

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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from his original brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from his original brief.

ARGUMENT

I.

Jackie's statements were testimonial hearsay.

Jackie Washington ran down the street screaming for help. Lamont was not chasing Jackie; no one else was outside (Tr. 139). Michael Johnson brought Jackie into his home, and his wife Laura called 911.

The initial interrogation conducted in a 911 call is primarily designed to describe current circumstances requiring police assistance. *Davis v. Washington*, __ U.S. __, 126 S.Ct. 2266, 2276 (2006). At the beginning of the call in this case, Laura spoke to the operator about events as they were happening. She told 911, "Um, yes, we had this lady that came screaming down the street banging on our door yelling, 'Help! Help! Call the cops,' and she's in our yard right now half-naked." (State's Ex. at :19, *See* App. Br. Appendix at A-2). She then relayed to 911 what Michael told her, "Oh, she said her boyfriend has had her locked up for 8 hours with a gun and she was just now able to escape." (State's Ex. at :56). The operator established that the boyfriend was down the street and got his address (State's Ex. at :56 to 1:44). She asked whether an ambulance was needed, but Jackie said she was okay (State's Ex. at 1:51). Jackie was inside the Johnson residence with the Johnsons (State's Ex. at 2:07).

A conversation which begins as an interrogation to determine the need for emergency assistance can evolve into testimonial statements once that purpose has been achieved. *Id.* at 2277. In *Davis*, after the operator gained the information needed to address the exigency of the moment, the emergency ended when Davis drove away from the premises. *Id.* The battery of questions the operator then asked the caller, McCottry, elicited testimonial responses, which is exactly what happened here. *Id.*

Jackie's statements that were admitted at trial came five minutes and forty-eight seconds into the 911 phone call (State's Ex. 1; State's Ex. at 5:48). Her statements were in response to a battery of questions asked by the operator, not to address the exigency of the moment, but to gain information about what had happened.

The State argues that "everyone involved...felt that this was still a dangerous situation" because Lamont was across the street with a gun and had been smoking crack (Resp. Br. at 25). In *Davis*, the defendant had hit McCottry and then left in a car with someone else. *Id.* at 2271. The fact that he could have easily driven back and attacked McCottry further did not impact the Court's determination that the emergency had ended, and the same logic applies here. In fact, Jackie was arguably *more* safe than McCottry because she was in another residence with two adults, unlike

McCottry, who was still alone at the residence where she had been attacked.

The State argued three cases that have been decided after *Davis* in order to persuade this Court that Jackie's statements were not testimonial: *Frye v. State*, 850 N.E.2d 951 (Ind. Ct. App. 2006), *State v. Reardon*, 2006 WL 2196458 (Ohio Ct. App. August 4, 2006), and *Vinson v. State*, 2006 WL 2291000 (Tex. App. 1 Dist. August 10, 2006).

The *Frye* court found that Chastain's statements were made under the stress of an event and so were admissible as excited utterances. *Frye*, 850 N.E.2d at 954-55. But the defendant admitted that the event occurred when he told the police that he went to Royal's residence, where both handguns were found. *Id.* at 954. Here, there is no evidence, independent of Jackie's statements, that the startling event took place.¹

The *Frye* court determined that Chastain's statement was nontestimonial because it was made during an ongoing emergency. *Id.* at 954-55. But *Frye* is distinguished by the fact that Frye was still pointing his guns at Royal and preventing him from getting up from the couch when the police arrived, which is when Chastain made her statements. *Id.* at 953. The incident that Chastain was reporting to Officer Harper was still

¹ See Point II.

happening; it was an ongoing emergency. By contrast, when the operator elicited Jackie's responses which were admitted at trial, the emergency had ended. Jackie was asked about the details of the *night before*, a past event, that could be potentially relevant to a later criminal prosecution.

According to *Davis*, such an interrogation elicits testimonial statements.

Davis, 126 S.Ct. at 2274.

In *Reardon*, a 911 call was made as men were trying to unlawfully enter a home. *Reardon*, 2006 WL 2196458, slip op. at *1. As the first officers arrived on the scene, they saw suspects fleeing into the neighborhood, but they did not know how many there were or how heavily armed they were. *Id.* slip op. at *3. The *Reardon* court relied heavily on the officers' need to ensure the safety of the neighborhood in determining that the blurted-out statement revealing the names of two suspects was not testimonial and could be admitted as an excited utterance. *Id.* The court stated that the record was unclear as to what questions were asked, but noted that they were asked at the emotionally-charged scene within minutes of the 911 call. *Id.* slip op. at *1-*2.

