

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)
)
 Respondent,)
)
 vs.) No. SC 87371
)
LAMONT CORTEZ KEMP,)
)
 Appellant.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
13TH JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE GENE HAMILTON, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant Lamont Kemp was convicted by a Boone County jury of felonious restraint, §565.120, and unlawful use of a weapon, §571.030.¹ He was sentenced by the Honorable Ellen S. Roper² to seven years in the Department of Corrections for felonious restraint and a concurrent four years for unlawful use of a weapon. Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Western District. Article V, §3, Mo. Const. (as amended 1982); §477.070. This Court granted Appellant's application for transfer after an opinion and now has jurisdiction. Article V, §10, Mo. Const. (as amended 1976) and Rule 83.04.

¹ All statutory references are to Revised Statutes of Missouri, 2000. Rule references are to Missouri Court Rules (2006).

² Judge Roper was assigned to this case for the purpose of sentencing following a post-trial motion for change of judge for cause (L.F. 9). The Honorable Gene Hamilton presided at trial (L.F. 6).

STATEMENT OF FACTS

In October of 2003, Michael and Laura Johnson lived at 4300 Mesa Drive in Boone County, Missouri (Tr. 138).³ At about 8:30 a.m. one morning, Michael⁴ was awakened by loud banging on his door and screams for help (Tr. 138-39). Laura, who was watching television, also heard the banging and screaming (Tr. 145). She looked through the living-room window and saw a woman naked from the waist up and wearing a green nightgown (Tr. 146). Laura went to get Michael, then got on the phone and called the police (Tr. 146). Michael got out of bed, put on some pants, and ran outside (Tr. 139).

When he got outside, he did not see anyone (Tr. 139). Laura told him that the woman had run down the street, so Michael ran in that direction (Tr. 139). He found the woman running down Scott Boulevard and falling to the ground (Tr. 138-39). She was frantic, crying, shaking, and having trouble breathing (Tr. 140). The woman told Michael that her boyfriend had held her hostage at gunpoint all night and did not let her

³ The record on appeal consists of a transcript (Tr.) and a legal file (LF).

⁴ Because Michael and Laura Johnson have the same surname, their first names will be used for clarity, and no disrespect is intended.

leave (Tr. 140). Michael told the woman he would get her help from the police and took her to his apartment through the back entrance (Tr. 140).

When Michael and the woman got inside, Laura was already on the phone with a 911 operator (State's Ex. at :19).⁵ Michael told Laura that the woman's boyfriend had her locked up for eight hours with a gun, and Laura relayed that to the operator (State's Ex. at :56). The operator asked where the boyfriend was, but Michael and Laura did not know (State's Ex. at 4:07). Laura asked the woman, "Ma'am, do we know an address where he is?" and the woman calmly responded with her boyfriend's address, "4301 Mesa, apartment B," then exclaimed, "Oh, God!" (State's Ex. at 1:43).⁶

The operator asked if the woman needed an ambulance, but she said, "I think I'm OK." (State's Ex. at 1:51). The woman was inside the

⁵ The State's Exhibit containing a compact disc recording of the entire 911 call is not marked with a number or a letter. Appellant's transcription of the exhibit is in the Appendix.

⁶ Laura stayed on the phone with the operator throughout the entire call, and relayed the operator's questions to the woman and the woman's responses back to the operator.

Johnson home, and Laura told the operator, "She thinks she's OK, she's just really scared." (State's Ex. at 1:57-2:10).

The operator asked for the woman's name, and the woman said she was Jackie Washington (State's Ex. at 2:10). The operator asked for her boyfriend's name, and Jackie responded, "Lamont Kemp." (State's Ex. at 2:18). Jackie said she thought Lamont was still in the apartment, which was across the street (State's Ex. at 2:30). She said he had a big gun (State's Ex. at 2:37).

The Johnsons gave Jackie a shirt while the operator continued asking her about the gun, its color, and where it was kept (State's Ex. at 2:54). When asked if anyone else was in the house, Jackie said there was no one else in the house but there were two friendly dogs on the back porch (State's Ex. at 3:35-4:00). Jackie said that Lamont chased her, but she did not know if he knew where she was (State's Ex. at 4:05). The last time Jackie saw Lamont, he was on the back porch (State's Ex. at 4:15).

Jackie was offered a seat on the couch and again refused medical treatment (State's Ex. at 4:39). Laura commented that Jackie had a little bit of chest pain, but it was probably from running and screaming (State's Ex. at 4:45). The operator asked for Laura's name and confirmed her phone

number and address (State's Ex. at 4:50-5:02). She told Laura that there were five police officers on the way (State's Ex. at 5:20).

Approximately thirty-five police officers eventually responded to Lamont's apartment (Tr. 162-63). After an hour of knocking on the door and sides of the house, one officer called the residence from his cell phone (Tr. 162, 169). In a couple of minutes, he made contact with Lamont and talked him into coming outside (Tr. 169).

Lamont was charged by indictment with committing the class C felony of felonious restraint, §565.120, and the class D felony of unlawful use of a weapon, §571.030.1(4) (LF 13-14).⁷ He pleaded not guilty to both counts and a jury trial was scheduled (LF 3).

