

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) No. 78238-5
)
 v.)
) EN BANC
 JAMES DOUGLAS OHLSON,)
)
 Petitioner.) Filed October 18, 2007
 _____)

FAIRHURST, J. – James Douglas Ohlson was convicted of two counts of assault in the second degree following a jury trial at which one victim, L.F., testified and the other victim, D.L., did not. Ohlson appeals his conviction on the grounds that D.L.’s out-of-court statements were improperly admitted as excited utterances and that admitting the statements violated Ohlson’s Sixth Amendment right to confrontation. We hold that the trial court did not abuse its discretion by admitting D.L.’s statements as excited utterances. While we reject the Court of Appeals’ per

se rule that excited utterances can never be testimonial, we hold, under the facts presented here, that D.L.’s statements were nontestimonial and thus their admission did not violate Ohlson’s right to confrontation under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) and *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). We affirm the Court of Appeals in part and reverse in part.

I. FACTUAL AND PROCEDURAL HISTORY

On April 16, 2004, two minors, L.F. and D.L., were standing on the sidewalk near the entrance to Lion’s Field in Bremerton, Washington, waiting for their mothers to pick them up. L.F. testified that as she and D.L. were waiting, Ohlson drove by them, yelling racial slurs at them and making obscene gestures. Ohlson turned around and drove past them again, speeding and braking while continuing to yell racial slurs and make obscene gestures. Ohlson then drove out of sight and was gone for approximately five minutes.

When Ohlson returned, L.F. and D.L. were still on the sidewalk. L.F. testified that Ohlson drove toward them, over the curb, and onto the sidewalk where they were standing, causing the two of them to “jump out of the way.” I Verbatim Report of Proceedings (VRP) at 66. D.L. said, “look out,” and L.F. turned to see Ohlson’s car very close to them, before they jumped out of its way. I VRP at 68.

L.F. described Ohlson as “tr[ying] to run us over,” going “really fast . . . like 45 [miles per hour],” and she stated that she was scared. I VRP at 66, 67. Robert Klose, an eyewitness standing across the street, testified that he saw Ohlson driving up onto the sidewalk toward L.F. and D.L., who had to jump out of the way. Klose testified he yelled, “[h]ey, that guy tried to hit you.” II VRP at 112.

L.F. called 911. Bremerton Police Officer Crystal Gray received the report of “a vehicle speeding . . . trying to hit some juveniles” and made an emergency response using lights and siren. I VRP at 90. She arrived at the scene within five minutes of the call. Officer Gray testified that L.F. and D.L. were “pretty upset” and “pretty shaken up.” I VRP at 91. At that point in Officer Gray’s testimony, Ohlson made an objection to the admission of D.L.’s out-of-court statements, which the trial court overruled.

Officer Gray then testified that L.F. and D.L. told her that while they were standing on the sidewalk waiting for a ride,

a vehicle . . . had gone by and flipped them off and, I quote “called them [racial slurs]” and sped off. The vehicle then came back around and actually swerved up on to the curb trying to hit them. . . . They had to literally jump out of the way so that they were not hit. This continued, they said, at least four times, where the car went back and forth in front of them, calling them racial names.

I VRP at 92-93. A second Bremerton police officer also made an emergency

response to L.F.'s 911 call, arriving after Officer Gray. That officer drove around in the immediate area looking for the suspect vehicle while Officer Gray made initial inquiries of L.F. and D.L.

Ohlson was arrested at his home several hours after the incident. The arresting officer testified that Ohlson admitted to yelling racial slurs and making gestures at L.F. and D.L. while driving past them multiple times, as well as to driving "kind of recklessly to scare [L.F. and D.L.]," at one point coming within "about five feet from [D.L.]" I VRP at 84-85. Ohlson also testified at trial. He admitted to using racial slurs but stated that he had not intended to scare L.F. and D.L. Rather, Ohlson explained, he was in a "fit of rage" because he had lied to his wife about using drugs. II VRP at 124.

