a forensic interviewer was in preparation for trial and thus testimonial); *Mechling*, 633 S.E.2d at 323 (holding where police arrive on scene after being dispatched to a domestic violence call and interview the victim, those statements cannot substitute for the victim's live testimony because such statements are inherently testimonial). Having examined the Supreme Court's approach in *Davis* and *Hammon*, we now turn to the case before us today.

B. Cone's Statements to Officer Swisher

The facts of this case more closely resemble the facts in *Hammon* than the facts in *Davis*. Cone was contacted by police alone on the front porch, exactly like the declarant in *Hammon*. Cone, though upset (like the declarant in *Hammon*), did not ask for help. Instead she said "he's around back." There was no immediate threat to Cone's person. During the incident itself while Raile was in the trailer, and despite Cone's statements that she had been pushed, Kent did not call the police right away. Instead Kent checked around the house, and then later [*23] called the police because Cone was uncomfortable.

Later, the police took separate statements from each witness, including Cone. Like the declarant in *Hammon*, the police also asked Cone to make a formal written statement. Cone never asked for help for herself. Rather she did what a witness would do on direct examination and what the declarant in *Hammon* did -- she recounted how potentially criminal events began and progressed. In

short, Cone was "testifying" to the police officer in the same way that she would have testified in court.

Swisher testified that Cone said Raile came through the back door and that he had pushed her. Cone continued by telling Swisher that Raile then went into his wife's room, that he was calling them names, and that he got in her face and then threatened her with a "fake" punch. None of those statements were in the present tense or related to an event in progress. These statements described a past event, made in response to Swisher's questions. Swisher even had Cone demonstrate how Raile had threatened to punch her. There was nothing in either the police questions or Cone's answers that would or could resolve a then-existing problem. Cone's statements [*24] were made in response to a police interrogation whose primary purpose was to investigate possible crimes that had already been completed. Objectively considered, there was no ongoing emergency at the time that Cone spoke to Officer Swisher. Cone's statements were testimonial.

Even if there were an ongoing emergency when the police arrived, like the 911 statements in *Davis*, the emergency ended once the police had control of the situation. Police uncertainty about whether Raile was a suspect cannot transform Cone's later statements into nontestimonial statements. As the *Davis* Court noted, it is the statements themselves that must be examined from the point of view of an objective observer. Therefore, we do not examine whether Officer Swisher thought there was an ongoing emergency. Rather, we look to whether a reasonable declarant would perceive an emergency when Cone made her statements and whether Cone's statements were made in response to that emergency. See *Davis* 126 S. Ct. at 2273-74. At the time Cone made her statements to Swisher, Cone was not asking for help, she was not in any danger, the situation was under the control of the police, and even Raile [*25] was under control. Considered objectively, there was no emergency. Thus, Cone's statements, made in response to police interrogation, produced testimonial statements.

To illustrate further that Cone's statements here were testimonial, we can contrast them to the initial statements in *Davis*. Unlike the 911 caller in *Davis*, Cone did not describe an event that was actually happening, nor were her statements made during an ongoing emergency. They were made after police had control of the situation. The caller in *Davis* was calling for immediate help, whereas here Cone never asked for police assistance from Swisher. Unlike the 911 caller, Cone's statements were not made in a frantic or unstable situation. By the time Cone made her statements, Raile had become polite and compliant. Raile did not even try to interject himself into Cone's interrogation. Thus, in contrast to the statements

in *Davis*, Cone's statements cannot be classified as non-testimonial. n11

n11 Whether or not such statements meet the standard for the excited utterance hearsay exception under the rules of evidence is a separate analysis distinct from the threshold question of admissibility under the *Confrontation Clause*, one we do not engage in here.

[*26]

In conclusion, the primary purpose of Swisher's interrogation was to elicit statements that established, and that were potentially relevant to, a later criminal prosecution. We reach this conclusion by examining how Cone's statements were made, what the statements were used for, whether there was an ongoing emergency, the formality of the interrogation, and what the statements themselves described. It is clear from the evidence that, in light of the context and circumstances, Cone's statements to Officer Swisher were testimonial and therefore their admission violated Raile's right to confront the witnesses against him.