Jackie did not testify at Lamont's trial (Tr. 131-195). Her statements about what happened to her were admitted into evidence through the admission of a portion of the 911 phone call recording and the testimony of both Michael and Laura Johnson (Tr. 140-41, 147, 178-79; State's Ex. 1).⁸

⁷ A third charge of receiving stolen property was dismissed by the State after the trial court sustained Appellant's motion for a new trial on that count (LF 8, 10, 71).

⁸ While the unmarked State's Exhibit contains the entire recording of the 911 phone call and is used to illustrate Appellant's argument, only State's

By motion in limine, Lamont had requested the exclusion of this evidence at trial (LF 28-32). In particular, he sought to exclude testimony by Michael and Laura regarding Jackie's out-of-court statements made on the date of the incident charged (LF 28-32). In support of his motion, Lamont argued that the United States Supreme Court's decision in *Crawford v. Washington*⁹ required both unavailability of a witness and a prior opportunity for cross-examination of the witness before that witness's testimonial hearsay statements could be admitted at trial (Tr. 76, LF 29). Lamont argued that Jackie was not "unavailable," and he did not have a prior opportunity to cross-examine her (Tr. 76, LF 29).

The trial court ruled that Jackie's statements as she was running down the street were admissible as excited utterances (Tr. 78). The court ruled that the statements she made on the 911 call and to the Johnsons were not testimonial and were also excited utterances (Tr. 79). Lamont was granted a continuing objection to the admission of the statements (Tr. 80-81).

Exhibit 1, containing a portion of the 911 recording, was heard by the jury (Tr. 177, 180).

⁹ 541 U.S. 36 (2004).

At trial, Lamont objected to the admission of Michael's testimony about what Jackie said to him when he found her outside (Tr. 140). He also objected to Laura's testimony about what Jackie said about the charged events (Tr. 146-47). And when State's Exhibit 1, a CD containing a portion of the 911 recording, was admitted and played for the jury, Lamont again objected based on his pre-trial motions (Tr. 177, 179-80). All of his objections were denied (Tr. 140, 146, 180).

Lamont was convicted on both counts (Tr. 215). In his motion for a new trial, he argued that the trial court violated his constitutional right to confront the witnesses against him by admitting Jackie's statements at trial (LF 28-32). The motion was overruled on that issue, and Lamont was sentenced to seven years in the Department of Corrections for felonious restraint and four concurrent years for unlawful use of a weapon (Tr. 252; LF 8, 70-73). This appeal follows.

POINTS RELIED ON

I.

The trial court abused its discretion in admitting into evidence Jackie's out-of-court statements and in overruling Lamont's motion for a new trial, because the admission of those statements violated Lamont's right to confront and cross-examine the witnesses against him, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §18(a) of the Missouri Constitution, in that Jackie's statements were testimonial hearsay, Lamont never had the opportunity to cross-examine her, and she was not shown by the State to be unavailable before the statements were admitted.

Davis v. Washington, __ U.S. __, 126 S.Ct. 2266 (2006);

Hammon v. Indiana, __ U.S. __, 126 S.Ct. 2266 (2006);

Crawford v. Washington, 124 S.Ct. 1354 (2004);

Barber v. Page, 390 U.S. 719, 721 (1968);

U. S. Const., Amends. 6 & 14;

Mo. Const., Art. I, §18(a).

II.

The trial court abused its discretion in admitting Jackie's out-of-court statements as excited utterances and in overruling Lamont's motion for a new trial, in violation of Lamont's rights to due process and to confront and cross-examine the witnesses against him, guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that even if some of Jackie's statements were not "testimonial," they were still hearsay, and they did not meet the "excited utterance" exception to the rule against hearsay because they were not made under the domination of the senses as a result of shock produced by an event, and there was no independent evidence that a startling event occurred.

State v. Hook, 432 S.W.2d 349 (Mo. 1968);

State v. Post, 901 S.W.2d 231 (Mo. App. E.D. 1995);

State v. Kemp, 919 S.W.2d 278 (Mo. App. W.D. 1996);

State v. Debler, 856 S.W.2d 641 (Mo. banc 1993);

U. S. Const., Amends. 6 & 14;

Mo. Const., Art. I, §§ 10 and 18(a).

ARGUMENT

I.

The trial court abused its discretion in admitting into evidence Jackie's out-of-court statements and in overruling Lamont's motion for a new trial, because the admission of those statements violated Lamont's right to confront and cross-examine the witnesses against him, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §18(a) of the Missouri Constitution, in that Jackie's statements were testimonial hearsay, Lamont never had the opportunity to cross-examine her, and she was not shown by the State to be unavailable before the statements were admitted.

Introduction

By the time Michael Johnson caught up to Jackie Washington, walked her back to his house, and brought her inside, Jackie's "emergency" was over. Michael did not see anyone else outside when he ran after Jackie, and although she said that Lamont chased her, she last saw him on his back porch and believed him to be in his apartment (Tr. 139, State's Ex. at 2:30, 4:05). She was asked twice, but each time denied the need for an ambulance (State's Ex. at 1:57, 4:39).

The statements Jackie made inside the Johnson home were in response to questions made by the Johnsons and the 911 operator. Once it was established that there was no longer a threat to Jackie's safety, the purpose of the questions could only be to discover what had happened to her, laying the ground for a potential criminal prosecution. For this reason, Jackie's statements were testimonial, and their admissibility at trial was conditioned on two things: her unavailability and Lamont's prior opportunity to cross-examine her. Since neither condition was met, the statements were inadmissible, and their use at trial was error.

