

A05-0488

A05 488

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent,

v.

Farah Abshir Warsame,

Appellant.

BRIEF OF APPELLANT

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PROCEDURAL HISTORY

1. October 24, 2004: Date of alleged offense.
2. October 26, 2004: Complaint filed charging Appellant with felony
terroristic threats and domestic assault.
3. October 27, 2004: Appellant's first appearance on the complaint.
4. November 17, 2004: Probable cause/pre-trial hearing.
5. December 9, 2004: Pre-trial continued at defense request.
6. January 7, 2005: Probable cause found; not guilty plea entered; jury trial
demanded; speedy trial waived.
7. March 3, 2005: Rasmussen hearing, the Hon. John Q. McShane,
presiding. Victim's statements ruled inadmissible; motion to reconsider denied;
order stayed five days to file notice of appeal.
8. March 9, 2005: Notice of appeal filed.
9. August 9, 2005: Court of Appeals files opinion reversing the District
Court's order.
10. September 8, 2005: Appellant files petition for further review.
11. October 26, 2005: Minnesota Supreme Court files its order denying
further review.
12. January 18, 2006: Appellant files petition for writ of certiorari with the

Supreme Court of the United States.

13. June 30, 2006: U.S. Supreme Court grants petition, vacates Minnesota Court of Appeals' judgment, and remands to Court of Appeals for reconsideration in light of Davis v. Washington,, __ U.S. __, 126 S.Ct. 2266 (2006).

14. November 21, 2006: Court of Appeals files opinion again reversing District Court.

15. December 21, 2006: Appellant files petition for further review.

16. February 20, 2007: Supreme Court grants review.

STATEMENT OF THE LEGAL ISSUE

WHERE THE POLICE WITHIN MINUTES RESOLVED THE ISSUES PRESENTED BY THE ALLEGED VICTIM, AND BECAUSE A POSSIBLE EMERGENCY DOES NOT QUALIFY AS AN EMERGENCY FOR PURPOSES OF CURRENT CONFRONTATION-CLAUSE ANALYSIS, DID AN ON-GOING EMERGENCY EXIST THAT MADE ALL OF N.A.'s STATEMENTS NON-TESTIMONIAL?

The District Court held that alleged victim N.A.'s statements were testimonial because, except for the her initial statement to the police officer, she made her subsequent statements under circumstances showing that she intended that they be used to prosecute Appellant.

The Court of Appeals, based on facts it found for the first time on appeal and without record support, held that potential emergencies existed as to N.A. and to third-parties that made N.A.'s statements non-testimonial because the statements enabled the police to respond to the possible emergencies.

Most apposite cases

Davis v. Washington, 547 U.S. ____, 126 S.Ct. 2266 (2006)

State v. Wright, 726 N.W.2d 464 (Minn. 2007)

STATEMENT OF THE CASE

The State appealed from a pre-trial order denying its motion to admit statements the alleged victim, N.A., made to police concerning an alleged assault and threats by Appellant. The Court of Appeals reversed the District Court's Confrontation Clause ruling, and remanded for a determination of whether the statements were admissible under hearsay rules. The District Court ruled they were, but in the meantime Appellant's petition for a writ of *certiorari* to the Supreme Court of the United States had been granted. The Supreme Court vacated the Court of Appeals' judgment, and remanded the case to the Court of Appeals for reconsideration in light of Davis v. Washington, ___ U.S. ___, 126 S.Ct. 2266 (2006). See, Warsame v. Minnesota, ___ U.S. ___, 126 S.Ct. 2983 (2006).

On remand, the Court of Appeals again reversed the District Court's Confrontation Clause ruling, holding that the alleged victim's statements were admissible because they were non-testimonial because they described potential emergencies that existed as to N.A. and to third-parties, and because the statements enabled the police to respond to the possible emergencies.

STATEMENT OF THE FACTS

Eden Prairie Police Officers John Wilson and Sgt. Robert Olson testified that shortly after midnight on October 24, 2004 they responded to a call concerning Appellant Warsame's residence, which is two blocks from the police station (T. 9, 26).¹ Wilson arrived one to two minutes after being dispatched (Id.). Outside the residence, Wilson saw a woman, later identified as N.A., in the middle of the street (Id.). She told him "My boyfriend just beat me up" (T. 27). N.A. was crying and holding the left side of her head, which Wilson observed to have a large bump (T. 26-27). N.A. appeared faint so Wilson had her sit on the curb (T. 27). Wilson used his EMT bag to begin treatment, and observed fresh bruising on N.A.'s neck (T. 27-28).