III. Harmless Error Analysis

Having found that the admission of Cone's statements through Officer Swisher was a violation of Raile's constitutional right to confront the witnesses against him, we now turn to whether this error was harmless beyond a reasonable doubt. This is the standard we apply to trial errors such as *Confrontation Clause* violations. *People v. Fry*, 92 P.3d 970 (Colo. 2004). We review trial errors such as these for the effect they had on the trial. See *Sullivan v. Louisiana*, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); *Blecha v. People*, 962 P.2d 931, 942 (Colo. 1998). [*27] This is not an analysis of whether a guilty verdict would have been rendered in a trial without the error, but what effect the error had on this verdict. See *Sullivan*, 508 U.S. at 279.

We are guided in our analysis by various factors "including the importance of the witness' testimony to the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence on the material points of the witness' testimony, the extent of the cross-examination otherwise permitted, and the overall strength of the prosecution's case." *Blecha*, 962 P.2d at 942 (citing *Merritt v. People*, 842 P.2d 162 (Colo. 1992)). If there is a reasonable probability that the defendant could have been prejudiced by the error, it cannot be a harmless error and, as the reviewing court, we must reverse the conviction below. *Blecha*, 962 P.2d at 942. Applying these standards, our review of the record indicates that the admission of

Cone's statements was harmless beyond a reasonable doubt.

The only disputed issue at trial was whether or not Raile was invited to come over. n12 Raile's defense at trial [*28] was that if he was invited, he was not guilty. The prosecutor argued that Raile did not have permission to enter the trailer, thus he was guilty of both burglary n13 and criminal trespass. n14 Raile argues that Cone's testimony affected whether or not Raile was invited to enter in three ways: first, Cone's testimony supported the prosecution's assertion that Raile was not invited to enter because he acted like he was not invited to enter; second, Cone's testimony undermined Raile's wife's credibility upon which Raile's invitation defense rested; and third, that Cone's testimony was highly prejudicial. After a full review of the record, we reject the notion that Cone's statements had a reasonable probability of prejudicing Raile at trial.

n12 Raile conceded during opening statements that he was guilty of the Violation of Restraining Order charge. He consistently denied that he harassed Cone and was acquitted of that charge.

n13 Pursuant to *section 18-4-203*: "A person commits second degree burglary, if the person knowingly . . . enters unlawfully in, or remains unlawfully after a lawful or unlawful entry . . . with intent to commit therein a crime against another person or property." § 18-4-203, C.R.S. (2006). The statutes remain unchanged from the date of the offense, therefore we cite to the current version.

[*29]

n14 Pursuant to *section 18-4-502*: "A person commits the crime of first degree criminal trespass if such person knowingly and unlawfully enters or remains in a dwelling of another." § 18-4-502, C.R.S. (2006).

First, Raile argues that Cone's statements are not harmless error because her description of Raile to Swisher was consistent with the prosecution's theory that he entered the trailer uninvited. n15 According to Cone, Raile walked in and then they had an altercation. This was consistent with his wife's statement that she left the back door unlocked. Also, Cone never testified about whether or not Raile had permission, nor could she, she did not know. Rather, she merely testified to what hap-

pened after she encountered Raile, who was already inside the trailer. Further, Raile's wife was not present when Raile entered. She did not testify about what happened after Raile entered but before he came to her room, other than to discredit Cone's story generally. Thus, any support Cone's statements might have provided to the prosecution's theory that Raile was not invited [*30] was indirect and insubstantial. Raile's wife and Cone each testified about two different events. Raile's wife testified about what happened before Raile entered the trailer, and Cone testified to what happened after Raile entered. The statements were not inconsistent.

n15 The prosecution responded to Raile's defense that he was invited inside the trailer with two arguments: first, Raile's wife did not invite Raile over, contrary to her testimony at trial; and second, the restraining order made Raile's entry unlawful. The court of appeals addressed Raile's defense that he was invited by assuming that it was error for the prosecution to argue that the restraining order made Raile's entry unlawful as a matter of law. Raile, slip. op at 23-24. We make the same assumption without deciding the issue here and limit our review of the effect of Cone's statements on the trial to Raile's defense that he was invited.

