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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1750**

State of Minnesota,
Respondent,

vs.

Chim LoVan,
Appellant.

**Filed August 28, 2017
Affirmed
Larkin, Judge**

Nobles County District Court
File No. 53-CR-15-553

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Kathleen A. Kusz, Nobles County Attorney, Worthington, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Johnson, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant argues that his constitutional right to confrontation was violated when the district court allowed a police officer to testify that a homicide victim identified appellant as the person who had stabbed him. We affirm.

FACTS

Respondent State of Minnesota charged appellant Chim LoVan with second-degree murder, third-degree murder, first-degree manslaughter, and second-degree assault for the stabbing death of B.T. The complaint alleged that Officer Colby Palmersheim of the Worthington Police Department responded to a report that a man was “bleeding from the mouth” at a residence. Officer Palmersheim found B.T. in the basement of the residence, lying on a mattress in a fetal position, holding a bloody T-shirt. Officer Palmersheim asked B.T. what happened, and B.T. responded that he was stabbed by “Monkey,” who police later identified as LoVan. B.T. was transported to a hospital and died during surgery.

Prior to trial, the state moved the district court to admit statements that B.T. made while Officer Palmersheim was attending to B.T.’s injuries. The state also sought admission of B.T.’s statements to other responders at the scene. LoVan objected, arguing that the statements were inadmissible hearsay and that their admission would violate his rights under the Confrontation Clause of the United States Constitution.

The district court held an evidentiary hearing on the state’s motion. Officer Palmersheim testified that he was trained as an Emergency Medical Technician (EMT) and in Cardiopulmonary Resuscitation (CPR). At approximately 5:50 p.m. on June 19, 2015,

he responded to a call that an individual at the residence “was bleeding from the mouth.” He was the “first officer on the scene” and the sole emergency responder. He found B.T. in the basement lying “in the fetal position on a mattress with several T-shirts that appeared like they were blood-soaked.” B.T. appeared to be in extreme pain, very pale, and very lethargic, which, according to Officer Palmersheim’s training, “are signs of being in shock.” While in the basement Officer Palmersheim “asked [B.T.] what the problem is, and [B.T.] told [Officer Palmersheim] that he was stabbed.”

Officer Palmersheim “wanted to make sure that the person that stabbed [B.T.] was not a current threat to [the police] or for the EMS that was going to be arriving shortly.” He “asked [B.T.] who stabbed him and at what time.” B.T. responded that “Monkey” had stabbed him around 3:00 a.m. Officer Palmersheim asked B.T. about the incident, and B.T. responded that “there was a confrontation at the front door or the south door of the house, that Monkey was trying to get in the house and when [B.T.] . . . was trying to shut the door on Monkey, that [B.T.] was stabbed at that point.”

Officer Palmersheim viewed his role as a “First Responder for . . . medical assistance.” He was also “there for scene safety for the . . . ambulance that was coming.” Officer Palmersheim explained during cross-examination that he “didn’t know anything prior to [his] arrival” and that he learned when the stabbing had occurred when he spoke to B.T.

The district court ruled that B.T.’s statements to Officer Palmersheim were admissible under the residual exception to the hearsay rule and that their admission would not violate LoVan’s confrontation rights. But the district court held that the majority of

B.T.'s other statements at the scene, including additional statements to Officer Palmersheim, were inadmissible under the Confrontation Clause.

The case was tried to a jury, and Officer Palmersheim testified as follows regarding his conversation with B.T.:

Then I asked [B.T.] what had happened and he told me that he was stabbed and showed me a puncture just above his belly button on his abdomen.

....

I asked [B.T.] who had stabbed him and he told me it was a person named Monkey, and I asked him when this happened at. He told me it was at about 3:00 a.m., uh, that morning and that there was a—that Monkey came over to his house, was trying to get in the door, [B.T.] was trying to shut the door on him and during that altercation he ended up being stabbed.

The jury found LoVan guilty of all but one of the charged offenses, and the district court sentenced him to serve 200 months in prison. LoVan appeals.