The jury found Ohlson guilty of two counts of assault in the second degree and not guilty of malicious harassment. Ohlson appealed his conviction on multiple grounds, and the Court of Appeals affirmed. *State v. Ohlson*, 131 Wn. App. 71, 125 P.3d 990 (2005). In the published portion of its opinion, the court upheld the trial court's admission of D.L.'s out-of-court statements as excited utterances. *Id.* at 78, ¶ 19. Additionally, in adopting a per se rule that excited utterances cannot be testimonial under *Crawford*, the court rejected Ohlson's claim that his Sixth Amendment right to confrontation was violated by the admission of D.L.'s

statements. *Id.* at 79-84, ¶¶ 20-38. We granted Ohlson’s petition for review on the excited utterance and confrontation clause issues. *State v. Ohlson*, 158 Wn.2d 1001, 143 P.3d 828 (2006).

II. ISSUES

- A. Did the trial court abuse its discretion by admitting as excited utterances D.L.’s statements to Officer Gray?
- B. Was Ohlson’s Sixth Amendment right to confrontation violated by admitting D.L.’s out-of-court statements?

III. ANALYSIS

A. *Excited utterance*

Ohlson contends that the trial court erred when it admitted as excited utterances D.L.’s out-of-court statements to Officer Gray. Ohlson argues that the evidence was insufficient to establish that D.L. perceived a startling event and spoke under the stress of excitement of that event, two of the requirements of ER 803(a)(2), the excited utterance exception. We disagree.

This court reviews for abuse of discretion a trial court’s decision to admit a hearsay statement as an excited utterance. *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992). We will not reverse the trial court’s decision “unless we believe that no reasonable

judge would have made the same ruling.” *Woods*, 143 Wn.2d at 595-96.

ER 803(a)(2) provides that a statement is not excluded as hearsay if it is an excited utterance “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” The excited utterance exception does not require a showing that the declarant is unavailable as a witness. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). This court has recognized that the proponent of excited utterance evidence must satisfy three “closely connected requirements” that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. *Woods*, 143 Wn.2d at 597; *Chapin*, 118 Wn.2d at 686. Ohlson contends that the evidence was insufficient to establish the first and second requirements of the excited utterance exception.

Ohlson argues that the first requirement was not met because “no testimony was provided *directly* from D.L. to indicate that a startling event occurred *from his perspective*.” Appellant’s Pet. to Review at 5 (emphasis added). But, as the Court of Appeals correctly stated, while the focus is on the declarant’s perception in analyzing whether a startling event has occurred, “the declarant need not testify regarding his perception of the event in order to establish this requirement.”

Ohlson, 131 Wn. App. at 77, ¶ 16. Indeed, a statement may be admitted as an excited utterance even if the declarant recants or testifies at trial that the event never occurred. See *State v. Williamson*, 100 Wn. App. 248, 258-59, 996 P.2d 1097 (2000) (statements by victim describing her kidnapping and attempted murder held admissible as excited utterances, even though victim later recanted and refused to testify against defendant); *State v. Briscoeray*, 95 Wn. App. 167, 173-74, 974 P.2d 912 (1999) (victim's statement describing assault by boyfriend held admissible as excited utterance, even though victim testified at trial that assault never occurred).

Here the evidence amply supports a finding that D.L. perceived a startling event, the assault, to have occurred. L.F. testified that Ohlson yelled racial slurs at her and D.L., then drove onto the sidewalk toward where they were standing. L.F. testified that it was D.L. who said, “look out,” as Ohlson's car came very close to them. I VRP at 68. Both L.F. and eyewitness Klose testified that L.F. and D.L. then had to jump out of the way of Ohlson's car to avoid being hit. This evidence is sufficient to establish that D.L. perceived the assault to be a startling event.

As for the second requirement, Ohlson's argument that no evidence indicated that D.L. was under the influence of the startling event when he made his statements to Officer Gray also fails. We have previously upheld the admission of statements as excited utterances where the statements were made by alleged victims to a police

officer “just minutes” after an alleged robbery, the officer testified that the declarants “were visibly shaken and excited” when they made the statements, and the statements “appear[ed] to have been spontaneous.” *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997). Here, Officer Gray testified that she spoke with L.F. and D.L. approximately five minutes after the assault occurred and that L.F. and D.L. were “pretty upset” and “pretty shaken up.” I VRP at 91. L.F. and D.L. described the incident to Officer Gray in a spontaneous recitation of the facts.