What is also clear from the record is that the prosecution gave very little importance to Cone's statements [*31] as they related to the burglary or the criminal trespass charges. The prosecution's sole comment about Cone's statements regarding Raile's entrance was: "the defendant walked in, he shoves her." Even more importantly, the prosecution never connected Raile's actions to whether or not he had permission to enter. If Cone's statements were important to the outcome of the trial, it was as support for the harassment charge, not the burglary or criminal trespass charges. n16

n16 Defense counsel also argued at trial that Cone's statements were offered to support the harassment charge by objecting to the inclusion of the harassment jury instruction and verdict form because the charge was supported entirely by the objectionable hearsay at the heart of this appeal.

Further undermining Raile's position is the fact that Cone's statements were consistent with the defense's own version of the events that night. During opening statements, defense counsel told the jury: "Mr. Raile comes

on over, the door is unlocked, he walks [*32] in. There are problems inside and the police are called." Cone's statements were consistent with defense's theory that there were "problems" inside, a theory they asserted from the beginning of the trial.

Finally, Cone also made statements to Kent that were admitted by the trial court and not under review here. n17 Those statements were very similar, though not cumulative of, Cone's statements to Swisher. Kent testified that Cone told her that Raile pushed her, knocked her into the wall while she had her baby in her arms, and that he was coming into the house and "hitting people." Swisher testified that Cone told him that Raile did not knock or announce himself, that he had pushed her, that he was screaming and yelling, and that she was scared that Raile was going to punch her. To the extent that the prosecution's case was supported by Cone's statements to Swisher, the case was similarly supported by Cone's statements to Kent.

n17 Kent was not a police officer and Cone did not make her statements in response to questioning by Kent. Instead, her statements to Kent were clearly a request for help during an ongoing emergency. Further, her statements do not fit into any of the three "core" testimonial statements described in *Crawford*. Accordingly, we accept without reviewing the court of appeals' finding that they were not testimonial for the purpose of conducting our harmless error analysis here.

[*33]

As we already noted, the connection between Cone's statements and the inference that Raile was uninvited was tenuous because Cone never addressed whether Raile was invited. The lack of a direct connection between Cone's statements and the inference that Raile was uninvited, combined with the inclusion of Kent's statements, makes it difficult to perceive how Cone's statements were anything other than harmless, insofar as they related to the jury's understanding of whether Raile's behavior was consistent with an uninvited entrance.

Raile makes a second argument against harmless error: that the admission of Cone's statements to Swisher was not harmless because they undermined the credibility of Raile's wife who provided the basis of Raile's defense that he was invited. At trial, Raile's wife recanted her statement to Officer Swisher that she did not invite Raile over that night. Instead, she testified that she did invite Raile over and that she left the back door unlocked so he could come in. Her daughter (Raile's stepdaughter) also testified on the stand that her mother had been on the phone all night trying to get Raile to come over.

Raile argues that, in order to establish that Raile [*34] did not have permission to enter the trailer, the prosecution used Cone's statements that he entered in an unruly way to undermine the credibility of Raile's wife's in-court testimony. Thus, Raile argues that, if believed, Cone's statements would lead a juror to conclude that Raile's wife never really invited him over and therefore find him guilty of burglary and criminal trespass.

The credibility of Raile's wife was clearly an important issue at trial. We note, however, that everyone agreed to what happened once Raile entered the trailer -- there were "problems inside"; and Cone's statements to Swisher were limited to those problems. Moreover, though the defense clearly wanted the jury to believe that Raile was invited over, defense counsel also directly attacked Raile's wife's credibility. Defense counsel described Raile's wife during closing arguments as a liar who both lied to police and lied on the stand: "Because a woman that would lie under oath would lie to a police officer. You can't believe it. You can't believe her then, you can't believe her now, there is just no way." Thus, even if Cone's statements served to impeach Raile's wife's credibility, defense counsel did so [*35] as well -- and much more directly. Under these circumstances, we cannot say that any harm done to the credibility of Raile's wife by Cone's statements had any effect above Raile's wife's inconsistent statements, which were emphasized in defense counsel's own arguments. The admission of Cone's statements to Swisher was harmless.

