

NO. 07-184

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 87651

STATE OF OHIO,

Plaintiff-Appellant/Cross-Appellee

-vs-

JAKEENA BROWN,

Defendant-Appellee/Cross-Appellant

MEMORANDUM IN RESPONSE TO JURISDICTION

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WHY JAKEENA BROWN'S CROSS-APPEAL IS NOT, IN PART, A CASE OF GREAT PUBLIC OR GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

The State of Ohio has requested the jurisdiction of this Court on two propositions of law, as set forth in the Memorandum in Support of Jurisdiction filed February 1, 2007. In our Memorandum, we sought review of the application of R.C. 2941.25 – allied offenses – and its interplay with the Double Jeopardy Clause. Defendant Brown has also raised one proposition relating to the same issue. The issue raised by Defendant Brown, albeit a contradictory stance, is complimentary to the issues raised by the State. These issues raised by the State and Defendant Brown should therefore be addressed collectively. And the States urges this Court to accept jurisdiction on Propositions of Law One, Two and Three.

Defendant Brown, in her Fourth and Fifth Propositions of Law, calls for clarification of statements falling under the purview of the Confrontation Clause. Recently, the United States Supreme Court further delineated testimonial statements in *Davis v. Washington* (2006), 126 S.Ct. 2266, expanding upon *Crawford v. Washington* (2004), 541 U.S. 36.

As this Court is well aware, the Confrontation Clause bars the admission of testimonial statements of witness, who is unavailable, unless the defendant had a prior opportunity to cross-examine the witness. *Crawford* at 54. However, *Crawford* left unresolved the testimonial nature of statements. *Davis* attempted to resolve this quandary. The Court held that statements made in response to an ongoing emergency are nontestimonial in nature. And the *Davis* Court specifically ruled that a statement identifying the assailant is *not* testimonial. *Davis* at paragraph two the syllabus. But

the Court also held that for these statements to be nontestimonial, they must be made during the course of an emergency. *Id.* In so ruling, the Court differentiated the facts in *Crawford*, finding that statements will be testimonial when an interrogation is “part of an investigation into possibly criminal past conduct.” *Id.* at paragraph three of the syllabus.

The statement elicited from the victim herein occurred during an ongoing emergency. While he had already been stabbed by Defendant Brown, Kevin Johnson was in desperate need of medical attention, so he flagged down officers passing by, as he lie on the sidewalk, grasping his side, and bleeding profusely.

These facts clearly demonstrate that the police questioning was in response to an emergency situation. And while the initial question posed elicited a response identifying Kevin Johnson’s assailant, taken as a whole, it was an ongoing emergency, falling in line with *Davis*.

Lower courts have reached the same conclusion in almost identical fact patterns. And these cases follow the precedent set forth in *Davis*. Since lower courts have systematically adopted *Davis* and correctly applied it, this case leaves nothing for this Court to resolve. Therefore, the jurisdiction of this Court is not warranted.

Defendant Brown also urges this Court to accept jurisdiction on an issue currently under review by this Court. See *State v. Carswell*, 109 Ohio St.3d 1423, 2006-Ohio-1967. Defendant Brown challenges the constitutionality of the marriage amendment as applied to the charge of domestic violence. But the facts herein mirror those of *Carswell*.

For the reasons more fully set forth herein, the State requests this Court to accept jurisdiction in part, and deny jurisdiction, in part.

STATEMENT OF THE CASE AND FACTS

The State previously set forth the underlying facts of this case in its Memorandum in Support of Jurisdiction, as found by the Eighth District in *State v. Brown* (Dec. 19, 2006), Cuyahoga App. No. 87651, 2006-Ohio-6267. In light of Defendant Brown's propositions of law, a more elaborate detailing of the facts surrounding this case is warranted.