N.A. told Officer Wilson she had been heading toward the nearby police station to report the incident because the phone line in her house had been cut (T. 31). She was crying and shaking when she spoke to Wilson (T. 30). She said her boyfriend had come home, and she wanted to talk but he did not (T. 29). They began to argue (Id.). Appellant went into the kitchen, grabbed a cooking pot, and struck her in the head with it (Id.). She fell onto the bed, and he then got on top of her and choked her (Id.). N.A.'s two sisters came up and attempted to get the

¹ "T." refers to the transcript of the March 3, 2005 Rasmussen Hearing.

boyfriend off her (Id.). N.A. said the boyfriend then went into the kitchen, got a knife and came back, threatening to kill her (T. 30). She said he chased her from room to room (Id.).

N.A. told Wilson she was three months pregnant, but she did not believe the baby had been injured (Id.). She said that while all this was occurring she was frightened, and believed that Appellant was going to kill her (T. 30). N. A. told Wilson that Appellant had left in a car with one of the sisters, later identified to Sgt. Olson as S.D. (T. 30, 32). Wilson's interview of N.A. lasted fifteen to twenty minutes (T. 34).

Officer Robert Olson arrived at the scene no more than one minute after Wilson had (T. 10, 34). Olson heard N.A. describe Appellant to Officer Wilson, and say that a knife had been involved and that another person had been cut (T. 11, 13). As N.A. gave a description of Appellant to Officer Wilson, Sgt. Olson broadcast it to nearby squads, along with the information that a knife had been involved in the assault (T. 11-12, 18). Olson left the scene three to five minutes later to investigate the house (T. 14). Inside he learned it was I.A. who had been cut, and that she had only a small, non-bleeding cut on her finger, and did not want medical assistance (T. 14, 16).

After N.A. left via ambulance, Officer Wilson spoke with N.A.'s other

sister, I.A., and obtained her description of events, which Wilson said was similar to that given by N.A. I.A. (T. 32-33). I.A. told him that she had tried to grab the knife Appellant had, and while doing so cut her finger (T. 33).

Other officers were following the vehicle Appellant was driving, and had been doing so since just after he drove away from the residence (T. 19, 35).

The District Court put the statements from N.A. and I.A. into three categories: 1) N.A.'s statements to Officer Wilson consisting of the initial volunteered statement "My boyfriend beat me up," the statement that she had been choked, and N.A.'s full account of what happened; 2) I.A.'s statements to Sgt. Olson; and 3) I.A.'s later statements to Officer Wilson (T. 61).²

The District Court ruled that the statement about her boyfriend beating her up was not testimonial, but that all the other statements by N.A. and I. A. were, and hence inadmissible under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) unless the declarants would testify (T. 61-65, at AA, A1-A5). The District Court ruled that the statements N.A. had made after she knew she was no longer in danger and had had sufficient time to reflect on events, were the sort that a reasonable person could expect to be used prosecutorially (Id.). The State

² The District Court did not make written findings on the Confrontation Clause issue. Its oral ruling and findings are at Appellant's Appendix to this brief (AA), at A1-A15.

appealed the exclusion of N.A.'s statements, but not I.A.'s.

ARGUMENT

BECAUSE THE POLICE WITHIN MINUTES RESOLVED THE ISSUES PRESENTED BY THE ALLEGED VICTIM, AND BECAUSE A POSSIBLE EMERGENCY DOES NOT QUALIFY AS AN EMERGENCY FOR PURPOSES OF CURRENT CONFRONTATION-CLAUSE ANALYSIS, NO ONGOING EMERGENCY EXISTED THAT MADE ALL OF N.A.'s STATEMENTS NON-TESTIMONIAL.

Standard of Review

In a pre-trial appeal the District Court's ruling must be upheld unless it is shown to be clearly and unequivocally erroneous. State v. Webber, 262 N.W.2d 157, 159 (Minn. 1977).

Summary of Appellant's Argument

The facts of record show that from the outset of N.A.'s encounter with the police, she wanted to see Appellant prosecuted, and that the emergency-aspects of her situation were quickly resolved. Most of N.A.'s statements over the course of her time with the police therefore cannot be categorized as necessary to enable the police to respond to any emergency. Most of her statements primarily served to establish past facts relevant to a later criminal prosecution.

The Court of Appeals's opinion incorrectly concludes that *potential* emergencies as to other persons justified treating *all* of N.A.'s statements as essential to facilitating a police response to N.A.'s situation and that of other

persons. This mode of analysis does not find support in governing precedent as set out in Davis v. Washington, 547 U.S. ___, 126 S.Ct. 2266 (2006), or this Court's decision in State v. Wright, 726 N.W.2d 464 (Minn. 2007).

Governing precedent

In Davis v. Washington, *id.*, the Supreme Court held that witness statements made during police interrogation, the primary purpose of which is to establish past events to support a criminal prosecution, are testimonial within the meaning of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). Statements are not testimonial if the purpose of the interrogation was to enable the police to meet an ongoing emergency. Davis, 126 S.Ct. 2273-74. The effect of a statement being testimonial is that it may not be admitted absent the witness's in-court testimony unless the defendant previously had the opportunity to cross-examine the witness, and the State establishes the witness's unavailability. Crawford, 541 U.S. at 53-54, 124 S.Ct. 1354.