Raile finally argues that Cone's statements to Swisher were much more "horrific" and explicit, prejudicial, and cumulative of the statements admitted through Kent. However, the inconsistencies between Cone's statements to Kent and to Swisher were minor. Kent tes-

tified Cone told her that she was holding her baby when Raile pushed her, but Swisher, when asked, said Cone did not say that to him. Another inconsistency between the statements made by Cone to Kent, versus Cone's statements to Swisher, related to whether or not Raile had hit people; Cone told Kent that he did, but said nothing to Swisher. Because the defense theory conceded that there were "problems" we can see no reason to believe that the minor differences between Cone's statements to Swisher and Kent were of such a degree so as to effect the jury's decision.

Based on our review of the record, there [*36] is no reasonable probability that the defendant could have been prejudiced by Swisher's wrongfully admitted testimony regarding the statements that Cone made to him at the scene. Any impact the statements had on Raile's defense that he was invited into the trailer that night was insubstantial, indirect and therefore harmless. As such, though their admission was error, it does not warrant a reversal of Raile's conviction.

IV. Conclusion

Because Cone's statements, as testified to by Officer Swisher, were testimonial, the defendant was entitled to confront and cross-examine Cone before her statements could be admitted at trial. Because Cone was unavailable, and Raile did not have the opportunity to cross-examine Cone, admission of her statements violated Raile's *Sixth Amendment* rights under *Crawford v. Washington* and *Davis v. Washington*. However, there is no reasonable probability that Raile was prejudiced by the admission of the statements; thus, the trial court's error was harmless. We therefore affirm the decision of the court of appeals on different grounds.

LEXSEE 2006 MICH. APP. LEXIS 3418



Analysis

As of: Jan 14, 2007

**PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ALVIN C.
WALKER, JR., Defendant-Appellant.**

No. 250006

COURT OF APPEALS OF MICHIGAN

2006 Mich. App. LEXIS 3418

November 21, 2006, Decided

NOTICE: [*1] THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE MICHIGAN COURT OF APPEALS REPORTS.

PRIOR HISTORY: Oakland Circuit Court. LC No. 2002-187306-FH. *People v. Walker*, 720 N.W.2d 754, 2006 Mich. LEXIS 1886 (Mich., 2006)

JUDGES: Before: Neff, P.J., and Owens and Cooper, JJ. COOPER, J. (concurring).

OPINION BY: Janet T. Neff

OPINION:

ON REMAND

NEFF, P.J.

This case is before us on remand from the Supreme Court for reconsideration of defendant's *Confrontation Clause* claim in light of *Davis v Washington*, US ; 126 S. Ct. 2266; 165 L. Ed. 2d 224 (2006). We conclude that the standards announced in *Davis* render the written statement of the victim's account of the alleged felonious assault, and her statements in response to questioning by police officers at a neighbor's home, testimonial, and, therefore, inadmissible absent an opportunity for cross-examination by defendant. However, the statements made in the 911 call are nontestimonial in character, and, therefore, no error occurred in the trial court's admission of the 911 call evidence. Given the record before us, and the fact that this case was tried before either *Davis* or

Crawford v Washington, 541 U.S. 36; [*2] 124 S. Ct. 1354; 158 L. Ed. 2d 177 (2004), was decided, we vacate defendant's sentences and remand this case to the trial court for further proceedings, including consideration of amended charges and resentencing, if appropriate.

I. Facts

The underlying facts of this case were set forth in our earlier opinion as follows: n1

This case stems from a domestic assault in which defendant beat his live-in girlfriend repeatedly with a stick and threatened her with a gun. The couple had been living together for several years and had a son together. The victim told police that after the couple had an argument on the evening of October 18, 2002, defendant forced her to lie on the bed on her stomach while he beat her with white sticks on her back, buttocks, legs, and arms. He then pointed a handgun at her and told her he would "blow her back out" if she moved. The beatings continued until early the next morning. The victim escaped at approximately 9:00 a.m. by jumping from a second-story balcony while defendant was sleeping. She ran to the home of a neighbor, who called 911.