The trial court did not abuse its discretion when it admitted D.L.’s out-of-court statements as excited utterances.

B. *Sixth Amendment right to confrontation*

In the alternative, Ohlson argues that even if D.L.’s out-of-court statements to Officer Gray were properly admitted as excited utterances, their admission violated his Sixth Amendment right to confrontation¹ under *Crawford* and *Davis*. The State responds that admitting D.L.’s statements did not violate Ohlson’s right to confrontation because the statements were not testimonial. We agree.

1. *The confrontation clause after Crawford and Davis*

¹Article I, section 22 of the Washington Constitution also guarantees criminal defendants the right to confront and cross-examine witnesses against them. However, as Ohlson made no arguments based on the state constitution, we do not address the state constitution here. See *State v. Wheeler*, 145 Wn.2d 116, 124, 34 P.3d 799 (2001) (declining to address potential claim under state constitution where parties failed to argue or brief the issues).

The Sixth Amendment 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. In its watershed 2004 decision, *Crawford*, the United States Supreme Court reformulated the analysis of confrontation clause claims. *Crawford* explained that the confrontation clause “bars ‘admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” *Davis*, 126 S. Ct. at 2273 (quoting *Crawford*, 541 U.S. at 53-54).

While *Crawford* “[le]ft for another day any effort to spell out a comprehensive definition of ‘testimonial,’” 541 U.S. at 68, the Court did identify that a “core class of ‘testimonial’ statements exist.” *Id.* at 51. Without selecting among them, the Court provided three possible formulations of that core class, including “‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” *Id.* at 52 (quoting Br. for Nat’l Ass’n of Criminal Defense Lawyers et al. as Amici Curiae at 3). The Court also stated that “[s]tatements taken by police officers in the course of interrogations” were within the core class. *Id.* at 52. The Court did not define “interrogation,” beyond specifically indicating that it was using the term “in its colloquial, rather than any technical legal, sense.” *Id.* at 53 n.4.

Two years later, the Court elaborated on “which police interrogations produce testimony” in the consolidated cases of *Davis v. Washington* (statements to law enforcement officers during a 911 call²) and *Hammon v. Indiana* (statements to law enforcement officers at a crime scene). *Davis*, 126 S. Ct. at 2273. The Court stated:

Without attempting to produce an exhaustive classification of all conceivable statements--or even all conceivable statements in response to police interrogation--as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: 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 2273-74. However, the Court stressed, “of course . . . it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the *Confrontation Clause* requires us to evaluate.” *Id.* at 2274 n.1.

The *Davis* primary purpose test is not focused on the reasonable belief of an objective declarant, as was one definition of “testimonial” endorsed in *Crawford*. *See* 541 U.S. at 52. Whether statements are testimonial or nontestimonial “is essentially beyond police control. . . . [T]estimonial statements are what they are.”

²For the purposes of its decision, the Court assumed, without deciding, that 911 operators are law enforcement officers. *Davis*, 126 S. Ct. at 2274 n.2.

Davis, 126 S. Ct. at 2279 n.6. Ultimately, with respect to police interrogations, the question presented by the confrontation clause is “whether, objectively considered, the interrogation that took place . . . produced testimonial statements.” *Id.* at 2276.

Thus, the primary purpose test requires courts to make an objective appraisal of the interrogation itself. In applying the test to the facts of *Davis* and *Hammon*, the Court discussed four characteristics of the circumstances in which the statements were made: (1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation.

In *Davis*, proper, the Court determined that Michelle McCottry’s statements to a 911 operator during a domestic disturbance, including McCottry’s identification of her assailant by name in response to the operator’s questions, were not testimonial. First, with respect to timing, McCottry was “speaking about events *as they were actually happening*, rather than ‘describ[ing] past events’” as had the declarant in *Crawford*, whose interrogation “took place hours after the events she described had occurred.” *Id.* (alteration in original) (quoting *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999) (plurality opinion)).

