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IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

-vs-

LEE MASCORRO,

Defendant-Appellant.

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S.C. No. 2009-2079

On Appeal from the
Lucas County Court
of Appeals, Sixth Appellate
District

Court of Appeals
Case No. L-08-1355

APPELLEE'S MEMORANDUM IN RESPONSE

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**EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

Toledo police officers kicked in a door at the victim's house after they heard cries for help coming from inside. They found the defendant in the basement wearing only his underwear. The victim was curled up in a fetal position on the basement floor. She was sobbing and shaking. Officer Leroux asked the victim if she had been raped. She replied "yes". Officer Leroux didn't ask her anymore questions. He immediately called for a female officer to assist the victim in getting dressed.

Officer Leroux was responding to an emergency. His question and the victim's reply were not testimonial statements under the primary purpose test of *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed. 2d 224. Therefore, this evidence was admissible under the excited utterance exception of Evidence Rule 803(2).

The decision in this case by the Sixth District Court of Appeals is consistent with previous decisions by the Ohio Supreme Court in *State v. Siler*, 116 Ohio St.3d 39, 2007 Ohio 5637 and *State v. Stahl*, 111 Ohio St.3d 186, 2006 Ohio 5482. The issue raised by the appellant is well settled. Therefore, there isn't a compelling reason to grant jurisdiction.

STATEMENT OF THE CASE AND FACTS

The appellee accepts the appellant's Statement of the Case and Statement of the Facts.

ARGUMENT AGAINST JURISDICTION

When the Toledo Police officers rescued the victim, they found her shaking and crying. She was curled up in a fetal position and she was lying naked on the basement floor. This is a classic situation where an excited utterance would be admissible under Evidence Rule 803(2) prior to the decision in *Crawford v. Washington*, (2004) 541 U.S. 36, 124 S.Ct. 1354, 13 L.Ed. 2d 177.

Crawford held that out of court statements that are testimonial are barred, under the Confrontation Clause, unless the witness is unavailable and the defendant has had the prior opportunity to cross-examine the witness. This is true, regardless of whether such statements are deemed reliable by a court. The essential question on the admission of an out of court statement is whether or not the statement is testimonial. *Crawford* didn't define what was or was not a testimonial statement.

The United States Supreme Court ruled in *Davis v. Washington*, (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed. 2d 224 that:

"Statements are nontestimonial when made in the course of a 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 prosecution."

The circumstances in this case clearly establish that the police were responding to an emergency call. The circumstances surrounding the discovery of the victim demonstrate an ongoing emergency that was going to require police assistance.

Officer Leroux only asked the victim one question. Then he immediately made arrangements for additional assistance by a female officer.

The appellant suggests that the emergency was over when the police entered the house. That argument assumes that a rape victim doesn't need emergency medical care and there isn't any psychological stress caused by the act of rape. The ongoing emergency didn't stop because the defendant was arrested and placed in handcuffs. The victim still needed police assistance and medical attention. The emergency remained ongoing and the single question directed related to the emergency.

Also, it is important to note that the question asked by Officer Leroux was only a small part of the evidence against the defendant. The victim's testimony, the testimony of the nurse who examined and treated the victim and the remaining testimony of Officer Leroux all established that the appellant raped his former girl friend.

This court should not accept jurisdiction in this case because the application of *Crawford supra* and *Washington, supra* clearly demonstrate that victim's response to Officer Leroux was not a testimonial statement and was therefore admissible as an excited utterance.

CONCLUSION

The lower appellate court and the trial court ruled based upon established case law. Additional clarification is not needed. Therefore, this Court should not accept jurisdiction in this matter and the ruling of the Court of Appeals should stand.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 
Timothy F. Braun, #0038750
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was sent via ordinary U.S. Mail this 11th day of December, 2009, to Thomas P. Kurt, 610 Adams Street, Second Floor, Toledo, Ohio 43604, Counsel for Defendant-Appellant.


Timothy F. Braun, #0038750
Assistant Prosecuting Attorney