

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 9, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP683-CR

Cir. Ct. No. 2005CF88

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID D. DEBAUCHE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County:
MICHAEL T. JUDGE, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. David DeBauche appeals a judgment convicting him of three counts of first-degree intentional homicide, contrary to WIS. STAT.

§ 940.01(1)(a).¹ DeBauche contends the circuit court erroneously permitted testimony about a victim's statements during a 911 phone call. We disagree and affirm the judgment.

BACKGROUND

¶2 DeBauche was charged in the murders of his ex-wife, Amy DeBauche, and her parents, David and Jane Jenson, who were killed in the Town of Mountain in Oconto County on August 7, 2005. Each victim died of multiple gunshot wounds.

¶3 While there was circumstantial evidence of DeBauche's guilt, the most damning evidence was testimony from a 911 police dispatcher, Gail Angell, who described an emergency phone call she received on the night of the murders. Angell later learned the call was from Jane Jenson, and Angell's testimony about the call was as follows.²

¶4 At 11:58 p.m. on August 6, 2005, Angell received an emergency call from a woman requesting immediate police assistance at "13979 County Trunk W because their daughter's husband was on the property and he had a gun." Angell described the caller's tone as "very frightened and in urgent need of help."

¶5 After Angell dispatched sheriff's deputies, the caller stated her daughter had been shot. Angell asked where they were on the property, and the

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² There was no tape recording of the 911 call. Apparently, due to construction work, some lines had mistakenly been cut several days earlier and no one was aware the recording system was not working.

caller responded they were in a camper trailer. Angell asked the caller what her daughter's husband's name was, and the caller responded "David DeBauche." Angell asked her to spell his last name, which she did.

¶6 Angell asked about the type of gun used and DeBauche's current location. The caller did not know the type of gun used and only knew that DeBauche was somewhere outside. The caller also indicated it was just her, her husband, and her daughter in the camper. Angell asked if DeBauche was "outside on foot or if he had possibly left in a vehicle," to which the caller responded she did not know because it was dark outside and they were too scared to look. Angell also asked what type of vehicle DeBauche might have, and the caller described what DeBauche usually drove. Angell also asked for the caller's cell phone number in case they got disconnected, and the caller gave Angell the number.

¶7 Because responding rescue squads wanted to know the condition of the caller's daughter, Angell inquired about her condition. The caller indicated her daughter was conscious and alert and had only been shot once right below the rib cage. The caller also asked Angell to contact the Green Bay Police Department to check on DeBauche's children because he had left them home alone. The caller further indicated her daughter was in the process of a divorce with DeBauche. After explaining in more detail where the camper was located on the property, the caller stated her husband wanted to go outside to find DeBauche. Angell told the caller they should not leave the camper.

¶8 The caller then stated her husband had been shot. Angell described the caller as “very hysterical and scared” and said she was screaming.³ Angell had difficulty conversing with the caller because she was so hysterical. According to Angell, “then she came back to the phone and with extreme gravity in her voice said, I’ve been hit. I’ve been shot too.” Angell asked her where she had been shot, “but she was not able to respond to me at all after that.” Angell could only hear screaming and shuffling. Approximately thirty seconds after the caller stated she had been shot, Angell heard “three or four popping noises,” which she believed to be gunshots, after which “everything just went totally silent”

¶9 Angell held the line open and dialed the caller’s cell phone number on another line thinking the call might have been disconnected. When calling the cell phone number, Angell “got a voice mail for David and Jane, and that’s where I first knew what their names were” On the original open line, Angell did not hear anything else until sheriff’s deputies entered the camper. Sheriff’s deputies found all three victims deceased on the floor of the camper. Deputies found DeBauche a few hours later. He was in the woods near a car that was parked about a quarter-mile from the crime scene on a dead-end road.

¶10 Before Angell testified, DeBauche objected to her testimony on hearsay and confrontation grounds. The circuit court overruled the objection. The court concluded that Angell’s testimony about the phone call from Jenson fit with an exception to the hearsay rule as an excited utterance. The court further concluded the evidence was not testimonial and therefore did not violate

³ This was approximately six or seven minutes into the call, making it past midnight and a new date, August 7, 2005.

DeBauche's confrontation rights. Alternatively, the court concluded that the testimony was "an exception to the confrontation clause by the rule of forfeiture against wrongdoing."

DISCUSSION

¶11 DeBauche contends Angell's testimony about Jane Jenson's statements constituted testimonial evidence in violation of his right to confront witnesses. He also argues the court erred when determining, in the alternative, that DeBauche waived his confrontation rights under the rule of forfeiture by wrongdoing.⁴

¶12 Under the United States Constitution, criminal defendants are entitled to confront their accusers: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. The same right is guaranteed by the Wisconsin Constitution. WIS. CONST. art 1, § 7. We review de novo whether a defendant's constitutional confrontation rights were violated. *State v. Rodriguez*, 2006 WI App 163, ¶13, 295 Wis. 2d 801, 722 N.W.2d 136.