Second, as to the threat of harm, “any reasonable listener would recognize that McCottry (unlike [the declarant in *Crawford*]) was facing an ongoing

emergency.” *Id.* McCottry’s 911 call was “plainly a call for help against bona fide physical threat.” *Id.*

Third, objectively viewing “the nature of what was asked and answered[,] . . . the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past.” *Id.* Resolving the present emergency even encompassed establishing the assailant’s identity because it was important for the responding officers to know whether they might “be encountering a violent felon.” *Id.*

Finally, as to the level of formality, unlike the declarant in *Crawford* who “was responding calmly, at the station house, to a series of questions,” McCottry provided her “frantic answers . . . in an environment that was not tranquil, or even . . . safe.” *Id.* at 2277. Considering all of the above, the Court concluded that “the circumstances of McCottry’s interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency,” rendering the resulting statements nontestimonial. *Id.*

In *Hammon*, the Court reached the opposite result, holding that Amy Hammon’s statements to the police officer who interviewed her after responding to a domestic disturbance call were testimonial. With respect to timing, Hammon made the statements in question “some time after the events described were over.”

Id. at 2278. “When the officer questioned [Hammon] for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) ‘what is happening,’ but rather ‘what happened.’” *Id.*

Considering the threat of harm and the need for information to resolve a present emergency, the Court emphasized that when Hammon made her statements, “[t]here was no emergency in progress.” *Id.* In fact, when the officers first arrived, Hammon “told them that things were fine” and that “there was no immediate threat to her person.” *Id.* During the later interrogation, the police “actively separated” Hammon and her husband and “forcibly prevented [him] from participating in the interrogation.” *Id.*

Finally, while “the *Crawford* interrogation was more formal,” Hammon’s interrogation was “formal enough.” *Id.* The questioning “was conducted in a separate room, away from [Hammon’s] husband,” and Hammon’s statements “deliberately recounted, in response to [that] questioning, how potentially criminal past events began and progressed.” *Id.* The Court concluded, “[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct,” rendering the resulting statements testimonial. *Id.*

The Court was careful to point out, however, that the determining factor--making the statements in *Hammon* testimonial and those in *Davis* nontestimonial--

was *not* the fact that in *Hammon* the police had arrived on the scene, while in *Davis* the interrogation was by phone. *Id.* at 2279. Although the Court “necessarily reject[ed] the . . . implication that virtually any ‘initial inquiries’ at the crime scene will not be testimonial,” it emphasized “we do not hold the opposite-- that *no* questions at the scene will yield nontestimonial answers.” *Id.* (quoting *Hammon v. Indiana*, 829 N.E.2d 444, 453, 457 (Ind. 2005)). By way of explanation, the Court continued,

“[o]fficers called to investigate . . . need to know *whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.*” Such exigencies may *often* mean that “initial inquiries” produce nontestimonial statements. But in cases like [*Hammon*], where [*Hammon*’s] statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were “initial inquiries” is immaterial.

Id. (first emphasis added) (first two alterations in original) (citation omitted) (quoting *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 186, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004)).

The concurrence suggests that whether a statement is “in the past or present tense” is indicative of its testimonial or nontestimonial nature. Concurrence at 4. However, this simple grammatical analysis is inconsistent with the Court’s emphasis that initial inquiries at a crime scene enabling officers to “‘assess the situation, the

threat to their own safety, and possible danger to the potential victim” “may . . . produce nontestimonial statements.” *Id.* (quoting *Hiibel*, 524 U.S. at 186). Information essential to assessing a situation will necessarily sometimes include recitations of events that occurred in the past, if only by a matter of minutes.

Furthermore, it is worth considering that, while McCottry’s nontestimonial statements in *Davis* were phrased in the present tense, she was, most likely, technically describing events that had already occurred. Certainly there is no indication that she was being assaulted *as* she spoke with the 911 operator. Thus, *Davis* supports a more nuanced approach when considering the timing of a statement than merely noting whether a declarant phrased his or her statement using past or present tense.

The concurrence also suggests that “the presence or absence of the perpetrator at the scene may indicate whether an emergency is ongoing and, by extension, whether the victim’s statements are testimonial.” Concurrence at 5. While the perpetrator’s location and status undoubtedly contribute to whether an ongoing emergency exists, *Davis* no more supports a bright line “perpetrator present or absent” rule than it does the aforementioned “declarant used past tense or present tense” rule. The perpetrators were at the scenes in both *Davis* and *Hammon*, but the *Davis* statements were nontestimonial and the *Hammon* statements testimonial.