This Court in State v. Wright, *id.*, applied Davis v. Washington's above-stated criteria for determining whether a statement is testimonial. Wright held that statements made during a 911 call were not testimonial because they were made either to permit the police to respond to an ongoing emergency, or they did not prove any past fact potentially relevant to a later criminal prosecution. 726

N.W.2d at 474-75.

With respect to statements the alleged victim in Wright and her sister made to the police approximately one-half hour after Mr. Wright had been apprehended, this Court found that the statements occurred after the emergency had ended and were made to facilitate a future prosecution of Mr. Wright. 726 N.W.2d at 476.

The factual record as set out by the State in Warsame I and II

The State initiated this appeal, and it was the Appellant in both Court of Appeals' decisions rendered to date in this case (Warsame I and II).³ In the brief it submitted in Warsame II, which is the decision this Court now reviews, the State did not accurately present the facts. Because Mr. Warsame, as the Appellant in this Court, will not have an opportunity to point out the inaccuracies of the State's recitation of the facts if the State submits a Respondent's brief that presents the facts the same way it did in Warsame II, Appellant must use the opportunity he has in this brief to point out the past inaccuracies in case the State repeats them in its brief. Moreover, and more importantly, correcting the misstatements in the State's factual statement in its last brief will enable this Court to focus on the facts germane to the issues of ongoing emergency as to N.A., whether emergencies

³ Warsame I is State v. Warsame, 701 N.W.2d 305 (Minn. App. 2005), judgment vacated, ___ U.S. ___, 126 S.Ct. 2983 (2006), and Warsame II is State v. Warsame, 723 N.W.2d 637 (Minn. App. 2006).

existed as to others, and whether N.A. made statements primarily intended to prove past facts.⁴

The State at page 3 of its brief in Warsame II states that after police asked N.A. her name “. . . a story rattled out of the injured woman without prompting or questioning (T. 42-43).” This is not accurate. Wilson testified that after he observed the lump on her head he asked N.A. an open-ended question as to what had happened (T. 27-28, 41-42). Wilson also testified that toward the end of his encounter with N.A. he asked “. . . some small questions at the end to obtain some extra detail” (T. 42). Sgt. Olson testified that he heard Wilson say to N.A. words to the effect of you’re hurt, who did this, how did this happen? (T. 19).⁵

The State at page four of its brief in Warsame II, the first paragraph, fourth sentence, said that “N.A. reported that Respondent had also assaulted and cut her sister I.A., who was still inside the house.” The State gave no transcript citation to support this statement. Although Sgt. Olson and Officer Wilson, upon entering N.A.’s house, learned from I.A. that she had received a non-bleeding cut on her

⁴ The State designated its brief submitted in Warsame II as Appellant’s Supplemental Brief.

⁵ In its initial brief in this appeal (Warsame I), the State acknowledged that Wilson had asked N.A. some questions, in notable contrast to the way the State now describes N.A. as providing information, without prompting or questions,. See, State’s initial brief, page 3.

pinky finger that earlier had caused her to pass out, they did not testify that N.A. had told them that it was I.A. who had been cut (T. 13-14, 16, 32-33).

The only testimony as to what N.A. said about someone being cut came from Sgt. Olson, who testified “. . . one of the things I heard while Officer Wilson was talking to the first victim was that a knife had been involved and that another person was cut” (T. 13). Furthermore, Olson did not testify that N.A. said this person was still in the house.

In the last sentence of the first paragraph on page 4 of its last brief to the Court of Appeals, the State says that “N.A. also said that Respondent, who might still have the knife, had driven away a third sister in his car. (T. 30).” First of all, N.A. never said that Mr. Warsame might still have the knife. A review of the transcript page the State cites, page 30, and the rest of the motion-hearing transcript, verifies she did not say that. Sgt. Olson testified he broadcast that a knife had been involved in the assault, not that Appellant had it with him (T. 18).

Secondly, the State here inaccurately asserted in the above-quoted sentence that N.A. told Officer Wilson that Mr. Warsame “*had driven away* a third sister in his car” (emphasis added). Wilson actually testified: “Her boyfriend *had left in her vehicle with* one of her sisters” (T. 30) (emphasis added). In its brief, in Warsame I, the State had more accurately said: “According to N.A., one of her

sisters *was in* the SUV. (T. 30) (emphasis added).” State’s brief in Warsame I, page 6.

The difference between the way the State in its brief in Warsame I phrased the circumstance of the third sister, S.D., being in the SUV with Mr. Warsame, and how it described that circumstance in Warsame II, when the existence of an emergency governed the analysis, shows that the State knew it would help its case in Warsame II to state or imply that the police had been faced with a kidnapping situation, or some other immediate threat to the third sister. But nothing N.A. had said gave the officers any reason to believe the sister had been taken against her will.