The police arrived within a few minutes. Because the victim was upset, the neighbor wrote [*3] out her statement of what happened. The victim accompanied

the police to the couple's home, where the police found three white sticks and a handgun. Defendant was not at the home, but was located and arrested a short while later. [*People v Walker*, 265 Mich. App. 530, 532; 697 N.W.2d 159 (2005).]

n1 The facts are repeated for purposes of our discussion of the issue on remand. We express no opinion with regard to the admissibility of particular factual evidence.

II. Issue

At issue on remand is the admissibility of hearsay statements, including statements made during the 911 call, the victim's statements recorded in writing by the neighbor, and her statements to the police. n2 The trial court determined that the statements were admissible under *MRE 803(2)* as excited utterances, and in our earlier opinion, we agreed. However, we must now decide whether the statements are objectively characterized as testimonial under the standards articulated in *Davis* and, therefore, inadmissible [*4] under the *Confrontation Clause*. Only testimonial statements "cause the declarant to be a 'witness' within the meaning of the *Confrontation Clause*." *Davis*, *supra* at 2273. "It is the testimonial character of [a] statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the *Confrontation Clause*." *Id.*

N2 The victim was not present at the trial.

III. Analysis

The *Confrontation Clause of the Sixth Amendment* bars the admission of "testimonial" statements of a witness who did not appear at trial, unless the witness was unavailable to testify, and the defendant had a prior opportunity to cross-examine the witness. *Crawford*, *supra* at 1369, 1374. In *Crawford*, the Court concluded that a recorded statement, given in response to structured police questioning after the declarant was in custody and had received *Miranda* warnings, was clearly an inadmissible "testimonial" statement made during a police "interrogation." *Crawford*, [*5] *supra* at 1365 n 4, 1370. The Court however declined to "spell out a comprehensive definition" of testimonial hearsay for purposes of the *Confrontation Clause*. *Id.* at 1374.

The Court in *Davis*, and the companion case of *Hammon v Indiana*, has since further defined the demarcation between "testimonial" and "nontestimonial" hearsay in evaluating statements made to law enforcement personnel during a 911 call or at a crime scene:

Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: 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. [*Davis*, *supra* at [*6] 2273-2274.]

Like this case, *Davis* involved the admission of a recording of a 911 call in which the caller, Michelle McCottry, indicated that she had been assaulted by her former boyfriend, Davis, who had just fled the scene. *Davis*, *supra* at 2270-2271. The Court held that McCottry's 911 call statements identifying Davis as her assailant were not testimonial. *Id.* at 2277. However, in *Hammon*, the Court held that statements made to police officers who responded to a domestic disturbance at the home of Hershel and Amy Hammon were testimonial and, therefore, inadmissible. *Id.* at 2272. In *Hammon*, when the police arrived at the Hammon home, Amy was sitting on the front porch, and, although she appeared frightened, she told the police that "nothing was the matter." The police entered the home and subsequently questioned Hershel and Amy in separate rooms. Amy recounted details of Hershel's assault, and an officer had her complete and sign a battery affidavit. Amy's statements to the police and her affidavit were admitted as evidence against Hershel when Amy failed to appear for trial. *Id.* However, the *Davis* Court found Amy's statements and affidavit violative [*7] of the defendant's rights under the *Confrontation Clause*, and therefore inadmissible. *Id.* at 2278-2279.

In this case, as in *Davis*, we must address the admissibility of hearsay statements occurring in various contexts, including statements made during a 911 call, the victim's statements recorded in writing by the neighbor, and her statements to the police. As noted in our earlier opinion, defendant challenged the statements generally

and did not distinguish between the victim's oral statements to her neighbor, her written statement, and her statements to the police. *Walker, supra at 536 n 3*. Nonetheless, for purposes of analysis under the standards set forth in *Davis*, the statements in these contexts must be distinguished and analyzed accordingly.

