

# ***The Minnesota Lawyer***

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## **Minnesota Court Rules Defendant's Confrontation Clause Rights Were Not Violated**

**By Michelle Lore**

A woman's statements to police following a domestic assault were made as part of an ongoing emergency and therefore were not testimonial and could be introduced at the defendant's trial, the Minnesota Court of Appeals has ruled.

In so ruling, the court found that in examining whether statements to police are testimonial for purposes of the Confrontation Clause, a court may consider events beyond the location where the victim is being questioned.

The woman had stopped police and told them that her boyfriend had beaten her up. In response to further questioning, the woman said the defendant choked her, tried to kill her and then took off in a car with her sister. The woman later refused to testify at the defendant's trial so the state sought to admit her prior statements.

A Hennepin County District Court judge found that only the statement that the defendant had beaten the woman up was admissible under the U.S. Supreme Court's 2004 decision *Crawford v. Washington*, which held that evidence consisting of out-of-court "testimonial" statements violate the Confrontation Clause.

But the Court of Appeals reversed, finding that all of the woman's statements were nontestimonial and therefore admissible.

"[The defendant's] right to confrontation would not be violated by admission of [his girlfriend's] narrative account of the alleged assault," wrote Judge Terri Stoneburner. "Police were dealing with an 'ongoing emergency' potentially extending to three separate locations when they spoke with [the girlfriend] at the curb and when she gave her narrative account of the incident."

The 13-page decision is *State v. Warsame*.

Paul R. Scoggin, head of Hennepin County's Violent Crimes Division, told Minnesota Lawyer that the decision is significant in that it attempts to shed light on current federal caselaw.

Whether a police interrogation elicits testimonial or nontestimonial statements depends on whether the police are meeting an emergency at the scene or simply trying to prove past events, Scoggin observed. "This decision clarifies that line somewhat," he said.

Scoggin acknowledged, however, that it's "never going to be easy" to make that call because these cases are fact-based and each one is different. "I don't envy the District Court's job of defining this," he said.

St. Paul attorney Mark D. Nyvold, who represented the defendant, declined to comment on the decision.

At a continuing legal education seminar sponsored by the Minnesota State Bar Association's Criminal Law Section earlier this month, Hennepin County District Court Judge Kathryn Quaintance discussed some of the difficulties in determining whether statements are testimonial or nontestimonial under *Crawford*. The rules relating to the Conference Clause are "changing as we speak," she said.

Quaintance noted that the *Crawford* decision "made a huge dent" in particular cases, especially those involving excited utterances and child testimony. Questions exist over how this will all shake down, she said. "[But] it has serious implications for prosecutors of domestic violence without a victim testifying."

Scoggin agreed. The *Crawford* decision has posed problems for prosecutors, he said. "It's a significant issue. The domestic assault area is a good example because victims often recant their statements to police. "

### **Statements given**

In Warsame, an Eden Prairie police officer who was responding to a 911 call concerning conduct at defendant Farah Abshir Warsame's address was flagged down by a woman near the house. She told the officer that her boyfriend (the defendant) had just beaten her up. As he was giving the woman medical attention, another officer showed up.

The woman described her assailant and one of the officers broadcast that description to other squads. Police had been following the defendant's vehicle since just after he drove away from his residence.

The woman told the officers that she had been choked and gave a narrative account of what had happened, indicating that her sister had tried to help her. Minutes later, one of the officers went to the defendant's residence to check on the sister. Her finger was cut but she was not in need of medical assistance.

The defendant's girlfriend was crying and shaking as she talked to the officer who was assisting her, telling him that she believed the defendant was going to kill her. She also indicated that the defendant had left with another one of her sisters.

The defendant was charged with domestic assault and terroristic threats. When his girlfriend failed to testify at trial, the state moved to admit her statements to police. The District Court judge admitted the statement by the woman that her "boyfriend just beat [her] up," finding that it was nontestimonial. All other statements, however, were "testimonial" and inadmissible under *Crawford* unless the woman testified at trial.

The state appealed and the Court of Appeals reversed. The Minnesota Supreme Court denied review but the U.S. Supreme Court granted certiorari, vacated the Court of Appeals' opinion and remanded for consideration in light of its recent decision in *Davis v. Washington*.

### **Ongoing emergency**

The Court of Appeals began by reviewing recent federal court caselaw on the Confrontation Clause.

Two years ago, in *Crawford*, the U.S. Supreme Court enunciated a rule that "testimonial" statements by declarants who do not testify at trial and whom the defendant has had no prior opportunity to cross-examine violate the Confrontation Clause. Testimonial statements may include statements taken by police in the course of interrogation.

In *Davis*, issued earlier this year, the U.S. Supreme Court determined that statements are nontestimonial when made in the course of a police investigation under circumstances indicating that the primary purpose of the interrogation is to enable the police to meet an ongoing emergency. Statements are testimonial when the circumstances indicate there is no such emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Turning to the case at bar, it was undisputed that an ongoing emergency existed at some points during the girlfriend's encounter with police. The issue, according to Stoneburner, was when the purpose of the questioning became one of obtaining information about past events "potentially relevant to later criminal prosecution."

The court found that this was a difficult situation wherein the police faced possible emergency situations in three locations:

- the street curb where the girlfriend was being attended to,
- the defendant's house where a sister remained, and
- the fleeing vehicle where another sister was with the defendant.

The court determined that the “ongoing emergency” referred to in *Davis* as making out-of-court statements nontestimonial need not be limited to the complainant’s predicament or the location where she is questioned by police.

“As long as a possible emergency situation, occurring at another location or involving another person, is related to the complainant’s own situation and is one which can be clarified by questioning her, the purpose of the questioning may be considered as for the primary purpose of enabling police assistance to meet an ongoing emergency, making the complainant’s statements non-testimonial,” Stoneburner wrote.

Here, the complex circumstances surrounding the girlfriend’s statements supported the conclusion that there was still an ongoing emergency when she related to police the critical narrative of the incident. Accordingly, all of her statements up to and including the critical narrative account were nontestimonial and could be admitted at trial.

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