Moreover, if Sgt. Olson or Officer Wilson had believed they were dealing with a kidnapping or hostage situation, the prosecutor certainly would have asked about that at the motions hearing in this case, but did not, and the officers otherwise provided no testimony to this effect. The State also would not have characterized, as it did in its first brief in Warsame I, N.A.’s sister as merely being with Appellant if N.A. had provided any basis for the officers to believe she was in danger.

Furthermore, not only did N.A. not say or imply anything to indicate that her sister had been taken against her will or was otherwise in danger, the State

omitted from its last brief in Warsame II, as well as its initial brief in Warsame I, any mention that Appellant had been followed by an Officer Groves right from the time Appellant pulled out of the driveway to leave N.A.'s house (T. 20, 23, 35, 45), and that Sgt. Olson and Officer Wilson knew this almost immediately. Id. The State said at page 4, second paragraph, of its brief in Warsame II only that Appellant had been stopped within minutes of their encountering N.A.

It undercuts the State's claim of an ongoing emergency that the police were in a position the entire time after Appellant left N.A.'s house to apprehend him and thus prevent him from re-entering N.A.'s house, and it also shows that the officers quickly determined what had happened, and whether anyone might be in danger.

Also in the second paragraph on page 4 of its last brief, the State made more inaccurate and misleading statements as to the facts relevant to the case it made for an ongoing emergency. The State says: "Olson broadcast an alert about the Respondent, the white SUV he was leaving in, the knife, and the sister taken in Respondent's car." The State provided no transcript citation for this statement, which is understandable, because the statement is mostly erroneous.⁶

⁶ In the first brief the State filed in this appeal (Warsame I), the State did not put in its Statement of Facts that Olson broadcast that one of N.A.'s sisters had been taken by Appellant, or that he broadcast that she was with Appellant. See

What Olson actually testified he broadcast was a description of Appellant, and that a knife had been involved in the assault (T. 11-12, 18). It was the dispatcher who had put out the information describing the SUV, and that it had left the scene (T. 20). More importantly, however, Olson never testified that he broadcast anything about N.A.'s sister being in Appellant's car (T. 11-12, 18). (We pointed out earlier that N.A. had never even said that Appellant "took" her sister.)

N.A. expressed an intent from the outset to have Appellant prosecuted, and any emergency as to N.A. was not ongoing

We now apply to the facts Davis's definition of testimonial, which as stated earlier is that statements are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to a criminal prosecution. This definition includes volunteered statements, and recognizes that an emergency can end abruptly and thereby render statements testimonial.

The facts as set out above show that although the police needed to obtain information about N.A.'s injuries and the location of her alleged assailant, N.A. also intended from the outset of her encounter with the police to provide them

State's initial brief, pages 5-6.

information about what had happened so that Appellant could be prosecuted. The facts further show that in any event any emergency circumstances as to N.A. were quickly resolved, and her statements then became testimonial, to the extent she had not already made testimonial statements during the brief time the police needed to resolve her situation.

This is evident from N.A.'s conduct after flagging down Officer Wilson. She did that on her way to the police station two blocks from her home. When Wilson responded to her waving at him, she did not say she needed medical attention, or that anyone else needed help, but instead said "My boyfriend beat me up." In addition, Officer Wilson testified that N.A. told him the reason she was going to the police station was "To contact the police to report the assault" (T. 31). She could not call the police because the phone line had been cut, so she walked to the police station (Id.). The nature of N.A.'s initial statements to Wilson, which did not ask for medical help, or say anyone else was in need of help, but which instead focused on the past fact she had been beaten up, and that she wanted to report the assault, show that she primarily wanted to supply information relevant to a criminal prosecution.⁷

⁷ The Court of Appeals incorrectly states that "Both parties appear to agree that the initial, volunteered statement 'My boyfriend beat me up' is, as the district court found, non-testimonial." 723 N.W.2d at 641. Appellant has never agreed

The police in our case wanted to determine what N.A.'s injuries were, the location and identity of her alleged assailant, and the status of the person who had been cut and of the third sister, S.D., who was with (but had not taken by) Appellant. However, these circumstances do not mean everything N.A. said was testimonial, contrary to what the Court of Appeals concluded. This is because these circumstances did not meet the criteria for an emergency that is ongoing, which Davis says must exist to make statements non-testimonial. See Davis, 126 S.Ct. at 2274, 2276, 2277, 2278 (references to an ongoing or present emergency).