What distinguishes the two situations is that in *Davis*, the perpetrator posed a threat to the declarant, while in *Hammon*, the perpetrator was under police control, “actively separated” from the declarant. *Davis*, 126 S. Ct. at 2278. Thus, the critical consideration is not whether the perpetrator is or is not at the scene, but rather whether the perpetrator poses a threat of harm, thereby contributing to an ongoing emergency.

To summarize, *Davis* announced that whether statements made during police interrogation are testimonial or nontestimonial is discerned by objectively determining the primary purpose of the interrogation. If circumstances objectively indicate that the primary purpose is to enable police assistance to meet an ongoing emergency, the elicited statements are nontestimonial. If circumstances indicate that the primary purpose is to establish or prove past events, the elicited statements are testimonial. Characteristics to consider when objectively assessing the circumstances of the interrogation include the timing of the statements, the threat of harm, the need for information to resolve a present emergency, and the formality of the interrogation. With this background in mind, we turn to examining the statements Ohlson challenges.

2. *D.L.’s out-of-court statements*

Ohlson claims that admission of D.L.’s out-of-court statements to Officer

Gray violated his Sixth Amendment right to confrontation. The confrontation clause is violated by admission of testimonial out-of-court statements when the declarant does not testify at trial unless the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 53-54. It is undisputed that D.L. did not testify at trial and that Ohlson had no prior opportunity to cross-examine D.L. regarding the challenged statements. Thus, whether the confrontation clause bars admission of D.L.’s out-of-court statements turns exclusively on whether D.L.’s statements were testimonial.

The Court of Appeals, without the benefit of *Davis*, “adopt[ed] a per se rule and h[e]ld that excited utterances cannot be testimonial under *Crawford*.” *Ohlson*, 131 Wn. App. at 84, ¶ 37. The court reasoned that since an excited utterance requires the declarant to be “‘still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment,’” *id.* at 83, ¶ 37 (alteration in original) (internal quotation marks omitted) (quoting *State v. Brown*, 127 Wn.2d 749, 758-59, 903 P.2d 459 (1995)), “[i]t is not reasonable to regard an excited utterance as ‘bearing witness,’ such that the declarant would know that it would be used in a later prosecution.” *Id.* at 82, ¶ 32. Therefore, the court reasoned, “excited utterances are not testimonial by their very nature.” *Id.*

In light of *Davis*, the Court of Appeals' per se rule is no longer tenable. *Davis* indicated that the objectively determined primary purpose of a police interrogation is decisive in evaluating whether a resulting statement is testimonial. 126 S. Ct. at 2276-79. *Davis* also rejected "the Indiana Supreme Court's implication [in *Hammon v. State*] that virtually any 'initial inquiries' at the crime scene will not be testimonial," while making clear that it was "not hold[ing] the opposite--that *no* questions at the scene will yield nontestimonial answers." *Id.* at 2279.

The reasoning of *Davis* and its focus on the primary purpose for which statements were obtained seem to have implicitly foreclosed any per se rule that excited utterances cannot be testimonial. Certainly, applying *Davis*, we can "conceive of a hybrid situation where a predominantly excited utterance might contain testimonial elements." *Ohlson*, 131 Wn. App. at 84, ¶ 42 (Hunt, J., concurring). We therefore reverse the Court of Appeals decision to the extent that it announced a per se rule that excited utterances cannot be testimonial.

However, applying *Davis* to the facts presented here, we nonetheless conclude that D.L.'s statements in response to Officer Gray's interrogation were nontestimonial.³ The circumstances of Officer Gray's interrogation of D.L.

³The Court of Appeals reasoned that D.L.'s statements were not given in the course of police interrogation because "Officer Gray's minimal questioning was not an 'interrogation' as

objectively indicate that the primary purpose of that interrogation was to enable police assistance to meet an ongoing emergency.