Patrolman David DiMaria of the Cleveland Police Department was on duty on April 4, 2005. He received a call to respond to Greenwich Avenue; it was a priority call for an assault of a female. (Tr. 98-99.) As he and his partner, Officer Richard Rusnak, drove eastbound on Greenwich Avenue towards the address requesting assistance, they saw a man – later identified as Kevin Johnson – flagging the officers down. (Tr. 99.) As they neared him, both officers noticed blood on his shirt. (Tr. 115.) Not only did he have blood on his shirt, but he was holding his side. When officers stopped their vehicle and first inquired, they immediately noticed he was excited. But they also realized that Kevin Johnson had already lost a tremendous amount of blood, as exhibited by the amount of blood on his tee shirt. (Tr. 100.) And Officer Rusnak called for assistance while Officer DiMaria inquired further.

Officer DiMaria instantaneously inquired, asking "what happened?" Kevin Johnson just pointed up the street, and muttered, "She stabbed me." (Tr. 100.) Officer DiMaria and his partner questioned him some more, in an attempt to seek medical assistance for him and gauge the situation. Kevin Johnson responded: "My girlfriend, she's in that truck, she stabbed me. Look." (Tr. 100.) At which, he pulled up his shirt

and displayed his wound to the officers. The only thing Officer DiMaria could comprehend was the amount of blood Kevin Johnson had already lost. (Tr. 100.)

When Kevin Johnson initially pointed up the street, officers noticed a red Chevrolet Blazer parked on the wrong side of the street. (Tr. 100.) As officers were administering assistance to Kevin Johnson and waiting for EMS to arrive, the red Blazer moved from its original position, and began traveling towards the officers. The woman operating the Blazer – subsequently identified as Appellant – parked it immediately next to the officers' vehicle. (Tr. 101.) She exited the vehicle and approached Officer DiMaria, espousing: "I called you because that nigger just tore my truck up." Officer DiMaria immediately noticed that this woman was angry and inquired as to whom she was referring. And Appellant responded, "him," and pointed at Kevin Johnson. Officer DiMaria realized that the person, to whom Kevin Johnson initially referred as his girlfriend, was in fact, Appellant. (Tr. 101-102.)

Officer DiMaria described the scene as "volatile." Not only was Kevin Johnson excited and frenzied because Appellant stabbed him, Appellant was as equally animated. She related to officers that Appellant and Kevin Johnson had gotten into a fight, and she then described how he "tore my truck up." (Tr. 102.) Officer DiMaria described her state as "mad;" she was angry about the condition of her truck. (Tr. 102, 103.) Appellant told officers that he broke the window to the truck, damaged the bumper, removed the temporary tag and fed it to the dog. (Tr. 107.) Because of the confrontation between the two, Officer DiMaria then asked Appellant what role she played. Appellant answered, "I cut him." (Tr. 102.) Officer DiMaria further inquired with what instrument, and she responded that she cut Kevin Johnson with a knife. (Tr. 102.)

Officer DiMaria searched for the evidence. Not able to locate the knife in her truck, he walked to the area where the Blazer was originally facing the wrong direction on the street. He found the knife lying in the middle of the street, covered in blood. (Tr. 103.) The knife was similar to a steak knife; it had a black handle and a serrated edge. (Tr. 103.)

After thoroughly investigating the incident, he found that Appellant and Kevin Johnson lived together, but they were having domestic problems. (Tr. 104.) This information was further verified by the personal identifying information provided by Appellant at booking. (Tr. 104.) And Kevin Johnson, during his written statement with Detective Brown, verified this information as well. (Tr. 112.)

After processing the crime scene, he also responded to the hospital to formally speak with Kevin Johnson. At the hospital, Kevin Johnson appeared regretful for the trouble he and Appellant caused. (Tr. 105.) He admitted to engaging in a volatile argument with Appellant, and damaging her vehicle. But he also exclaimed that the stabbing was a surprise attack; Appellant came around the side of the vehicle, and without any warning or hesitation, struck him with a knife. During the formal statement, Kevin Johnson continued to apologize and express remorse for their problems, but also admitted to loving her. (Tr. 104.) They had been fighting for three days, which resulted in the stabbing. (Tr. 107.) Kevin Johnson remained hospitalized overnight at Metro Health Medical Center for observation. (Tr. 119.)