The ongoing emergency that Davis says is likely to produce non-testimonial statements has two bases. The first is that a person's cry for help under such circumstances precludes characterizing the person as the out-of-court equivalent to an in-court witness. Id., at 2277. The second is that the police need to elicit

that the District Court correctly ruled that the State could use this one statement by N.A. Appellant did not cross-appeal this aspect of the District Court's otherwise favorable ruling, but that does not mean that Appellant cannot cite this statement, which has new significance in light of Davis's definition of testimonial statements as those made for the primary purpose of establishing past facts, to support his argument that N.A. had such a purpose from the beginning of her encounter with the police.

To the extent the statement can be viewed as volunteered, this by itself does not mean it is not testimonial. State v. Wright, 726 N.W.2d at 475 n. 5, citing Davis's statement at 126 S.Ct. 2274 n. 1 that the "Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."

information to resolve a present emergency, and such efforts are normally not directed at learning what happened in the past with the purpose to make a criminal case. Id., at 2276-77.

Davis does not take an expansive view of what constitutes an emergency. It is possible to conceive of an “emergency” as something that extends for an almost indefinite time, until all possible dangers and ramifications are resolved. Under this expansive definition, an emergency could be construed to have existed in Appellant’s case until N.A. was examined by a physician and stabilized in a hospital.

But Davis does not take that approach. An emergency involves an immediate and continuing threat (“ . . . the exigency of the moment . . .” Id., at 2277). This is why Davis says that the emergency involving the 911 caller in that case appears to have ended when Davis drove away, which was before the police even arrived. Id. Davis does not say that the mere possibility that a suspect might return, not a plausible possibility in our case (as we discuss below), creates an ongoing emergency. Id.

The Davis criteria for an ongoing emergency are not met in Appellant’s case as to every statement N.A. made because the police, within three-to-five minutes after encountering N.A., resolved the circumstances she presented. This assumes

that an emergency even existed as to each circumstance, which is not the case since N.A. had immediately expressed an intent to establish the facts necessary to prosecute Appellant, she was outside her house, Appellant had left and was being pursued by police, police officers were present to protect her, and the other circumstances were only speculatively emergencies, or were likewise quickly resolved.⁸

N.A.'s medical issues did not demonstrate an ongoing emergency. Wilson examined N.A. to see if any of her injuries could have affected her pregnancy (T. 28, 30). It is not clear how long the examination lasted, but Wilson testified that his interview of N.A. "took place while I was providing a medical assessment of her so [the interview lasted] anywhere from the time I called for an ambulance to the time that she left (sic) was approximately 15 to 20 minutes" (T. 30).

Officer Wilson did not say it took twenty minutes to do the medical

⁸ This Court's decision in State v. Wright to classify R.R.'s and her sister's post-911 call statements as testimonial rested in part on Wright being in police custody, the custody evidencing in part that the emergency had ended. 726 N.W.2d at 376. Davis v. Washington in the Hammon part of its opinion found that the presence of the police to protect the spouse helped support the conclusion that no emergency existed, even though Mr. Hammon was still on the scene and aggressively attempted to interfere with the investigation. 126 S.Ct. at 2272, 2279. Applied to our case, the almost-immediate presence of the police at N.A.'s location, and the police apprehension of Appellant just minutes later shows that any emergency as to N.A. owing to Appellant's being at large ended quickly.

assessment, and he did not do anything more than conduct a visual observation. In fact, Sgt. Olson testified that in the short time he was present he could hear the siren of the paramedic vehicle in the distance (T. 11). He testified that when they arrived they took over assessing and treating N.A., and he went inside Appellant's residence (T. 31).

Examination of the time frames in which Sgt. Olson and Officer Wilson responded confirms that just minutes elapsed before the police had resolved the issues N.A. presented, including her medical condition, Appellant's location, and the status of the sister who had left with Appellant.

Olson testified he arrived at N.A.'s location within three minutes of being dispatched (T. 9), and that just before he arrived he heard on the radio that Wilson had arrived (T. 10). Olson arrived almost simultaneously to, or within one minute of, Wilson's arrival (T. 10, 34). Olson testified he stayed with Wilson and N.A. 3-5 minutes before going into N.A.'s house. Wilson testified that Olson arrived within 1-3 minutes after he, Wilson, encountered N.A., and that Olson went inside N.A.'s house within the next 2-5 minutes (T. 34).

Sgt. Olson testified that it had taken him about three minutes to get to N.A.'s location, and that he started speaking with N.A.'s sister I.A. inside the house within 5-10 minutes after being dispatched (T. 9, 16). Olson testified that it

was while listening to the conversation between N.A. and Officer Wilson that he learned that the suspect had been stopped, but was not yet in custody (T. 19-20). Wilson testified he could not recall if Olson was still present when the suspect was stopped (T. 35).

With these timeframes in mind, we recount what the police learned and when they learned it, to determine when the issues that confronted the police were resolved, to the extent that the police knew everyone's status, condition, and whereabouts.