DECISION

LoVan contends that “[t]he district court violated [his] confrontation rights by admitting hearsay statements [B.T.] made to Officer Palmersheim identifying LoVan as the person who stabbed [B.T.] because the statements were testimonial.”¹ He argues that “[t]he statements [B.T.] made about who stabbed him, and why and how the altercation occurred, were testimonial because when Palmersheim questioned [B.T.], the emergency had been over for hours and hours.”

An appellate court generally reviews a district court’s evidentiary rulings for a clear abuse of discretion. *State v. Warsame*, 735 N.W.2d 684, 689 (Minn. 2007). But appellate

¹ LoVan does not challenge the district court’s hearsay ruling.

courts review de novo whether the admission of evidence violated a defendant's rights under the Confrontation Clause. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend VI. In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause prohibits the admission of testimonial out-of-court statements unless the declarant is unavailable to testify and there was a previous opportunity to cross-examine the declarant. 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004). Whether a declarant's statement to the police was testimonial depends on the primary purpose of the police questioning. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74 (2006). The Supreme Court has 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. 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."

Michigan v. Bryant, 562 U.S. 344, 356, 131 S. Ct. 1143, 1154 (2011) (quoting *Davis*, 547 U.S. at 822, 126 S. Ct. at 2273-74).

The Supreme Court has further explained that when a court determines whether the Confrontation Clause bars the admission of a statement at trial, the court

should determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the

parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. . . . [T]he existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.

Id. at 370-71, 131 S. Ct. at 1162 (footnote omitted).

For example, in *Bryant*, police questioned a “mortally wounded” victim “in a gas station parking lot.” *Id.* at 348, 131 S. Ct. at 1150. The victim “had a gunshot wound to his abdomen.” *Id.* at 349, 131 S. Ct. at 1150. “The police asked him what had happened, who had shot him, and where the shooting had occurred.” *Id.* (quotation omitted). The victim identified his assailant and described the shooting. *Id.* The United States Supreme Court considered the following circumstances in determining whether the primary purpose of the police interrogation was to meet an ongoing emergency and whether the victim’s identification of the shooter therefore was a nontestimonial statement.

First, the Supreme Court examined the circumstances in which the interrogation occurred. *Id.* at 371, 131 S. Ct. at 1163. The Supreme Court noted that “[a]t no point during the questioning did either [the victim] or the police know the location of the shooter.” *Id.* at 374, 131 S. Ct. at 1164. The Supreme Court reasoned that “[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue.” *Id.* at 363, 131 S. Ct. at 1158. The Supreme Court concluded that “[a]t bottom, there was an ongoing emergency here where

an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [him].” *Id.* at 374, 131 S. Ct. at 1164.

Having concluded that there was an ongoing emergency, the Supreme Court considered the circumstances of that emergency. *Id.*, 131 S. Ct. at 1165. The Supreme Court noted that the victim’s statements to police were made while he “was lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen” and that “[h]e was obviously in considerable pain and had difficulty breathing and talking.” *Id.* at 375, 131 S. Ct. at 1165. The Supreme Court reasoned:

The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim’s medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

Id. at 364-65, 131 S. Ct. at 1159. The Supreme Court concluded that based on the description of the victim’s condition and his statements, it could not “say that a person in [the victim’s] situation would have had a ‘primary purpose’ ‘to establish or prove past events potentially relevant to later criminal prosecution.’” *Id.* at 375, 131 S. Ct. at 1165 (quoting *Davis*, 547 U.S. at 822, 126 S. Ct. at 2274).

The Supreme Court next considered the circumstances from the perspective of an objective officer. *Id.* at 375-76, 131 S. Ct. at 1165-66. The Supreme Court noted that the responding officers

did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred. The questions they asked—what had happened, who had shot him, and where the shooting occurred—were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public, including to allow them to ascertain whether they would be encountering a violent felon. In other words, they solicited the information necessary to enable them to meet an ongoing emergency.

Id. (footnotes and quotations omitted).