The Statements

Over Lamont's objection, Michael testified that when he caught up with Jackie outside, she was frantic, crying, and shaking and said that "her boyfriend had been holding her hostage at gunpoint all night and wasn't letting her leave." (Tr. 140). He testified that once inside, Jackie identified her boyfriend as Lamont Kemp and described his gun as a silver pistol (Tr. 141).

Laura Johnson testified over objection that when Jackie came into her house, "She said that she had been held in her basement by her boyfriend at the time, Lamont Kemp, at gunpoint, since 9 o'clock the

previous night, and that she had just gotten out of the house when she came banging on our door.” (Tr. 146-47).

Finally, the jury heard a portion of the 911 phone call wherein Laura relayed questions from the 911 operator to Jackie, and relayed Jackie’s responses to the operator. The jury heard:

Laura: It’s OK.

911: 911. What is your emergency?

Laura: Um, yes we...

Laura: What’s your name, ma’am?

Jackie: Jackie.

Laura: Huh?

Jackie: Jackie.

Laura: Jackie.

Jackie: Washington.

Laura: Washington.

911: What’s his name...what’s the boyfriend’s name?

Laura: What’s your boyfriend’s name?

Jackie: Lamont Kemp.

Laura: Lamar Kemp?

911: OK.

Jackie: ...went in there. He got this gun in the back of his pocket.

(inaudible)

Michael: What type of gun?

911: Did he have her tied up?

Laura: Did he have you tied up or just locked in the bathroom?

Jackie: No, he had, he had the gun on me. He had me sittin' down with him like this while he's wavin' the gun around talkin' about he's seein' people. This been goin' on all night.

Laura: Did you hear that?

911: OK. Yeah.

(State's Ex. 1).

Standard of Review

This Court reviews a trial court's decisions on the admission of evidence for abuse of discretion. *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. banc 2006). The trial court's judgment will be reversed if its ruling is clearly against the logic of the circumstances, and its error is so prejudicial that it deprives the defendant of a fair trial. *Id.* Trial court error is prejudicial if there is a reasonable probability that the trial court's error affected the outcome of the trial. *Id.*

Discussion

A. Question Presented

Four days before this case was tried, the United States Supreme Court issued its decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Court held that out-of-court statements of a witness that are “testimonial” may only be admitted at trial if the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *Id.* at 68. The Court did not give a comprehensive definition of what statements are “testimonial,” but did offer the description, “statements that declarants would reasonably expect to be used prosecutorially,” and “statements...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 51-52. The question presented in this case is whether Jackie’s statements, recorded on the 911 call and heard by the Johnsons, were “testimonial hearsay” under *Crawford* and should have been excluded at trial.

B. Trial Court Ruling

After reading *Crawford* “three or four times,” and listening to the 911 call,¹⁰ the trial court ruled that Jackie’s statements made while running down the street immediately after the incident were admissible as excited utterances (Tr. 74-75, 78). It ruled that her statements on the 911 call in the presence of Michael and Laura Johnson were not testimonial and were also excited utterances (Tr. 79). The court said:

The 9-1-1 questions asked by the operator, the Court believes were elicited in order to determine who was in the house, whether the person in the house was armed, what the situation had been, in order to advise the officers of what to do when they arrived there, how many officers were needed, what the situation was, and were not elicited by the 9-1-1 dispatcher for the purpose of testimony at a trial at a later date but rather were for the purpose of finding out the situation in an emergency situation at the time.

¹⁰ The record suggests that the court listened to the “completely unredacted” 911 call (Tr. 74-75). The transcript clearly indicates that the court heard State’s Exhibit 1, which was ultimately admitted at trial (Tr. 74-75).

(Tr. 79). The court did not believe that the statements were taken as possible testimony in a future case (Tr. 79).

C. Davis v. Washington

The United States Supreme Court recently addressed in greater detail “what is testimonial” in the companion cases *Davis v. Washington* and *Hammon v. Indiana*, __ U.S. __, 126 S.Ct. 2266 (2006).

In *Davis*, a 911 call was made and the caller hung up. *Id.* at 2270. When the operator reversed the call, Michelle McCottry answered. *Id.* at 2270-71. She and her boyfriend Adrian Davis were involved in a domestic disturbance. *Id.* at 2271. McCottry told the operator, “He’s here jumpin’ on me again,” and “He’s usin’ his fists.” *Id.* In answer to the operator’s questions, McCottry gave Davis’s name. *Id.*

As the conversation continued, the operator learned that Davis hit McCottry and then ran outside and was leaving in a car with someone else. *Id.* The operator gathered more information about Davis, including his birthday, and learned that Davis said he had come to McCottry’s house to get his belongings because she was moving. *Id.* McCottry described for the operator the details of the assault. *Id.* Police arrived within four minutes of the 911 call and saw McCottry’s fresh injuries. *Id.*

Davis was charged with violating a domestic no-contact order and his case went to trial. *Id.* McCottry did not appear, and over Davis' objection based on the Confrontation Clause of the 6th Amendment, the trial court admitted a recording of her exchange with the 911 operator. *Id.* Police officers testified that McCottry exhibited injuries that appeared to be recent. *Id.*

The Supreme Court held:

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.

The Court noted that 911 calls are ordinarily not designed to establish or prove a past fact, but to describe current circumstances requiring police assistance. *Id.* at 2276. McCottry was speaking about events *as they were actually happening*, rather than describing past events.