Officer Wilson quickly learned from N.A. the alleged assailant's identity, and that Appellant had left her house with her sister. We know this because Sgt. Olson testified he broadcast Appellant's identity, and that a knife was used, as soon as he heard N.A. say these things (T. 11-12, 18). Because Olson left for N.A.'s house 2-5 minutes after he arrived (T. 12, 34), N.A. had to have said these things within 2-6 minutes after Wilson arrived.

Sgt. Olson's testimony gives further proof that during the short time he was present that Wilson either observed, or N.A. stated, the information necessary to resolve the concerns she presented. Olson testified:

... I'm listening to Officer Wilson as he's talking to the woman to find out the extent of her injuries, where the suspect might be located and whether or not there's any other victims.

(T. 10).

The issue of the suspect's identity and his being at large, to the extent this even posed an immediate threat, and the status of the third sister, S.D. (T. 32), who was with Appellant, were resolved within the same very short time frame prior to Sgt. Olson leaving. In the 2-5 minutes Olson was present with Wilson and N.A., he also heard N.A. describe the suspect and “. . . instantly relayed that . . . to the other units . . .” (T. 11-12).

What is more, Wilson and Olson knew that Officer Groves had been following an SUV from the moment it had left Appellant's driveway, and that Groves had stopped the SUV, and had at least detained if not arrested its driver as soon as Olson broadcast the information N.A. had provided to identify Appellant (T. 19, 35). Officer Wilson testified that “It was early on” during the 20 minutes he spent with N.A. that he became aware that the suspect had been taken into custody (T. 45).

The Court of Appeals' opinion in Warsame II fails to accurately state the facts of record with respect to the status of the sister who left with Appellant. For example, the opinion say the Rasmussen-hearing testimony “did not focus on the chronology” of events relating to the possible emergency situations involving N.A.'s sisters, 723 N.W.2d at 642, but that “. . . testimony, and reasonable

inferences from it” support the conclusion “. . . that there was still an ‘ongoing emergency’ when N.A. related to the police the critical narrative account of the incident.” Id.

However, the facts of record do not support this inference, as evidenced by the Warsame II opinion’s statement that Officer Wilson’s Rasmussen hearing testimony does not say anything about N.A. having told the police that her sister who had gone with Appellant was in any danger. Id. The Court’s Warsame II opinion nonetheless concludes that

there is a reasonable inference, based on the account of Warsame’s actions towards N.A., and her sisters’ attempted intervention, that N.A. was concerned about the safety of her sister who was in the car with Warsame.

Id. Whether or not the record shows instances of the sisters’ attempted intervention, the absence of any showing in the record that one of the sisters had been taken by Appellant against her will (which if it had happened would surely have been brought up at the original District Court Omnibus motion hearing) undermines the Court of Appeals’ effort to construe the situation as an ongoing emergency. Moreover, the Court of Appeals does not even say that these facts gave rise to an emergency, only a “concern.” Id.

The concerns about the person who N.A. said had been cut took hardly any

more time to resolve. Sgt. Olson, as soon as he left N.A., went inside her home, which was very close to where he had found N.A. because her location was within two blocks of the police station (T. 9). When Olson went inside the home he quickly learned that it was N.A.'s sister, I.A., who had received a cut on her pinky, and that she did not need or want medical attention (T. 14, 16).

The above-discussed timeframes show that it took at most six minutes, and probably less, for police to determine what had happened, to locate and stop if not also arrest Appellant (who had been followed by police from the moment he left N.A.'s house), and to learn the status of each of N.A.'s sisters. This leaves between nine and fourteen minutes in which N.A. made other statements, which the police did not need to respond to the emergent circumstances N.A. presented or described to the police.

The record shows that N.A.'s detailed description of the assault, reflected at T. 29-30, had to have come later, after the first five to six minutes. Sgt. Olson's testimony confirms this. He testified that the only subjects he heard discussed were N.A.'s injuries, whether there were other victims, and a description of the suspect (T. 12, lines 10-16, T. 21, lines 3-15). If he had heard the detailed description of the assault and threat while he was present, he likely would have been asked to describe what he heard, but he was not. Only Wilson testified to the

details (T. 29-30).

Davis's narrow view of an emergency does not support characterizing as an ongoing emergency the entire 15-20 minutes Officer Wilson spent with N.A., see T. 29-30, particularly where N.A. had sought from the outset of her encounter with the police to report Appellant for an assault, and to relate past facts to establish what Appellant had done. The record thus shows that the situation quickly evolved from dealing with the concerns N.A. presented to gathering evidence to prosecute Appellant.

