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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-933

No. COA22-138

Filed 29 December 2022

Mecklenburg County, Nos. 17 CRS 239077, 239079, 239465-70

STATE OF NORTH CAROLINA

v.

IVAN VIDAL DAWKINS, Defendant.

Appeal by Defendant from judgments entered 29 July 2021 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Chris D. Agosto Carreiro, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

MURPHY, Judge.

¶ 1

Under the Confrontation Clause of the Sixth Amendment, a defendant has the right to be confronted with the witnesses against him at trial. However, the Confrontation Clause does not apply to nontestimonial statements. Here, where an onlooker's statement regarding Defendant's alleged criminal conduct was made informally while pursuing Defendant in an emergency situation and for the purpose

of resolving the emergency, the statement was nontestimonial and did not implicate the Confrontation Clause.

¶ 2

Under our Rules of Evidence, hearsay is generally inadmissible. However, there are several exceptions to this general rule, one of which is that “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter[,]” is admissible. N.C.G.S. § 8C-1, Rule 803(1) (2021). The immediacy component of this “present sense impression” exception can apply even where several minutes have elapsed between the events described and the statement. Here, where the call allegedly constituting inadmissible hearsay took place entirely within an eight-minute window during a continuous, ongoing pursuit, the present sense impression exception properly applied.

BACKGROUND

¶ 3

This case arises out of an incident on 15 October 2017 in which Defendant allegedly forced Valerie, one of the daughters of a woman he was dating at the time, to perform fellatio on him.¹ On 15 October 2017, Valerie’s mother took Valerie and her sister, Sandy, to Independence Park in Charlotte to meet with Defendant. At the time, Sandy was nine years old and Valerie was seven. Around 6:00 or 6:30 p.m., the

¹ We use pseudonyms for all relevant persons throughout this opinion to protect the juveniles’ identities and for ease of reading.

girls' mother left them alone with Defendant. While Defendant was alone with the girls, an onlooker began to shout, believing he saw Defendant "molesting" the girls. Defendant and the girls ran from the park, and the onlooker followed, calling 911. During the 911 call, the onlooker described Defendant and the girls based on their general appearances, clothing, and condition; mentioned other times he had seen Defendant in the area; provided the dispatcher with updates on their location; and described his own appearance, clothing, and location so that law enforcement could identify him in the pursuit. At one point, he told dispatch that Defendant was "having [one of the girls] give him fellatio" while the other was on a nearby swing. The 911 call lasted just under nine minutes and culminated in the onlooker directing law enforcement to Defendant when they arrived at his location.

¶ 4

Defendant was indicted on 5 August 2019 for nine counts of indecent liberties with a child, one count of statutory sex offense with a child, one count of attempted first-degree statutory rape, and one count of committing a sex act by a substitute parent. At trial, prior to submission of the case to the jury, the State dismissed two counts of indecent liberties, the single count of attempted first-degree statutory rape, and the single count of committing a sex act by a substitute parent. The remaining charges—seven counts of indecent liberties and one count of statutory sex offense with a child—were submitted to the jury.

¶ 5

At trial, the State played a recording of the onlooker's 911 call without calling

him as a witness. Defendant objected on hearsay and Confrontation Clause grounds, but the trial court overruled these objections and allowed the 911 call to be played.

¶ 6

On 28 July 2021, the jury found Defendant guilty of seven counts of indecent liberties and one count of statutory sex offense. The trial court sentenced Defendant to 300 to 420 months of imprisonment for the statutory sex offense conviction and 15 to 27 months of imprisonment for each of the indecent liberties convictions, with the sentences to run concurrently. Defendant gave notice of appeal in open court.

ANALYSIS

¶ 7

On appeal, Defendant argues the trial court erred in admitting the 911 call because (A) Defendant's rights under the Confrontation Clause were violated in the absence of the caller having testified at trial; and (B) the 911 call contained inadmissible hearsay. For the reasons discussed below, we hold the trial court did not err in either respect.