A. 911 Call

Police interrogations, such as that at issue in *Crawford*, "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator," fall squarely within the class of testimonial hearsay subject to the *Confrontation Clause*. *Davis, supra at 2276*. "A 911 call, on the other hand, and at least the initial interrogation conducted in connection [*8] with a 911 call, is ordinarily not designed primarily to 'establish or prove' some past fact, but to describe current circumstances requiring police assistance." *Id.*

In this case, as in *Davis*, the 911 call, objectively considered, was a call for help, such that the statements elicited were necessary to resolve the present emergency, rather than learn what had happened in the past to establish evidence of a crime. *Id. 2276-2277*. The victim appeared at her neighbor's home, crying and shaking, and seeking help in response to an alleged beating. She had reportedly escaped from defendant by jumping from a second-story balcony. The 911 call made by the neighbor was a call for help, as indicated at the outset of the call:

Operator. Farmington Hills Police, Halsted. Hello?

Neighbor. Um, hi. I have-Come in here Dorothy and sit down. A neighbor just came down to my house and she can't go back home she says she's been beaten up and she can't even remember her address right now and I'm looking it up in my directory. We live on Muer Cove at Thirteen and Drake.

Operator. Is she all right? Does she need medical help?

Neighbor. You think you need [*9] medical help right now? She's really bruised up and she's really upset and shaking. I don't think she needs-Do you feel like you need to go to the hospital? She says she has to leave and she can't go home.

The subsequent questioning during the 911 call was directed at eliciting further information to resolve the present emergency and to ensure that the victim, the neighbor, and others potentially at risk, including the victim's eight-year-old son, would be protected from harm while police assistance was secured. The emergency operator sought details about the assault, including the location of the neighbor's home, the circumstances of the reported beating, the perpetrator's relationship to the victim, his name, and where he was, and where the child was. The operator attempted to calm the victim and the neighbor, and reassure them that the police would be responding right away. As in *Davis*, the circumstances of the 911 operator's questioning "objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency." *Davis, supra at 2277*.

Although in *Davis* the Court recognized that a 911 call could evolve into testimonial statements and [*10] that unduly prejudicial portions of otherwise admissible evidence should be redacted by the trial court, *id.*, defendant raised no such argument in this case. On the record before us, we find no error in the admission of the 911 call evidence.

B. Written Statement and Statements to Police

Unlike the 911 call, the victim's written statement recorded by her neighbor, and her statements to the police at the scene, are more akin to the statements in *Hammon*, which the *Davis* Court found inadmissible under the *Confrontation Clause*. In response to the 911 call, the police arrived at the neighbor's home. Although the victim was still visibly upset, we are constrained to conclude that the police questioning at this point was investigatory in nature.

As in *Hammon*, where the police questioned the domestic assault victim separately from her husband and obtained her signed affidavit of the circumstances of the assault, in this case, the police questioning first occurred in the neighbor's home, and there is no indication of a continuing danger. Rather, the victim's statement recorded by the neighbor and her oral statements to the police recounted how potentially criminal past events [*11] began and progressed. *Davis, supra at 2278*. Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, n3 we conclude that, on the record before us, these statements are generally testimonial under the standards set forth in *Davis*. n4 "Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime-which is, of course, precisely what the officer[s] should have done." *Davis, supra at 2278*. Accordingly, the victim's written statement and her oral statements to the police are inadmissible. n5

n3 See *Davis, supra* at 2279 (initial inquiries by police responding to a domestic dispute may produce nontestimonial statements in necessarily determining the parties involved, and the threat to safety of both the police and the victim).

n4 In its brief on remand, plaintiff essentially concedes that the written statement is "testimonial" under *Davis*.

n5 Although not directly at issue in our earlier opinion, testimony by the neighbor concerning the victim's oral statements after the 911 call, must also be deemed testimonial, and, thus, inadmissible.

[*12]

IV. Harmless Error

We cannot conclude that the error in this case was harmless. Because defendant failed to preserve his *Confrontation Clause* claim, we review the error under the standard for unpreserved constitutional error. *People v Carines*, 460 Mich. 750, 764; 597 N.W.2d 130 (1999). Defendant must show plain error that affected his substantial rights. *Id.* at 763; *People v Rodriguez*, 251 Mich. App. 10, 24; 650 N.W.2d 96 (2002).