The Warsame II opinion, despite its effort to wring from the record inferences the facts do not support, tacitly recognizes the absence of facts supportive of its conclusion that an ongoing emergency existed, as evidenced by its twice stating in the opinion that on remand the district court "may reopen the record for additional evidence and findings on the Confrontation Clause issue." 723 N.W.2d at 642, 643. The record not only does not support the inferences the opinion seeks to draw concerning the existence of "possible" emergencies, as the foregoing discussion has demonstrated, it supports just the opposite conclusion, that the other circumstances did not present emergencies, let alone ongoing ones.

Even if N.A. cried and shook through much of the time Officer Wilson was with her, this by itself has no significance in establishing an *ongoing* emergency,

since the issue is not simply her emotional state but whether an emergency continued to exist. Her emotional state and the existence of an emergency are not co-extensive. Witnesses in court rooms cry with some frequency, but that does not mean they are not testifying. The Court of Appeals' reliance in Warsame II on N.A.'s emotional state, see 723 N.W.2d at 643, is not consistent with the emergency-analysis in Davis and State v. Wright. In Wright, this Court found that R.R.'s and her sister's post-911 call police-interview provided testimonial statements, even though both were still crying and/or distraught. 726 N.W.2d at 469.

Officer Wilson's investigative interviews with N.A. and I.A.

Another, and strong, indicator that the situation had evolved from an emergency to an investigation intended to produce evidence is that after paramedics arrived to pick up N.A., Officer Wilson went inside N.A.'s house, even though Sgt. Olson had already gone inside ten to fifteen minutes earlier to assess the situation (T. 31-32). In the house, Wilson spoke to N.A.'s sister I.A., and obtained a description of how the assault and threat had occurred (T. 32-33). When asked why he spoke with I.A., Wilson testified "To confirm what [N.A.] told me actually did happen" (T. 33).

Wilson admitted this was "... an interview, investigation interview,

investigatory interview, I guess is what you would call it” Id. Wilson’s conducting what even he admitted was an *investigatory* interview of I.A. so he could verify what N.A. had told him about the assault and threat shows that he considered at least part of what N.A. had told him to have been primarily of investigative value, particularly since it related to what had happened concerning the earlier alleged assault and threat, not what was presently happening.

Officer Wilson took notes to establish past events

Yet further proof that what N.A. said beyond what the police needed to know to resolve the above-discussed concerns upon encountering N.A. constituted testimonial statements is that Officer Wilson took notes of what N.A. and I.A. said (T. 39, 44). Davis says that the protections of the Confrontation Clause cannot be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant instead of having the declarant sign a deposition. 126 S.Ct. at 2276.

Wilson took notes of what N.A. said in addition to getting her basic biographical information, and he was certain he took down the additional information either as N.A. spoke, or after the ambulance picked her up (T. 44). He took the notes so he “didn’t lose some of the key points . . .” that N.A. made (T. 44). Wilson did not have to take notes to resolve the emergent circumstances, such as N.A.’s medical condition; they had already been addressed, and N.A. by

this time was with paramedics (T. 31).

Wilson testified he took notes so he could remember “key points.” The key points would have had to do with the past facts as to how the assault and threat had occurred. Note-taking for such a purpose provides an additional, objective indicator that his purpose and N.A.’s was to be able to prove past events relevant to a criminal prosecution. The note-taking also lent a type of formality not present when police are only responding to an emergency.

The above-summarized facts also reveal that the Court of Appeals factually erred when it said “. . . Officer Wilson did not take notes of the conversation, except for N.A.’s name and date of birth.” 723 N.W.2d at 643. Because the Court of Appeals cited the absence of note-taking as an indicator that N.A. was not providing, and the police were not seeking to establish, past facts, its error here further undermines the correctness of the result it reached in applying Davis.

Potential emergencies are not ongoing emergencies

It is apparent from the Court of Appeals’ analysis in Warsame II that, owing to the lack of record support for the existence of one or more ongoing emergencies, the Court had to expand Davis’s definition of emergency. Warsame II refers at least three times to “possible” emergencies facing the police in three locations, where N.A. was, her nearby house where her sister I.A. was, and the

vehicle in which Appellant had left the scene accompanied by another of N.A.'s sisters. 723 N.W.2d at 641-42.

The Court of Appeals concludes that the ongoing emergency referred to in Davis “need not be limited to the complainant’s predicament or the location where she is questioned by police,” and that even though the record contains no explicit evidence to indicate that the sister in Appellant’s car was in danger, an inference can be drawn that N.A. was “concerned” about her sister’s safety. Id.

Possible emergencies and concerns, however, do not qualify as ongoing emergencies because Davis does not take an expansive view of what constitutes an emergency, but instead considers it to be an immediate and continuing threat. Id., at 2277. This Court’s decision in State v. Wright, id., recognizes the importance Davis attached to classifying as emergency statements only those that objectively appear to convey events as they are currently occurring, and necessary to resolving the present emergency. 726 N.W.2d at 473.