First, with respect to timing, D.L.’s statements to Officer Gray were made within minutes of the assault. L.F. called 911 immediately after the assault and within five minutes of the call Officer Gray was on the scene making her initial inquiries. This is not like *Hammon*, where the statements in question were made “some time after the events described were over,” during the officer’s second questioning of the declarant. *Davis*, 126 S. Ct. at 2278. While D.L. was not “speaking about events *as they were actually happening*,” the statements were made contemporaneously with the events described. *Id.* at 2276. In timing, D.L.’s statements are not unlike McCottry speaking to the 911 operator contemporaneously with the domestic dispute.

Considering the threat of harm, Ohlson had previously left the scene, only to return five minutes later and escalate his behavior from yelling to physically assaulting L.F. and D.L. Objectively viewing the course of events, there is no way to know, and every reason to believe, that Ohlson might return a third time and perhaps escalate his behavior even more. Unlike *Hammon*, D.L. did not greet

Crawford contemplated.” *Ohlson*, 131 Wn. App. at 80, ¶ 27. However, *Davis* clarifies that initial police inquiries at a crime scene, like those made by Officer Gray, are included within the definition of police interrogation as contemplated by *Crawford*. *Davis*, 126 S. Ct. at 2274 n.1.

Officer Gray with the message that “things were fine” and “there was no immediate threat to [his] person.” *Id.* at 2278. Also, unlike Hammon, the police could not “actively separate[.]” Ohlson from D.L., and “forcibly prevent[.]” Ohlson from harming D.L.--Ohlson’s identity and location were unknown. *Id.* Rather, like McCottry, D.L.’s statements to Officer Gray were “a call for help against bona fide physical threat.” *Id.* at 2276.

Third, D.L.’s statements to Officer Gray were necessary to resolve a present emergency. When Officer Gray arrived on the scene, all that was known about the situation was what the 911 call reported--a speeding vehicle was trying to hit some juveniles. The immediate top priority was to determine whether there was ongoing danger to those juveniles or any threat to the community or herself and her fellow officers. Officer Gray’s initial inquiries sought information essential to determining whether the situation presented such ongoing dangers or threats. At least until Officer Gray completed her initial triage of the situation, which in this case necessitated the information obtained from L.F. and D.L., the situation presented an ongoing emergency.

Finally, as to the level of formality, the circumstances of Officer Gray’s interrogation of D.L. were far less formal than those in *Hammon*, in which the interrogation was “conducted in a separate room” and Hammon “deliberately

recounted, in response to . . . questioning, how potentially criminal past events began and progressed.” *Id.* D.L.’s interrogation was conducted in an unsecured situation that “was not tranquil, or even . . . safe.” *Id.* at 2277.

For the above reasons, we conclude that the primary purpose of Officer Gray’s interrogation of D.L. was to enable police assistance to meet an ongoing emergency. As such, D.L.’s statements to Officer Gray were nontestimonial.⁴ Therefore, the trial court’s admission of D.L.’s out-of-court statements did not violate Ohlson’s Sixth Amendment right to confrontation.

IV. CONCLUSION

We hold that the trial court did not abuse its discretion by admitting D.L.’s statements as excited utterances. We reject the Court of Appeals’ per se rule that excited utterances can never be testimonial but hold that, under the facts presented here, D.L.’s statements were nontestimonial and, thus, their admission did not violate Ohlson’s right to confrontation. We affirm the Court of Appeals in part and reverse in part.

⁴The State further argues that even if we were to determine that D.L.’s statements were testimonial, the error in admitting them would be harmless. We agree. A violation of the confrontation clause is subject to harmless error analysis, using “the “overwhelming untainted evidence” test.” *State v. Davis*, 154 Wn.2d 291, 305, ¶ 37, 111 P.3d 844 (2005), *aff’d sub nom. Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (quoting *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). Here, any error in admitting D.L.’s out-of-court statements to Officer Gray would be harmless. The untainted evidence—including L.F.’s testimony, Klose’s eyewitness testimony, and Ohlson’s own statements, both at arrest and at trial—is overwhelming and necessarily leads to a finding of guilt beyond a reasonable doubt.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Charles W. Johnson

Justice Susan Owens

Justice James M. Johnson

Justice Bobbe J. Bridge