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually [*13] innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Carines, supra* at 763, quoting *United States v Olano*, 507 U.S. 725; 113 S. Ct. 1770; 123 L. Ed. 2d 508 (1993) (citations omitted).]

We cannot conclude that the improper admission of the victim's written statement and her statements to the police during their investigation were not outcome determinative. n6 Absent these statements, there is no evidence of defendant beating the victim with the sticks or threatening her with the gun, to support the charged offenses of felonious assault, *MCL 750.82*; possession of a firearm by a felon, *MCL 750.224f*, or possession of a firearm during the commission of a felony, *MCL 750.227b*. Under these circumstances, we find that the error seriously affected the fairness of the judicial proceedings, and defendant's convictions must be reversed. *Carines, supra* at 763. The key testimony in this case came from the neighbor and [*14] three police officers, all of whom repeatedly testified concerning the victim's statements to them, testimony that we have now determined to be inadmissible under *Davis*. n7

However, given the limited record before us, we remand this case to the trial court to determine whether defendant is properly subject to any alternate or lesser included offense, e.g., domestic assault, that may be pursued by the prosecutor on the basis of the admissible evidence and the proceedings of record. n8

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

n6 Plaintiff argues that defendant should nevertheless be denied relief on the basis of forfeiture by wrongdoing, *Davis, supra* at 2279-2280; however, we find no basis for a forfeiture claim on the record before us.

n7 Defendant was scheduled to testify, but he failed to appear on the final day of trial. The defense presented no testimony. Defendant was convicted in absentia.

n8 If the prosecutor does not pursue this matter on remand to the trial court, further proceedings will be unnecessary.

[*15]

/s/ Janet T. Neff

/s/ Donald S. Owens

CONCUR BY: COOPER

CONCUR: COOPER, J. (*concurring*).

I agree with the majority's conclusion and scholarly analysis under *Davis* and *Hammon* n1. However, because

I disagree as to the application in Part IV of *Carines* to this matter, I write separately to address that issue.

n1 *Davis v Washington*, US ; 126 S. Ct. 2266; 165 L. Ed. 2d 224 (2006).

The majority concludes that "[b]ecause defendant failed to preserve his *Confrontation Clause* claim, we review the error under the standard for unpreserved constitutional error." *People v Carines*, 460 Mich. 750, 764; 597 N.W.2d 130 (1999). I would read *Crawford v Washington*, 541 U.S. 36; 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), to automatically preserve *Confrontation Clause* claims. In *Crawford*, defendant properly objected at trial to the admission of certain statements as hearsay. Justice Scalia, [*16] writing for the majority, turned the analysis to the *Confrontation Clause*, although defendant had not preserved any such constitutional claim. I would find that *Crawford* sets the value of the *Confrontation Clause* guarantee high enough that violations of it cannot be unpreserved error.

Given the importance placed on the *Confrontation Clause* by Justice Scalia in *Crawford*, I am concerned that harmless error review is inappropriate. However, the Court did not directly speak to the applicable standard of review in *Crawford* or *Davis*, and we must therefore rely on existing Supreme Court precedent addressing the varied standards of review for constitutional errors. Here, because this error is not structural, but rather is "trial error," in that it "occurred during presentation of the case to the jury," we are bound to review it following the harmless error standard. *Arizona v Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). See also *Washington v Recuenco*, 126 S. Ct. 2546, 2551, 165 L. Ed. 2d 466 (2006); *United States v Gonzalez-Lopez*, 126 S. Ct. 2557, 2564, 165 L. Ed. 2d 409 (2006). I believe this [*17] is an issue the Supreme Court ought further address; there is an apparent gap between the importance of the *Confrontation Clause* in *Crawford* and its consignment to harmless error review by the division between structural error and trial error.

However, in the instant case I agree with the majority; under any analysis, this error was not harmless.

/s/ Jessica R. Cooper

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.