The Court of Appeals’ opinion, without any support from the Davis decision, expands the concept of ongoing emergency to include situations in which only a possibility of danger may exist, or even when there is only a concern of danger to others. Because application of this mode of analysis to determining what is or is not testimonial will curtail Confrontation Clause rights to a degree

that the results of trials will be come unreliable, this Court should, in light of the analysis provided in the preceding sections of this brief, reverse the Court of Appeals' decision, and in doing so make clear that the concept of ongoing emergency does not encompass just "concerns" or "possible emergencies."

District Court's finding of excited utterances does not affect Confrontation Clause analysis

Between the Court of Appeals' decisions in Warsame I and II, and prior to the U.S. Supreme Court's grant of certiorari., the District Court in Appellant's case decided that N.A.'s statements qualified as excited utterances. See Order and Memorandum at AA, A6. This finding has no impact on the Confrontation Clause issue this Court will decide.

First, Crawford v. Washington, *id.*, says that except for hearsay exceptions concerning co-conspirator statements, dying declarations, and business records, a finding that a statement qualifies as an exception to the rule against admitting hearsay statements does not control the Confrontation Clause issue. 541 U.S. at 56, 124 S.Ct. at 1367. The Sixth Amendment requires that reliability of evidence must be determined through cross-examination, not presumed based on hearsay law. 541 U.S. at 68, 124 S.Ct. at 1374.

Second, the Rule 803(2) exception for excited utterances applies a different

criteria for determining admissibility than does the Crawford/Davis Confrontation Clause analysis. Rule 803(2) permits a statement to be admitted as an excited utterance as long as it relates to a *startling event*, and it is made while the declarant was under the stress of excitement caused by the event or conditions, which could be a lengthy time. The case law governing the Confrontation Clause, however, requires that an *emergency* have existed and that the statements made must have enabled the police to *respond to the emergency*. Rule 803(2) thus creates a far broader criteria for admissibility of statements than what Confrontation Clause analysis permits.

No forfeiture of Confrontation Clause rights

The State in its brief in Warsame II made the surprising argument that Appellant has forfeited his confrontation rights because he cut N.A.'s phone line, and therefore the State does not have the benefit of being able to argue that N.A. made a 911 call, which the State asserts would have been contemporaneous with the assault/threat, and thus non-testimonial.

To begin with, logic and the facts do not support the State's claim. The State says Appellant cut the phone line, but N.A. never told anyone that (T. 31). The State's argument also assumes what N.A. would have said had she been able to make a 911 call, and that it would necessarily have been non-testimonial. One

must speculate as to what N.A. would have said, and that it would have been non-testimonial. However, Davis observes that even an emergency 911 call can quickly evolve into the caller making testimonial statements. 126 S.Ct. at 2277.

The Court of Appeals in Warsame II rejected the State's forfeiture argument because it did not assert that Appellant's allegedly cutting the phone line had procured N.A.'s absence at trial. 723 N.W.2d at 643.

In any event, the State waived any forfeiture argument because it never raised this issue below, either in the District Court or in Warsame I. If the State believed Appellant had done anything to forfeit his confrontation rights, it should have requested a hearing in the District Court to allow Appellant to respond to the claim. State v. Keeton, 589 N.W.2d 85, 88 (Minn. 1989) (Hearing held to determine if defendant had forfeited right to confrontation); State v. Fields, 679 N.W.2d 341, 347 (Minn. 2004) (State has burden of proving defendant waived confrontation rights). Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (A party cannot raise on appeal an issue not raised and litigated below).

In State v. Wright this Court found that the State had not waived the argument, because in light of the pre-Crawford Confrontation Clause analysis available when the parties in Wright litigated that issue in the district court (statements are admissible if they come within a firmly-rooted hearsay exception),

the State had a good Confrontation Clause argument, and could not have been expected to pursue a forfeiture issue. 726 N.W.2d at 482. That is not true here because the State knew in the District Court that Crawford applied, and the court analyzed the admissibility of N.A.'s statements in light of Crawford.

CONCLUSION

For the reasons stated in the foregoing Argument, Appellant requests that this Court affirm the decision of the District Court, which is far from clearly and unequivocally erroneous, excluding N.A.'s statements.

Respectfully submitted:

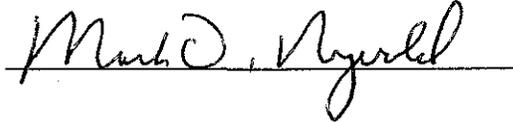


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CERTIFICATE OF COMPLIANCE

This brief contains 7,461 words (exclusive of the cover page, table of contents and table of authorities) as computed by the word processing program used to prepare this brief, WordPerfect 10, and it complies with the typeface provisions of the Rule of Civil Appellate Procedure 132.01, subd. 3.

A handwritten signature in cursive script, reading "Mark D. Nyvold", is written over a horizontal line.

Mark D. Nyvold