Appellant admitted to fighting with Kevin Johnson, but attempted to explain away the stabbing as an accident. She stated that she "went into her pocket, and he saw I had the knife in my hand. And then he pushed me into the car, and that's how he got

stabbed.” (Tr. 125.) But upon being questioned whether Kevin Johnson knew she had the knife, Appellant responded in the negative, and reasoned: “I guess he thought I came for him, but in the process of me explaining to him – when he saw it * * * he just ran up on me, and that’s how he got stabbed.” (Tr. 125-26.) She contended that Kevin Johnson ran into the knife while her eyes were closed. (Tr. 128.) And her son, Damonte, also believed that Kevin Johnson ran into the knife; Appellant “was trying to put the knife through * * * the car window and * * * he ran up on her.” (Tr. 155.) Appellant claims that she didn’t even know he was stabbed until the police informed her of the situation. (Tr. 134.)

Appellant also admitted that she initiated the police intervention. While she and Kevin Johnson were still embroiled in their fight, she alleged that she begged for any of the onlookers to call the police; she “didn’t have no way to call.” (Tr. 127.) After the fight ended, she drove her truck under the block, and returned to the same location, and then asked someone to call for the police. (Tr. 127.)

While the State has already filed a Memorandum in Support of Jurisdiction with this Court, seeking review of two issues, Defendant Brown also seeks the jurisdiction of this Court, seeking review of an additional four issues, further addressed below.

LAW AND ARGUMENT

Proposition of Law III: When, in a single animus, a person engages in conduct that violates a single Revised Code section prohibiting an offense, only one conviction may be imposed, even if that particular offense has been committed in more than one of the statutorily prescribed manners of commission.

Defendant Brown requests the jurisdiction of this Court to review the application of R.C. 2941.25 and the Double Jeopardy Clause to two counts of aggravated assault.

It proposes that the two counts of aggravated assault, for which Defendant Brown was ultimately convicted, must be merged as allied offense of similar import.

The State of Ohio has also requested the jurisdiction of this Court on the same matter, raising two propositions of law. In its first proposition of law, the State submits that alternate theories of aggravated assault are not allied offenses of similar import, and convictions under both theories must stand. In the alternative, the State argues that the Eighth District erred in dismissing one of the aggravated assault charges, completely ignoring the dictates of *State v. Rance* (1999), 85 Ohio St.3d 632, and the Double Jeopardy Clause.

The State acknowledges that this matter is unsettled, and more importantly involves a substantial constitutional question. And while Defendant Brown adopts a different perspective for this third proposition of law, it involves the same issue raised by the State in its first two propositions of law. these three propositions of law must therefore be considered together. For these reasons, the State respectfully requests that this Court accept jurisdiction on Propositions of Law One, Two and Three.

Proposition of Law IV: The portion of the statement made to the police at the scene of an investigation that is not essential to addressing an imminent harm is testimonial under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Proposition of Law V: In the absence of evidence that a suspect who has just committed a crime is about to harm another person, an on-the-scene identification of that suspect to police is testimonial under the Sixth Amendment Confrontation Clause.

Defendant Brown contends that the trial court violated her Confrontation Clause rights by allowing an out-of-court statement, made by the victim -- who did not testify at

trial -- to be introduced into evidence. The trial court allowed a police officer to testify that, upon arriving at the scene, Kevin Johnson immediately identified Defendant as the person who stabbed him. (T. 100). However, the police were responding to an emergency. And upon initial inquiry, the police immediately noticed that Kevin Brown was in distress. Therefore, this statement is not testimonial and as a result it does not violate her Confrontation Clause rights.

While Defendant raised this issue with the appellate court, she has waived this issue for review, since she failed to object to the questions or the statements elicited from the officers during the course of the trial. Typically, an appellate court need not consider any claim regarding a particular error if that claim was not presented by objection in the trial court. "The failure to raise an issue in the trial court or court of appeals waives all but plain error in our review." *State v. Issa* (2001), 93 Ohio St.3d 49, 56. In essence, the waiver doctrine provides that challenges to the constitutionality of a statute must be raised at the first opportunity. *State v. Awan* (1986), 22 Ohio St.3d 120, 122. Appellant never challenged the questions asked of the officer, or the response elicited. Only on appeal did Defendant Brown raise this argument. And the Eighth District noted Defendant's omission at the trial court, stating, as result, she waived all but plain error. *Brown* at ¶ 15. And the Eighth District did not find plain error. *Id.* The waiver doctrine is clearly implicated and Defendant Brown's argument is therefore barred.