Id. Any reasonable listener would recognize that McCottry was facing an ongoing emergency, and her call was a call for help against a bona fide physical threat rather than just a report of a crime not involving imminent danger. *Id.*

Additionally, the nature of the questions and answers, viewed objectively, demonstrated that the elicited statements were necessary to resolve the present emergency rather than simply to learn what had happened in the past. *Id.* The Court also considered the environment in which the statements were given. *Id.* at 2276-77. McCottry gave frantic answers over the phone in the midst of her attack. *Id.* Considering all of these factors, the Court concluded that the circumstances of McCottry's interrogation objectively indicated that the primary purpose of the 911 operator's questions was to enable the police to meet an *ongoing emergency*. *Id.* at 2277. McCottry was not acting as a witness or giving testimony. *Id.* Therefore, her statements were admissible. *Id.* at 2278, 2280.

The Court cautioned that the solicitation of nontestimonial information provided in an emergency can evolve into the solicitation of testimonial statements. *Id.* at 2277. For example, after the emergency ended, when Davis drove away from the premises, the operator continued asking McCottry questions, and the Court found those answers to be

testimonial. *Id.* The Court directed that trial courts should redact any portions of a statement that becomes testimonial so that they are not presented to a jury. *Id.* In *Davis*, only McCottry's early statements identifying Davis as her attacker were challenged, and the Court held that those were not testimonial. *Id.*

In the companion case of *Hammon v. Indiana*, police responded to a late-night report of a domestic disturbance at the home of Hershel and Amy Hammon. *Id.* at 2272. They found Amy on the front porch, frightened, but she told them that nothing was wrong. *Id.* She gave them permission to enter the house, where an officer saw a gas heater in the corner of the living room with flames coming out and broken glass on the ground in front of it. *Id.* Hershel was in the kitchen, and told the police that he and Amy had been in an argument, but it was resolved and it was never physical. *Id.*

Amy came back inside, and while one officer remained with Hershel in the kitchen, another talked with Amy in the living room and asked her again what had happened. *Id.* Hershel tried to intervene in Amy's conversation with the police, but he was "rebuffed." *Id.* After hearing Amy's account of what happened, the officer asked her to fill out and sign a battery affidavit. *Id.* Amy wrote, "Broke our Furnace & shoved me

down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter." *Id.*

Hershel was charged with domestic battery and with violating his probation. *Id.* Amy was subpoenaed, but did not appear at trial. *Id.* The officer who questioned Amy testified over Hershel's objection that Amy said she and Hershel had been in an argument, and that he threw her down into the glass of the heater he broke and punched her twice in the chest. *Id.* at 2272-73. The officer also authenticated Amy's affidavit, and Hershel again objected that he had not been given the opportunity to cross-examine Amy. *Id.* at 2272. The affidavit was admitted as a present sense impression, and Amy's statements were admitted as excited utterances. *Id.*

The Court found it clear from the circumstances that Amy's interrogation was part of an investigation into possibly criminal past conduct. *Id.* at 2278. There was no emergency in progress when the police arrived, and the interrogating officer did not hear any arguments or see anyone throw or break anything. *Id.* Amy told them that things were fine, and there was no immediate threat to her person. *Id.* When the officer

elicited Amy's challenged statements, he was not trying to determine "what is happening," but rather "what happened." *Id.*

Objectively, the primary purpose of the interrogation was to investigate a possible crime. *Id.* Amy was separated from Hershel, deliberately recounted in response to police questioning how past events began and progressed, and her interrogation took place some time after the events described were over. *Id.* Her statements were testimonial as a substitute for live testimony because they did precisely what a witness does on direct examination. *Id.* Amy's testimonial statements were not admissible, and Hammon's conviction was reversed and his case remanded. *Id.* at 2280.

D. Analysis of Kemp under Davis v. Washington

The *Davis* and *Hammon* opinion provides a clear framework for analyzing the facts of this case. To begin, it is important to recall the definition of testimonial statements presented in those cases: Statements *are not testimonial* 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. *Id.* at 2273. Statements *are testimonial* when the circumstances objectively indicate that there is no 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.

The first factor the *Davis* court considered was that in *Davis*, McCottry was speaking about events *as they were actually happening*, while in *Hammon*, there was no emergency in progress. *Id.* at 2276, 2278. In the case before this Court, it was not Jackie herself who made the 911 call from the apartment where she was being held at gunpoint. It was her neighbor, Laura Johnson, who called the police. Laura called 911 as her husband Michael ran outside in pursuit of Jackie. By the time Jackie made the statements which were entered into evidence at trial on State's Exhibit 1, she was safe inside the Johnson home.

There was no emergency in progress. Michael testified that when he ran out of his front door, he "didn't see anybody," so there is no evidence that Jackie was being pursued (Tr. 139). Laura told him that Jackie had run down the street, so he ran after her and found her running down another street (Tr. 139). When he caught up to Jackie, he told her that he would call the police and get her help, then brought her back to his home (Tr. 140). By the time the statements were made, the dangerous situation Jackie had been in was over. All of her statements elicited by the 911 operator described past events.

The second factor considered by the *Davis* court was whether a reasonable listener would recognize that there was an ongoing emergency. *Id.* at 2276. The court stated, “Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry’s call was plainly a call for help against a bona fide physical threat.” *Id.* McCottry was on the phone with 911 as Davis was assaulting her, and her statements were held to be *not* testimonial. *Id.* at 2271. Amy Hammon, however, was under no immediate threat to her person, and her statements *were* testimonial. *Id.* at 2278.