A. Confrontation Clause

¶ 8

The Confrontation Clause of the Sixth Amendment to the United States Constitution requires 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. The Confrontation Clause prohibits the “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.” *Crawford v.*

Washington, 541 U.S. 36, 53-54, 158 L. Ed. 2d 177, 194 (2004). “The Confrontation Clause does not, however, apply to nontestimonial statements.” *State v. McKiver*, 369 N.C. 652, 655 (2017) (citing *Whorton v. Bockting*, 549 U.S. 406, 420, 167 L. Ed. 2d 1, 13 (2007)).

¶ 9

In *Davis v. Washington*, the Supreme Court defined nontestimonial statements and compared them to testimonial statements:

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.

Davis v. Washington, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006). Examples of an ongoing emergency include “a call for help against a bona fide physical threat” or “speaking about events *as they were actually happening*, rather than ‘describ[ing] past events.’” *Id.* at 827, 165 L. Ed. 2d at 240 (brackets in original) (quoting *Lilly v. Virginia*, 527 U.S. 116, 137, 144 L. Ed. 2d 117, 135 (1999) (plurality opinion)). Our Supreme Court, elaborating on these holdings, has noted that “the existence of an ongoing emergency and its duration ‘depend on the type and scope of danger posed to the victim, the police, and the public.’” *McKiver*, 369 N.C. at 656 (quoting *Michigan v. Bryant*, 562 U.S. 344, 371, 179 L. Ed. 2d 93, 115 (2011)).

¶ 10

Defendant argues the 911 call included both testimonial and nontestimonial statements. In particular, Defendant argues “[the onlooker]’s statement that he saw one of the girls performing fellatio on [Defendant] was testimonial because it was made after the events occurred and had nothing to do with the ongoing emergency.” Defendant concedes that much of the 911 call was nontestimonial because the man told dispatch that he was following Defendant, described what Defendant and the girls were wearing, and gave updated locations of where they were. In support of this argument, Defendant points to *Davis*, where the Court indicated a nontestimonial statement has the potential to transform into a testimonial one:

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, “evolve into testimonial statements,” once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when [the defendant] drove away from the premises). The operator then told [the caller] to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, [the caller]’s statements were testimonial[.]

Davis, 547 U.S. at 828-829, 165 L. Ed. 2d at 241 (citations omitted). Defendant contends the 911 dispatcher received all the information it needed to secure police assistance when the caller told the dispatcher that the reason he called was because he saw Defendant molesting the girls in the park. The State responds by arguing the

entire 911 call was nontestimonial, particularly because “[s]ubstantially all the statements made on the 911 call were provided for the primary purpose of resolving the ongoing emergency[,] [and] [t]he entirety of the 911 call occurred while [the caller] was in hot pursuit of Defendant [who was] attempting to flee with the victims under his control.”

¶ 11 In determining whether a statement is testimonial or nontestimonial, we must consider such factors as:

(1) the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred; (2) objective determination of whether an ongoing emergency existed; (3) whether a threat remained to first responders and the public; (4) medical condition of declarant; (5) whether a nontestimonial encounter evolved into a testimonial one; and (6) the informality of the statement and circumstances surrounding the statement.

State v. Glenn, 220 N.C. App. 23, 26 (2012) (marks omitted), *disc. rev. denied*, *appeal dismissed*, 366 N.C. 403 (2012).

¶ 12 Applying these factors to the present case, we are obligated to hold the entirety of the onlooker’s call concerning Defendant was nontestimonial. While the declarant was not in any adverse medical condition and there was no apparent threat to first responders or the public, there was, objectively, an emergency in existence throughout the entirety of the call: a perceived sexual predator was running away

with two minor girls.² The call, while lasting several minutes, remained consistently informal, with the entire conversation taking place during the onlooker's pursuit of a fleeing Defendant to a dispatcher who only learned of the situation through the call itself. *Cf. id.* at 32 (finding a statement was testimonial because it was made formally with questioning that was part of an investigation, made outside of the defendant's presence, and was conducted by a police officer who was trying to ascertain what happened instead of what was happening). And, in light of the pursuit's continuity, the nature of the encounter did not evolve or otherwise deescalate at any point in its less-than-nine-minute span.