Assuming that Defendant's claim is not barred, the Confrontation Clause of the Sixth Amendment provides, in part, "in all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." In other words, an

accused has the right to confront and cross-examine witnesses testifying against him. The United States Supreme Court, in *Crawford v. Washington* (2004), 541 U.S. 36, recently realigned this issue. Rather than determining if the statements bore a sufficient indicia of reliability for purposes of admissibility, the attention turned to the testimonial nature of the statements. The United States Supreme Court ruled that a testimonial statement of a witness who is absent from trial shall be admitted only if the declarant is unavailable, and only when the defendant has had prior opportunity to cross-examine the declarant about the statement. *Id.* at 39. The *Crawford* court did not elaborate on the definition of "testimonial." But explained that "it's colloquial, rather than any technical legal sense." *Id.* at 53. Testimonial, while not sufficiently narrowed, includes statements from preliminary hearings, grand jury testimony, trials, and interrogations. *Id.* at 53. *Crawford* further requires the exclusion of these testimonial statements by unavailable witnesses.

Normally, statements made during a police investigation or court proceeding will qualify as testimonial. *U.S. v. Cromer* (6th Cir. 2004), 389 F.3d, 682, 672-73. And any statements made under circumstances that would lead a reasonable person to conclude that the statements would later be used at trial are also testimonial. *Crawford* at 52. However, certain statements are not testimonial, as examined in *Davis v. Washington* (2006), 126 S.Ct. 2266 . "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." *Id.* at 2273 (emphasis added).

The *Davis* court set forth three factors to aid in gauging the nature of the statement. First, the court must consider if the statement was made to identify current conditions. *Id.* at 2276. In other words, the emergency must be ongoing. Secondly, the question posed by the officer must be geared toward the emergency rather than gathering historic information. *Id.* "Finally, the formality of the questioning is an indicator. The emotional state of the declarant, the tranquility of the environment, and the relative safety of the parties involved all shed light on the testimonial nature of the statement. *Reardon*, *infra* at ¶ 15, citing *Davis* at 2277.

In the case sub judice, the Eighth District properly ruled that Kevin Johnson's initial statement to police was made in the course of an *ongoing emergency*. Police were initially responding to an assault on a female. However, on arriving at the scene, police officers were flagged down by Kevin Johnson, who was lying on the sidewalk, bleeding profusely. The police immediately stopped to aide Kevin Johnson. And the first question posed to Kevin Johnson was so innocuous. They asked, "What happened?" And he responded, "She stabbed me," and pointed in the direction of his girlfriend, who was standing next to a truck. The trial court, in so ruling, reasoned that "[t]he officer's questions, and Johnson's responses thereto, indicated that the primary purpose of the interrogation was to enable the police to assist Johnson in an ongoing

emergency, not to establish or prove events potentially relevant to criminal prosecution. Therefore, these statements were nontestimonial and appropriately admitted.” *Id.* at ¶ 21.

In so ruling, it followed well-established precedent established in *Davis*, *supra*, and relied upon time and time again in courts throughout Ohio. In *State v. McKenzie*, Cuyahoga App. No. 87610, 2006-Ohio-5725, the Eighth District, reviewed almost the same identical set of facts, and again held that the initial statements by the victim were nontestimonial. The police were responding to an unrelated call when they observed a woman exit an apartment building, “waving her arms and yelling, ‘that’s him, that’s him. He’s the one that just hit me.’” *Id.* at ¶ 11. The police immediately apprehended the defendant. The Eighth District concluded that “[t]he victim’s statement, taken in context, was made in the midst of an ongoing emergency and not for testimonial purposes.” The court rendered this conclusion in light of *Davis*, reasoning that “statements made in the course of an ongoing emergency * * * are not made for the primary purpose of being used at a trial of the accused. Instead, they are made primarily for emergency assistance and hence are not testimonial in nature.” *Id.* at ¶ 20.