In this case, the 911 operator asked Laura if Jackie needed an ambulance (State’s Exhibit, 1:51). Jackie responded, “I think I’m OK.” (State’s Exhibit, 1:57). Laura told the operator, “I think she’s OK, she’s just really scared.” (State’s Exhibit, 1:57). The operator asked if Jackie was inside, and Laura confirmed, “Yeah, she’s inside with us right now.” (State’s Exhibit, 2:07). Jackie said Lamont was still in his apartment (State’s Exhibit, 2:30). A reasonable listener would recognize that the incident was over and there was no ongoing emergency. Jackie had allegedly been held captive for some period of time, had escaped, and was now inside the home of her two neighbors. While it was important that law enforcement

be contacted to follow-up on the incident, Jackie was not in the midst of an ongoing emergency.

A third factor considered by the *Davis* court was the nature of what was asked and answered. *Id.* at 2276. The court believed that an objective bystander would find that McCottry's statements were necessary to be able to resolve the present emergency, whereas Amy Hammon's statements merely related what had happened in the past. *Id.* at 2276, 2278.

This case is more comparable to *Hammon* than *Davis*. Here, Jackie was not asked to describe the circumstances she was experiencing *currently*, but was asked to describe what had happened *in the past*. She was asked if there had been drug use going on at the time of the incident, and that question led to one of the statements admitted at trial, "He got this gun in the back of his pocket." (State's Ex. at 5:35; State's Ex. 1). Next, the operator asked if Jackie had been tied up, and her response was also admitted at trial, "No, he *had*, he *had* the gun on me, he *had* me sittin' down with him like this while he's wavin' the gun around talkin' about he's seein' people. This been goin' on all night." (State's Ex. at 5:57; State's Exhibit 1) *emphasis added*. Her statements described past events and were

not necessary to resolve any emergency because the emergency was over; Jackie had escaped.

Finally, the *Davis* court analyzed the level of formality of the interview. *Id.* at 2276-77. “McCottry’s frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.” *Id.* at 2277. By contrast, Amy Hammon was interviewed in a separate room, away from her husband. *Id.* at 2278. And her statements, made some time after the events described were over, “deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed.” *Id.*

Here, Jackie’s statements were made after she had escaped from her boyfriend and while she was safely in the home of her neighbors. When Jackie last saw her boyfriend, he was on the back porch of his apartment (State’s Ex. at 4:20). When she made her statements, there were already five police officers on the way (State’s Ex. at 5:20). And most importantly, Jackie’s statements were in response to the 911 operator’s questions about “how potentially criminal past events began and progressed.” *Id.*

The circumstances surrounding Jackie’s 911 statements that were admitted at trial would lead an objective observer to conclude that the

statements were testimonial. They described past events, were not made while she was facing an ongoing emergency, were not necessary to resolve any present emergency, and were made in the non-threatening environment of a neighbor's home. With the additional guidance given in *Davis*, it is clear that Jackie's statements were testimonial.

E. Admissibility

Because Jackie's statements were testimonial, they were only admissible at trial if she was unavailable and if Lamont had been given a prior opportunity to cross-examine her. *Crawford*, 124 S.Ct. at 1374. Lamont was indicted, and there is nothing in the record to indicate that he ever had an opportunity to cross-examine Jackie (LF 2-3). He argued in a pre-trial motion that Jackie was not unavailable (Tr. 76, LF 28-32). The motion was overruled, and Lamont was granted a continuing trial objection to the admission of Jackie's out-of-court statements based on his motion (Tr. 79-81).

The only pre-trial evidence on Jackie's availability is found in the transcript of Lamont's first trial, which resulted in a mistrial (LF 6). During a pretrial hearing, the State told the court, "I have not been able to get the victim served with a subpoena." (Tr. 12). The State asked permission to question the venire on whether they would have a problem

with the victim's absence because she was not subpoenaed (Tr. 25).

During the second trial, Jackie's "unavailability" was mentioned when the State told the jury that Jackie would not be called to testify because she was not served with a subpoena (Tr. 112-13).

Lamont raised in his motion for a new trial that the State had not proven that Jackie was unavailable (LF 58-59, paragraph 3). During a hearing on the motion, and for the first time in the record, the court asked why Jackie was unavailable (Tr. 222-23). The State responded that it "expended a great amount of resources attempting to get her served with the subpoena. She was doing her best to avoid that service. And we have expended every good-faith effort we possibly could to get her there." (Tr. 223). Additionally, although admitting that this evidence was not before the court, the State said that Jackie described on jail phone calls how she was attempting to avoid service (Tr. 223).¹¹ The court took the motion under advisement, and later ruled that "Ms. Washington was unavailable as a witness, the State having requested a subpoena and made a valiant effort to have the subpoena served" (Tr. 224, LF 8).

¹¹ The State attempted to admit the jail phone calls at trial for the purpose of proving the charge of receiving stolen property, but was unable to lay a proper foundation for their admission (Tr. 180, 184-87).