¶13 In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the United States Supreme Court held a defendant's confrontation rights are violated if the trial court received evidence of out-of-court statements by someone who does not testify at trial if those statements are "testimonial" and the defendant had no prior opportunity to cross-examine the witness. *Crawford* articulated two overlapping

⁴ DeBauche does not contest the court's conclusion that the testimony about Jane Jenson's statements fit within an exception to the hearsay rule.

considerations for determining whether an out-of-court statement was testimonial: “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Id.* at 51.

¶14 The Supreme Court elaborated on the distinction between testimonial and nontestimonial statements in *Davis v. Washington*, 547 U.S. 813, 822, 826-27 (2006), which involved, in part, a recording of a 911 call. The *Davis* court stated:

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 822. The Court concluded that statements in the 911 recording were not testimonial. *Id.* at 829. The Court noted the 911 caller was describing events as they were happening, not merely past events, and “any reasonable listener would recognize that [the caller] ... was facing an ongoing emergency.” *Id.* at 827. The Court further stated the call was “plainly a call for help against bona fide physical threat,” and “the nature of what was asked and answered ... again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than to simply learn ... what had happened in the past.” *Id.* [emphasis omitted]. The primary purpose of the call “was to enable police assistance to meet an ongoing emergency. [The caller] was not acting as a witness; [the caller] was not testifying.” *Id.* at 828 [emphasis omitted].

¶15 In *Rodriguez*, 295 Wis. 2d 801, ¶23, we discussed the *Davis* decision, noting that “[i]nsofar as a victim’s excited utterances to a responding law-enforcement officer encompass injuries for which treatment may be necessary, or reveal who inflicted those injuries, which may facilitate apprehension of the offender, they serve societal goals other than adducing evidence for later use at trial.” We stated that

an out-of-court declaration must be evaluated to determine whether it is, on one hand, overtly or covertly intended by the speaker to implicate the accused at a later judicial proceeding, or, on the other hand, is a burst of stress-generated words whose main purpose is to get help and succor, or to secure safety, and are thus devoid of the “possibility of fabrication, coaching, or confabulation.”

Id., ¶26 (quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990)).

¶16 Here, Jane Jenson’s statements, as reflected in Angell’s testimony, were not testimonial. Because DeBauche’s confrontation argument is based solely on his assertion that the statements were testimonial, we reject his argument that his confrontation rights were violated. As a result, we need not address the circuit court’s alternative conclusion that DeBauche forfeited his confrontation rights by wrongdoing. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

¶17 As Angell’s testimony demonstrates, Jane Jenson was facing an ongoing emergency throughout the course of her 911 call. See *Davis*, 547 U.S. at 827. The call began with a request for police assistance and a report of a man on the property with a gun. The discussion ended with Jane Jenson’s report that she had been shot. During the course of the call, police and rescue units were responding to the emergency.

¶18 There is no question that Jane Jenson was seeking help for a “bona fide physical threat.” *See id.* Her real-time account of the emergency and her ultimate fate demonstrate the threat she reported was real. Viewed objectively, Angell’s questions and Jane Jenson’s statements were directed at resolving the ongoing emergency, not simply describing past events. *See id.* The focus of the call was on rescuing Jane Jenson, as well as her husband and daughter. The location of the victims, the scope of their injuries, and the identity and nature of the threat were all directed at the rescue effort. *See Rodriguez*, 295 Wis. 2d 801, ¶23.

¶19 To the extent DeBauche argues the statements identifying him as the assailant were testimonial and should have been excluded, we need only point to our statement in *Rodriguez* that “[i]nsofar as a victim’s excited utterances to a responding law-enforcement officer ... reveal who inflicted those injuries, which may facilitate apprehension of the offender, they serve societal goals other than adducing evidence for later use at trial.” *See id.*, ¶23. That was the case here with Jane Jenson’s identification of DeBauche by name and her description of his vehicle.⁵ *See id.*

¶20 Jane Jenson’s statements were not intended to overtly or covertly implicate DeBauche at a later judicial proceeding; they were instead stress-generated statements meant to secure help and safety and therefore were “devoid of the ‘possibility of fabrication, coaching, or confabulation.’” *See id.*, ¶26

⁵ Jane Jenson’s statement about the safety of DeBauche’s children, aside from having the effect of identifying DeBauche, was also nontestimonial because it was directed at securing their safety rather than implicating DeBauche at later judicial proceedings. *See State v. Rodriguez*, 2006 WI App 163, ¶26, 295 Wis. 2d 801, 722 N.W.2d 136.

(quoting *Wright*, 497 U.S. at 820). Jane Jenson was not acting as a witness; she was not testifying. See *Davis*, 547 U.S. at 828. Her statements were not testimonial. See *id.*

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