¶ 13 Finally, it is reasonable to conclude that the purpose of the onlooker's communication was to inform and update law enforcement on the status of Defendant's alleged flight with Sandy and Valerie. Defendant argues it is "objectionably reasonable that [the caller] believed that [the caller] was telling law enforcement things that could later be used against [Defendant]." However, for purposes of this prong, the issue is not what collateral consequences a reasonable person would have believed their words might carry; rather it is what "*purpose [of] reasonable participants would have had*" in uttering those words. *Id.* at 26 (emphasis

² Indeed, Defendant remained in flight with the girls throughout the entire duration of the call, with the dispatcher requiring constant updates from the onlooker in order to locate Defendant.

added). A “purpose” is not incidental; it is “an objective, goal, or end[,]” necessarily connoting conscious intent. *Purpose*, Black’s Law Dictionary (11th ed. 2014). And the purpose of a reasonable participant in a 911 call who is actively pursuing a person they believe to be abducting and preying upon a child is, very naturally, to resolve the emergency and secure the child’s rescue.

¶ 14 For all the foregoing reasons, we hold the call was nontestimonial and, therefore, its admission did not violate Defendant’s Sixth Amendment right to confrontation.

B. Hearsay

¶ 15 Defendant next argues the trial court erred in admitting the 911 call because the call contained inadmissible hearsay; in particular, the onlooker’s “statement that he saw one of the girls perform fellatio on [Defendant].” “When preserved by an objection, a trial court’s decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*.” *State v. Rollins*, 226 N.C. App. 129, 133 (2013), *disc. rev. denied*, 367 N.C. 324, *cert. denied*, 574 U.S. 851, 190 L. Ed. 2d 96 (2014). Rule 801(c) of our Rules of Evidence defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C.G.S. § 8C-1, Rule 801(c) (2021). “Hearsay is not admissible except as provided by statute or by these rules.” N.C.G.S. § 8C-1, Rule

802 (2021). However, Rule 803 provides twenty-four hearsay exceptions which allow hearsay to be admissible. *See generally* N.C.G.S. § 8C-1, Rule 803 (2021).

¶ 16

Here, the statements at issue fall, at minimum, within the present sense impression exception. Under this exception, “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter[,]” is admissible despite definitionally qualifying as hearsay. N.C.G.S. § 8C-1, Rule 803(1) (2021). “The basis of the present sense impression exception is that closeness in time between the event and the declarant’s statement reduces the likelihood of deliberate or conscious misrepresentation.” *State v. Blankenship*, 259 N.C. App. 102, 114 (2018), *disc. rev. denied*, 372 N.C. 295 (2019). “There is no rigid rule about how long is too long to be ‘immediately thereafter[,]’” *id.*, and our Supreme Court has, in multiple occasions in the past, tolerated a delay of ten or more minutes between the declarant’s perception of the events recounted and the description itself. *See State v. Odom*, 316 N.C. 306, 313 (1986) (holding the “[declarant]’s statement was not too remote to be admissible under [the present sense impression exception]” where a statement was given to a police officer who arrived on the scene ten minutes after the events described); *State v. Cummings*, 326 N.C. 298, 314 (1990) (holding the present sense impression exception applied to a statement given after a short drive between the site of the incident described and the site of the declaration).

¶ 17 Here, the 911 call lasted approximately nine minutes, and it appears that just over three minutes elapsed from the beginning of the call before the declarant stated he saw one of the girls perform fellatio on Defendant. Especially given the declarant’s active pursuit of Defendant while making the statements, we cannot say that this modest delay rendered the statements “too remote to be admissible under [the present sense impression exception,]” even with respect to the statements made later in the call. *Odom*, 316 N.C. at 313. We conclude the statements in the 911 call were properly admitted, and the trial court did not err.

CONCLUSION

¶ 18 The statements Defendant alleges the trial court erred in admitting were nontestimonial and constituted the present sense impression of the declarant. Accordingly, their admission neither violated the Confrontation Clause of the Sixth Amendment nor constituted inadmissible hearsay.

NO ERROR.

Judges DILLON and INMAN concur.

Report per Rule 30(e).