The right of confrontation and cross-examination is an essential and fundamental requirement for a fair trial. *Barber v. Page*, 390 U.S. 719, 721 (1968). It is a right that may not be dispensed with lightly. *Id.* at 725. A witness is not unavailable for purposes of the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain her presence at trial. *Id.* at 724-25. The only evidence presented here of Jackie's unavailability *before her statements were admitted at trial* was that the State had not served her with a subpoena (Tr. 12, 25, 112-13).

In *State v. Brookins*, 478 S.W.2d 372 (Mo. 1972), the defendant's conviction was reversed when the deposition of a State witness was admitted at trial without a proper demonstration of the witness's unavailability. The witness, Nancy Tresslar, was deposed by the defendant and testified that she saw him at the scene of the crime. *Id.* at 373. She also testified that she was moving to Texas the next month. *Id.*

Trial began eight months later. *Id.* The State attempted to subpoena Tresslar for trial at her Missouri address, but made no attempt to secure her attendance by having her returned to Missouri under Missouri and Texas laws existing for that very purpose. *Id.* This Court held that since there was nothing in the record to indicate that the State made a good faith effort to return Tresslar to Missouri for the trial, she had not been proven

to be “unavailable,” and her deposition testimony should not have been admitted. *Id.* at 374-75.

Here, the only evidence presented by the State of Jackie’s unavailability was that the State had been unable to serve her with a subpoena. There is no other evidence upon which the trial court could have made a finding of a “good faith effort” to obtain her presence at trial. As in *Brookins*, it was insufficient for the State to merely request a subpoena in order to show that a good-faith effort had been made. Additionally, it was only *after* the trial and Lamont’s conviction that the court even asked the State about Jackie’s unavailability. And the only explanation the State provided was that it “expended a great amount of resources attempting to get her served,” and that “we have expended every good-faith effort we possibly could to get her there.” (Tr. 223).

It is questionable whether the State’s conclusory explanations were enough, *after the fact*, to prove that Jackie was truly an unavailable witness. Coupled with the fact that she was also never made available for Lamont to cross-examine, her testimonial statements admitted through both the 911 recording and the testimony of the Johnsons should have never been admitted at trial.

Conclusion

Michael and Laura Johnson were allowed to testify as to what Jackie Washington said in response to the 911 operator's questions, and a portion of the 911 phone call was also played to the jury. Jackie's statements on the 911 recording, and the Johnsons' testimony about those statements, were all testimonial hearsay. The admission of the statements was an abuse of discretion because Jackie was not proven by the State to be an unavailable witness before they were admitted. Additionally, Lamont had never had the opportunity to cross-examine Jackie about her statements. The trial court's error resulted in a deprivation of Lamont's constitutional right to confront and cross-examine the witnesses against him.¹² His convictions should be reversed, and his case remanded for a new trial.

¹² U. S. Const., Amends. 6 & 14, Mo. Const., Art. I, §18(a).

II.

The trial court abused its discretion in admitting Jackie's out-of-court statements as excited utterances and in overruling Lamont's motion for a new trial, in violation of Lamont's right to due process and to confront and cross-examine the witnesses against him, guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, in that even if some of Jackie's statements were not "testimonial," they were still hearsay, and they did not meet the "excited utterance" exception to the rule against hearsay because they were not made under the domination of the senses as a result of shock produced by an event, and there was no independent evidence that a startling event occurred.

Introduction

In the alternative to Point I,¹³ if this Court believes that Jackie's out-of-court statements admitted at trial were not testimonial, the trial court still abused its discretion in admitting the statements as excited utterances. The statements were not excited utterances because: first, the statements

¹³ In Point I, Lamont argued that Jackie's statements admitted at trial were testimonial hearsay and should not have been admitted.

were not made under the uncontrolled domination of the senses, but in response to questioning; and second, there was no proof, independent of the statements themselves, that a startling event took place.

Standard of Review

The trial court has broad discretion in the admission of evidence, and this Court will only reverse if this discretion was clearly abused and so prejudicial that it deprived the defendant of a fair trial. *State v. Edwards*, 31 S.W.3d 73, 77 (Mo. App. W.D. 2000).

The Excited Utterance Exception

Hearsay evidence is in-court testimony of an out-of-court statement which is offered to show the truth of matters asserted therein, and which rests for its value upon the credibility of the out-of-court speaker. *State v. Harris*, 571 S.W.2d 443, 446 (Mo. App. E.D. 1978). The excited utterance exception to the hearsay rule allows the admission of a statement that would otherwise be hearsay if the statement is made under the immediate and uncontrolled domination of the senses as a result of the shock produced by an event. *Edwards*, 31 S.W.3d at 78. The statement must be made “during the time when consideration of self-interest could not have been brought to bear through reflection or premeditation.” *Id.*, citing *State v. Post*, 901 S.W.2d 231, 234 (Mo. App. E.D. 1995). It is the “immediate and

uncontrolled domination of the senses...produced by the event," which allows the utterance to be taken as expressing the true belief of the declarant. *State v. Van Orman*, 642 S.W.2d 636, 639 (Mo. 1982). "So long as the statement is provoked by the excitement of the event and apparent spontaneous influence of the occurrence acting on the senses of the speaker," it can qualify as an exception to the rule against hearsay. *Edwards*, 31 S.W.3d at 78.