Similarly, in *State v. Reardon*, 168 Ohio App.3d 386, 2006-Ohio-3984, the Sixth District Court of Appeals again found the identification of a perpetrator during an initial interview was nontestimonial. One of the victims related to officers immediately after their arrival, and shortly after the perpetrators fled the home, that one of the assailants was “that fat fucker Reardon with his lazy eye down at the end of the street.” *Id.* at ¶ 9. In determining that the statement was nontestimonial, it utilized the test promulgated

by *Davis*. It held that the “primary purpose [of the statement] was to assist police in resolving an ongoing emergency.” *Id.* at ¶ 19.

The facts in the case sub judice bear a striking resemblance to these cases, wherein each court found that the statement elicited from the victim was nontestimonial. It is important that in the case sub judice, as well these two cases, the emergency had not passed, but was still ongoing. The initial statements made by Kevin Johnson were clearly made to the police for the purpose of police assistance, as highlighted above. The statements were not elicited during a police interrogation, but merely to assist Kevin Johnson and provide him the necessary medical attention. Furthermore, Kevin Johnson was still experiencing the stress of the attack, based upon the nature of his gesturing, the inflection in his voice, the manner in which he held his side, and the amount of blood he lost from the stab wound.

In this context, the question posed by the officer and response from Kevin Johnson resulted from an ongoing emergency. The United States Supreme Court and numerous Ohio courts have found these types of statements not violative of the Confrontation Clause. The statement herein falls in line with these cases.

The statements made by Kevin Johnson to police officers upon their initial arrival were nontestimonial. The Eighth District properly ruled on this issue, following the precedent established in *Davis* regarding statements made in the course of an emergency. For these reasons, Defendant Brown's fourth proposition lacks merit.

Proposition of Law VI: By virtue of Article XV, Section 11 of the Ohio Constitution, R.C. 2919.25, prohibiting domestic violence, does not apply to unmarried cohabitants without children.

The Constitution of the State of Ohio was recently amended so that the "state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Section 11, Article XV, Ohio Constitution. Appellant argues that Ohio's domestic violence statute, R.C. 2919.25, violates the state's Constitution because it grants a legal status to unmarried persons living as spouses.

However, the Eighth District Court of Appeals rejected the same argument just last year. See *State v. Burk* (2005), 164 Ohio App.3d 740. For the purposes of R.C. 2919.25, a person who is cohabiting or has cohabited with the offender qualifies as a "person living as a spouse." R.C. 2919.25(F)(2). The Court in *Burk* stated that "cohabitation" defines a factual, not legal, status between people, and so the statute does not intend to "approximate the design, qualities, significance or effect of marriage" as prohibited by the state Constitution. *Burk* at 745. The Court also noted that the domestic violence statute was passed in order to protect not married people, but all people who cohabit, regardless of marital status. *Id.* at 744.

Additionally, the State acknowledges that the same issue is currently being reviewed by this Court in *State v. Carswell*, 109 Ohio St.3d 1423, 2006-Ohio-1967. The same identical facts are in play in the within case.

CONCLUSION

The State of Ohio respectfully requests this Court to accept for review the two propositions of law originally raised by the State. In considering these two propositions, Defendant Brown has also raised a third proposition, which is compatible with those raised by the State. Therefore, the State also requests this Court's jurisdiction for

Defendant's Third Proposition of Law as well. The State, however, urges this Court to deny Defendant Brown jurisdiction on her Fourth and Fifth Propositions of Law. While these propositions involve constitutional questions, Ohio's lower courts have resoundingly resolved the issue. And these decisions mirror the United States Supreme Court precedent of *Davis*.

Respectfully submitted,

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A copy of the foregoing Brief of Appellee has been mailed this 3rd day of April, 2007 to David King and John T. Martin at 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113.

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