The Supreme Court reasoned that even though the victim indicated “that he had been shot at another location about 25 minutes earlier,” he “did not know the location of the shooter at the time the police arrived” and “gave no indication that the shooter, having shot at him twice, would be satisfied that [he] was only wounded.” *Id.* at 377, 131 S. Ct. at 1166. The Supreme Court concluded that “[n]othing in the [victim’s] responses indicated to the police that, contrary to their expectation upon responding to a call reporting a shooting, there was no emergency or that a prior emergency had ended.” *Id.*

Lastly, the Supreme Court considered the informality of the situation and the interrogation. *Id.* The Supreme Court noted that the questioning was unstructured and on location, which was unlike the “station-house interview” in *Crawford* that it found testimonial. *Id.* at 354, 377, 131 S. Ct. at 1153, 1166. The Supreme Court concluded that “[t]he informality suggests that the interrogators’ primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted [the victim] to or focused him on the possible future prosecutorial use of his statements.” *Id.* at 377, 131 S. Ct. at 1166.

Because the circumstances of the encounter, as well as the actions and statements of the victim and the police, objectively indicated that the primary purpose of the interrogation was to meet an ongoing emergency, the Supreme Court concluded that the victim's identification of the shooter was nontestimonial and that the Confrontation Clause did not bar its admission at trial. *Id.* at 377-78, 131 S. Ct. at 1166-67.

The facts here are similar to those in *Bryant*. The interrogation occurred in an informal setting, while B.T. was bleeding from a mortal wound to his abdomen. He was in extreme pain, very pale, and very lethargic. LoVan emphasizes that Officer Palmersheim arrived at the scene approximately 14 hours after the stabbing. But LoVan does not explain how the passage of time lessened B.T.'s obvious medical emergency. From an objective perspective, the apparent passage of time without medical attention likely exacerbated the risks associated with the medical emergency. Given B.T.'s physical condition, it is unlikely that B.T.'s primary purpose during the interrogation was to establish past events for use in a later criminal prosecution.

Moreover, Officer Palmersheim was a first responder working with limited information. When he observed B.T. in the basement he did not know that B.T. had been stabbed; he only knew that someone at the residence was bleeding from the mouth. Once Officer Palmersheim learned about the stabbing, the circumstances indicated that there could be an ongoing threat to first responders and the public. Officer Palmersheim therefore asked questions regarding the identity and location of the assailant. As explained in *Bryant*, an officer's primary purpose in questioning a victim may be to ensure that the

area is secure even if the assailant is not in the immediate area of the interrogation. *Id.* at 372-74, 131 S. Ct. at 1163-64; *accord Warsame*, 735 N.W.2d at 694.

The relevant circumstances in this case objectively indicate that the primary purpose of the interrogation was to address what appeared to be an ongoing emergency. As to this point, the following discussion from the Minnesota Supreme Court is instructive.

As first responders to emergencies, police are often required to assess a party's injuries and determine whether those injuries must be immediately addressed and whether the party requires additional assistance from paramedics or other health care professionals. In order to make that assessment, officers must inevitably learn the circumstances by which the party was injured, and if the circumstances of the questions and answers objectively indicate that gaining such information is the primary purpose of the interrogation, then the party's statements are nontestimonial. We acknowledge that information about a victim's injury and its cause may be useful in a later prosecution, but for Confrontation Clause purposes, it is the primary purpose of the interrogation that is dispositive.

Warsame, 735 N.W.2d at 693.

The supreme court further explained that “an interrogation that begins for the purpose of determining the need for emergency assistance can evolve into testimonial statements once that purpose has been achieved.” *Id.* at 695. The district court here recognized this distinction and carefully parsed out the victim's statements that were obtained after Officer Palmersheim had determined the need for emergency assistance.

In conclusion, the primary purpose of Officer Palmersheim's initial interview of B.T. was to determine the extent of what objectively appeared to be an ongoing emergency. That initial, brief questioning informed Officer Palmersheim's assessment of the situation as a first responder attending to an individual with a serious, unexplained medical

condition. Once Officer Palmersheim obtained basic information regarding how B.T. was injured and whether there was an ongoing threat, the primary purpose was achieved. Because the statements at issue here were obtained prior to that time, they were nontestimonial. The district court therefore did not err by ruling that the admission of B.T.'s statements to Officer Palmersheim did not violate the Confrontation Clause.

Affirmed.