Facts

Prior to his first trial in this case, Lamont objected to the admission of Jackie's statements as excited utterances (Tr. 11, LF 20-22). For the purpose of ruling on the objection, the trial court admitted State's Exhibit A¹⁴, a redacted version of the 911 phone call (Tr. 13-14, 15). The court ruled *in limine* that it would admit the parts of the 911 call "where you can hear the victim identifying herself, who she is, and then the second part where she made some direct statements on the telephone call as to what had happened to her in the house, the fact that it happened all night, that there was a gun involved, et cetera, et cetera, et cetera." (Tr. 18). The court believed that the statements were excited utterances, "in the fact that a

¹⁴ State's Exhibit A was not used at all in the second trial, which is the subject of this appeal. See Exhibit Index (Tr. v).

foundation, as I understand it, will be laid that this victim came running down the street, half-naked, screaming and yelling, and it was on that basis that the 9-1-1 call was made. And this is all assuming that the State lays a foundation as to who is speaking on the tape and lays sufficient foundation that I could find that it was an excited utterance at the time.” (Tr. 18).

After the first trial resulted in a mistrial, the 911 tape was revisited in anticipation of the re-trial. The court asked to hear what question was asked by the 911 operator immediately before Jackie’s responses that the court found admissible in the first trial (Tr. 72). The State played the unredacted 911 call, then played State’s Exhibit 1 (Tr. 74-75). Once again, the court ruled that Jackie’s statements made while she was running down the street immediately after the incident and while she was half-naked were admissible as excited utterances (Tr. 78). It ruled that Jackie’s statements on the 911 call and those that Jackie made to Michael and Laura Johnson were not testimonial and were also excited utterances (Tr. 79).

At trial, the only evidence of what Jackie was screaming was, “[H]elp, help” (Tr. 139), and “Help me. Please help me.” (Tr. 145). The evidence was not that she was screaming this as she ran down the street, but rather as she banged on the door of her neighbors (Tr. 139, 145).

Michael was the only witness who went outside in search of Jackie, and he testified that she was trying to run, but would fall to the ground, she was crying, shaking, and trying to catch her breath (Tr. 139-140). She was not, however, screaming anything.

Over Lamont's objection, Michael testified that at some point after he caught up with her outside, Jackie told him that her boyfriend had held her hostage at gun point all night (Tr. 140). Michael then reassured Jackie that he would get her help, call the police, and take her to the safety of his apartment (Tr. 140). Laura, who remained inside on the phone with 911, did not hear any statements from Jackie until she was brought inside the residence (Tr. 146). All of Jackie's statements that Laura testified to at trial were those she heard Jackie make in response to questions asked by the 911 operator (Tr. 147, State's Ex., unmarked).

Jackie's Statement to Michael

Jackie's statement to Michael made outside the residence was not an excited utterance. Michael testified over objection that Jackie stated, "frantically that her boyfriend had been holding her hostage at gunpoint all night and wasn't letting her leave." (Tr. 140). In a motion to exclude the statement, Lamont argued that there was no independent evidence that

there was ever a startling event to prompt Jackie's statement, other than the statement itself (LF 20-21).

In Missouri, the burden of making a sufficient showing of spontaneity to admit a hearsay statement as an "excited utterance" lies with the proponent of the statement. *Post*, 901 S.W.2d at 234. In order to establish the fact of a startling event which prompts an excited utterance, there must be *some* independent proof that the event occurred. *Id.* at 235. Such independent proof must be established by a preponderance of evidence that the exciting event *did* occur, not just that it *could* have occurred. *Id.* Using the statement itself to prove the startling event is "bootstrapping," and insufficient to meet this burden. *Id.* at 234.

Although they lived right across the street, the Johnsons both testified that they had no independent knowledge of what happened to Jackie or when it might have happened, other than through her statements (Tr. 143, 149). Michael testified that he did not really know Jackie and had never conversed with her (Tr. 142). He did not know what she was like, what her normal demeanor was, or whether she had any conditions that required her to take medication (Tr. 142-43). He did not know if Jackie was lying to him (Tr. 143).

Laura also testified that she did not really know Jackie, and that the time they were together during this incident is the most communication they have ever had with one another (Tr. 147). Laura did not know Jackie's usual demeanor, her normal speaking voice, or whether she had any psychological conditions (Tr. 148). She did not know if Jackie was taking medications that day, if she was on drugs, or if she was lying (Tr. 148-49). The fact that Jackie appeared to be upset was not evidence that what she *said* happened actually *did* happen. See *State v. Kemp*, 919 S.W.2d 278, 281 (Mo. App. W.D. 1996). It is just as likely that her actions resulted from an argument or any number of circumstances or causes other than being held at gunpoint. *Id.*

Although there was evidence that three stolen handguns were found in Lamont's kitchen trash can (Tr. 153-155, 159), they were found after the police had been knocking on his door and the side of his house for "at least an hour or two hours" (Tr. 163). The fact that handguns were found in the kitchen trash can, after thirty-five police officers surrounded Lamont's house, does not corroborate Jackie's story that she was held at gunpoint in the basement bathroom (Tr. 147, 163, State's Ex. at 5:48).

Finally, Jackie had no signs of physical abuse after allegedly spending nearly twelve hours being held on the bathroom floor at

gunpoint by her crack-smoking boyfriend. While there was evidence that she was topless, Jackie never explained why, and never indicated that her partial nudity had anything to do with the alleged incident.

