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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1509**

State of Minnesota,
Respondent,

vs.

Sam James Lemieux,
Appellant.

**Filed June 10, 2019
Affirmed
Connolly, Judge**

St. Louis County District Court
File No. 69DU-CR-18-508

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Mark Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and
Slieter, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his conviction of felony fifth-degree assault, arguing that the district court erred when it admitted hearsay statements given by a victim to a 911 dispatcher in violation of the Confrontation Clause. Because the district court did not err when it concluded that the statements were nontestimonial and qualified as an excited utterance, we affirm.

FACTS

In February 2018, a witness saw a man and woman walking near a hospital in Duluth. The pair was observed arguing and, at some point during the argument, the man struck the woman several times in the face with his fist. The witness observed the woman, later identified as C.R. (who appeared distraught), proceed to the hospital's emergency room as the man hurried away.

Once inside, C.R. called 911. C.R. told the dispatcher that her assailant was appellant Sam James Lemieux and provided information about his physical description, potential location, and whether he was armed with any weapons; she also described her current medical condition. Multiple police officers responded to the call, and appellant was located and arrested. The state charged appellant by amended complaint with one count of felony domestic assault and one count of felony fifth-degree assault. He pleaded not guilty.

C.R. did not appear at trial, and the state sought to admit a recording of the 911 call in her absence. Appellant filed a motion in limine to exclude the statements made by C.R.

during the 911 call, arguing that this evidence would violate his constitutional right to confront his accuser and that the statements in the call were inadmissible hearsay. The district court determined that portions of the 911 call were admissible. The jury found appellant guilty of both charges, and the district court imposed a sentence of 26 months in prison only on the felony fifth-degree assault. Appellant challenges his conviction, arguing that the district court erred when it determined that portions of the 911 call were not barred by the Confrontation Clause or the hearsay rule.

D E C I S I O N

This court reviews evidentiary rulings, including a finding that a statement is admissible under a hearsay exception, for abuse of discretion. *See State v. Griffin*, 834 N.W.2d 688, 693 (Minn. 2013). Claims that the admission of evidence violated the Confrontation Clause are subject to de novo review, and factual findings are reviewed for clear error. *State v. Lopez-Ramos*, 913 N.W.2d 695, 701 (Minn. App. 2018). “When the error implicates a constitutional right, a new trial is required unless the State can show beyond a reasonable doubt that the error was harmless.” *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). “An error is harmless beyond a reasonable doubt if the jury’s verdict was surely unattributable to the error.” *Id.* But if an error does not implicate a constitutional right, a new trial will not be granted unless the error substantially influenced the jury’s verdict. *Id.*

Confrontation Clause

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be

confronted with the witnesses against him.” U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. If a statement is testimonial, it violates the Confrontation Clause and is inadmissible in a criminal trial, unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004). If a statement is nontestimonial, it is not barred by the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 840, 126 S. Ct. 2266, 2284 (2006). The testimonial nature of statements is reviewed case-by-case. *See e.g., State v. Wright*, 726 N.W.2d 464, 473-74 (Minn. 2007).

This court employs a “primary purpose” test when examining whether statements made to 911 dispatchers are testimonial, focusing on whether statements in a 911 call were made “under circumstances objectively indicating that the primary purpose . . . [was] to enable police assistance to meet an ongoing emergency. *Davis*, 547 U.S. at 822, 126 S. Ct. at 2273. If the primary purpose of the call was to enable police to meet an ongoing emergency, the statements are nontestimonial. *Id.* But if the primary purpose of the statements were made to prove past events, which may be relevant to a criminal prosecution, then the statements are testimonial. *Id.* at 2274. It is the state’s burden to prove that a statement is not testimonial. *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013).

Appellant argues that the statements made to the 911 dispatcher were testimonial because the statements described a completed event, there was not an ongoing emergency, the call was made while C.R. was safely in the hospital, the assailant was not armed with a weapon, and C.R. was calm during the call. Appellant’s argument is not persuasive.

First, it is clear from the recording of the call that the questions asked and the answers given were not directed at trying to prove past events. *See Davis*, 547 U.S. at 822, 126 S. Ct. at 2273-74. On the contrary, almost all the statements in the recording focused on determining appellant's *current* whereabouts, his *current* physical description, and whether he was *currently* armed with a weapon, as well as C.R.'s *current* need for medical treatment. Thus, the record establishes that the primary purpose of the statements was to enable the police to aid an assault victim and to locate a potentially dangerous and at-large suspect, not to prove past events.

Second, appellant argues that, even if the statements were not made for the primary purpose of establishing past events, they were still made absent an ongoing emergency because C.R. was safe in the hospital and calm when she talked with the dispatcher. But appellant's assertion that C.R. was calm during the call is unsupported by the record and by the district court's findings, which indicate that, while C.R. was at times calm during the call, she was also agitated, frustrated and, often cursing. This finding is not clearly erroneous. *See Lopez-Ramos*, 913 N.W.2d at 701. Moreover, "[t]he existence of an ongoing emergency must be objectively assessed from the perspective of the parties . . . *at the time*, not with the benefit of hindsight. *Michigan v. Bryant*, 562 U.S. 344, 361 n.8, 131 S. Ct. 1143, 1157 n.8 (2011) (emphasis added). At the time of the call, the suspect's location was unknown and it was unclear what his intention was, whether he had a weapon, and where he was headed. Consequently, at the time of the call there was an ongoing emergency.

The district court did not err when it concluded that the primary purpose of the statements in the 911 call was to enable the police to meet an ongoing emergency and were therefore nontestimonial.

Excited Utterance

Appellant also objected to the introduction of the 911 call on the grounds that the information in the call was hearsay not within any exception. The district court determined that the statements were admissible under the excited-utterance exception to the hearsay rule. Minn. R. Evid. 803(2) provides that a statement relating to a startling event or condition, made while the declarant was under the stress of excitement caused by the event or condition, is excluded by the hearsay rule.

To qualify as an excited utterance, a declarant's statement must satisfy three requirements: "(1) there must be a startling event or condition; (2) the statement must relate to the startling event or condition; and (3) the declarant must be under a sufficient aura of excitement caused by the condition to ensure the trustworthiness of the statement." *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986) (quotation omitted). It is within a district court's discretion to admit the evidence if the district court determines that "the declarant was sufficiently under the aura of excitement" when the statement was made to insure that it is trustworthy. *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992) (quotation omitted). In considering these requirements, courts examine "the length of time elapsed, the nature of the event, the physical condition of the declarant, [and] any possible motive to falsify." *Daniels*, 380 N.W.2d at 782-83 (quotation omitted).

Consideration of these factors supports the district court’s determination to admit C.R.’s statements in this case. First, C.R. made the call only a few minutes after the incident. *See, e.g., id.* (statements made within one hour after fatal house fire admissible). The subject of the call—a physical assault—is a startling event. C.R.’s physical and emotional state—voice and pitch changes, frequent cursing, and a hurt face and headache—also support the admission of the statements. Finally, the circumstances surrounding the statements tend to show trustworthiness. The district court determined prior to trial that it had to “make a judgment call on the demeanor and everything of the . . . caller” and found that C.R. was still under the “impact of the startling event.” *See Griffin*, 838 N.W.2d at 693 (evidentiary rulings are generally within the discretion of the district court). Moreover, the record indicates that C.R. had outstanding warrants for her arrest, which make it unlikely that she would have contacted police falsely to report an assault.

Consequently, the district court properly exercised its discretion when it admitted the statements as excited utterances.

Affirmed.