“There is a considerable logical difficulty in allowing into evidence a statement admissible only because it arises from a startling event as proof also that the startling event occurred.” *Post*, 901 S.W.2d at 234. The fact that Jackie was “frantic” is insufficient independent evidence of a startling event, i.e., being held at gunpoint. See *Kemp*, 919 S.W.2d at 281. An excited utterance is presumably inadmissible because it is hearsay. *Id.* at 280. The State failed to carry its burden of overcoming this presumption, and the trial court erred in admitting the evidence.

Jackie’s Statements to Laura and the 911 Operator

In addition to Jackie’s statement to Michael as he brought her to his apartment, Jackie also made statements to Laura, who was on the phone with the 911 operator relaying questions and answers between the operator and Jackie. The first of these statements used at trial was made almost six minutes into the call (State’s Ex. at 5:46). The statement was prompted by Michael and the 911 operator asking Jackie whether she and Lamont had been using drugs (State’s Ex. at 5:28). Part of Jackie’s response

to that question was admitted for the jury to hear, “He got this gun in the back of his pocket...” (State’s Exhibit 1; State’s Ex. at 5:48).

The second of Jackie’s out-of-court statements that was admitted at trial was made after the operator asked, “Did he have her tied up?” (State’s Exhibit 1; State’s Ex. at 5:58). Jackie responded, “No, he had, he had the gun on me, he had me sittin’ down with him like this while he’s wavin’ the gun around talkin’ about he’s seein’ people. This been goin’ on all night.” (State’s Exhibit 1; State’s Ex. at 5:58). By the time Jackie made both of these statements, she was safe inside the home of her neighbors with 911 on the line and police officers on the way.¹⁵ She had twice denied any need for an ambulance and had been given a shirt to wear (State’s Exhibit at 1:57, 2:54, 4:40).

Jackie’s statements were not excited utterances because they were not produced by an event, but by the questions she was being asked. In *State v. Hook*, 432 S.W.2d 349 (Mo. 1968), this Court ruled as inadmissible the hearsay statements by a girl in response to police questioning. In that case, Hook and his stepdaughter were found parked in an orchard in the middle of the night. *Id.* at 350. When a highway patrolman tried to make

¹⁵ See State’s Exhibit at 5:28, just before the statements were made, where Laura relays that, “they got five cops on the way.”

contact with them, Hook drove away. *Id.* The officer finally caught up with the two and questioned them about what they were doing in the orchard. *Id.* at 351. After questioning both of them together, the officer asked Hook to go back to his car and wait while the officer questioned the stepdaughter. *Id.* At trial, the officer was permitted to testify to the out-of-court statements made by the stepdaughter during this questioning. *Id.* at 351-52.

On appeal, this Court reversed Hook's conviction. *Id.* at 354. This Court held that an excited utterance is one which is spontaneous and produced by the event itself. *Id.* at 352-53. A spontaneous statement implies a lack of prompting, and some of the officer's questions were quite leading and indicated a lack of spontaneity. *Id.* at 353. Additionally, the officer testified that that the girl was nervous and scared, but this Court found that her nervousness might have been caused by the officer's questioning rather than the "event." *Id.* Because of these circumstances, the girl's responses to the officer's questions were not admissible as excited utterances. *Id.*

Likewise here, Jackie's statements were not produced by the event she alleged happened, but by questions she was asked about it afterward. There is no spontaneity in her statements. They might not have been made

at all but for the questions she was asked. Jackie was sitting in the safety of her neighbors' apartment with police officers on the way. It was the questions, not the shock of what had happened to her, that produced her statements, and they were therefore not admissible as excited utterances. See *State v. Debler*, 856 S.W.2d 641, 648-49 (Mo. banc 1993)(hearsay statement that was the product of *emotion* when defendant's brother spoke to their mother about murder was not the product of the shock of the murder, and therefore inadmissible as excited utterance).

Conclusion

The right of confrontation and cross-examination compels a witness to "stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Barber v. Page*, 390 U.S. 719, 721 (1968). In order to deprive a criminal defendant of this right by admitting an out-of-court statement as an excited utterance, the statement must be trustworthy. *Edwards*, 31 S.W.3d at 80. Jackie's statements lack trustworthiness because there is no independent proof of the startling event which allegedly prompted them, and because they were made under circumstances which call into question whether they were made "during the *brief* period when considerations of self-interest could not have been

brought fully to bear by reasoned reflection.” *Post*, 901 S.W.2d at 234 (emphasis added).

Jackie’s statements were not excited utterances and their admission violated Lamont’s due process right to a fair trial and his right to confront the witnesses against him.¹⁶ He was prejudiced by the admission of the statements, because without them, there was no evidence that he committed the offenses for which he was convicted. This Court should find that the trial court abused its discretion, and remand this case for a new trial without Jackie’s out-of-court statements.

¹⁶ U.S. Const. Amend. 6 and 14, Mo. Const., Art. I, §10 and 18(a); *Lisenba v. California*, 314 U.S. 219 (1961).

CONCLUSION

Jackie's out-of-court statements were testimonial, and should have been excluded from evidence at Lamont's trial. Any statements that were not testimonial were still inadmissible because they were hearsay and did not meet any exceptions to the hearsay rule, including the "excited utterance" exception. For these reasons, Lamont's convictions should be reversed and his case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Margaret M. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font, which is no smaller than Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 8,793 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee VirusScan Enterprise 7.1.0, which was updated in July, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of July, 2006, to Shaun Mackelprang, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Margaret M. Johnston

APPENDIX

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