By the time Jackie made the statements that were admitted at trial in this case, the 911 operator already knew that there was only one suspect, he was armed, and she had his apartment address. There were five

officers on the way (State's Ex. at 5:20). There was nothing about the details of what happened the night before that was going to help the officers resolve the situation or which would protect the surrounding community. Furthermore, the atmosphere was not "emotionally charged." Just seconds after making her statements, Jackie was laughing with Laura about a person they could see outside and how he was not Jackie's boyfriend (State's Ex. at 6:09). Jackie's statements admitted at trial were not used to assist police in resolving an ongoing emergency. By the time her statements were made, the emergency was over and the operator's questions were geared toward finding out what had happened, which was potentially relevant to later criminal prosecution. They were testimonial.

In *Vinson*, the officer who responded to a hang-up 911 call was permitted to testify as to the caller's (Hollimon's) response when he arrived and asked her, "What happened?" *Vinson*, 2006 WL 2291000 at *7 . The officer knew upon his arrival that when the 911 dispatcher called the number back after the hang-up, a male answered and denied that there was an emergency, while someone in the background yelled for police assistance. *Id.* When the officer arrived at the residence ten to fifteen minutes later, Hollimon answered the door and she was bloody, appeared recently and badly injured, and the apartment was in disarray. *Id.* at *7

and *9. The *Vinson* court likened his question, “What happened?” to asking whether an emergency existed or whether Hollimon needed assistance. *Id.* at *7

Further, as Hollimon responded that her boyfriend had assaulted her, a shirtless man, who was sweating profusely and was “very excited,” entered the room and ordered Hollimon to answer in a way that would prevent him from being taken to jail. *Id.* at *8. The officer was continuing to assess the situation to see if Hollimon was still potentially in danger, if he needed to ask for back-up assistance, and if the man needed to be arrested. *Id.* at *9. He testified that it was only after his partner arrived and after the scene had been secured (after the challenged statements had been made) that he felt safe that nothing else was going to happen. *Id.* The *Vinson* court held that the statements were not testimonial because they occurred under circumstances which objectively indicated that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. *Id.* at *10, quoting *Davis*, 126 S.Ct. at 2276.

The State argues that these three cases demonstrate that “it is not necessary that the speaker literally be describing something that is happening as they speak” for the statements to be nontestimonial (Resp. Br. 29). What these cases more accurately demonstrate is how critical the

facts of a case are to a determination of whether there was an ongoing emergency at the time. In each of the three cases cited by the State, the facts demonstrated an ongoing emergency that justified on-scene officers' questioning of victims/witnesses to assess the situation and make a determination about future police action. In this case, however, the 911 operator had already determined that Jackie did not need an ambulance, and had dispatched five police officers to respond to Lamont's address. Just as the *Vinson* court distinguished *Davis*, where "the assailant was not present during the interview and, clearly, no emergency existed any longer," *Vinson* at *9, citing, *Davis* 126 S.Ct at 2278, this Court may distinguish this case from *Vinson* because here, again, Lamont was not present at the Johnson home and clearly, an emergency no longer existed.

Jackie's responses admitted at trial were elicited by the 911 operator's questions which asked about what had happened the night before, circumstances which had little to do with how the officers would respond to the scene once they got there. Objectively, the operator's questions asked Jackie to recount how criminal past events began and progressed, and the questioning took place some time after the events described were over. *Davis*, 126 S.Ct. at 2278. Jackie's statements formed the basis for Lamont's convictions for felonious restraint and unlawful use

of a weapon and were a substitute for her live testimony; hence, the statements were testimonial and should have been excluded. *Id.* Lamont's convictions for these offenses should be reversed, and his case remanded for a new trial.

II.

If Jackie's statements were not testimonial, they were still hearsay and should have been excluded because they did not meet the excited utterance exception.

Laura Johnson's only role in the underlying incident was to relay statements between the 911 operator and Jackie Washington. Jackie made no statements directly to Laura, but merely answered the 911 operator's questions that were relayed to her through Laura. Therefore, if Jackie's statements in response to the operator's questions are inadmissible as testimonial or because they are not excited utterances, Laura is also prohibited from testifying about them.

Jackie's responses to the 911 operator were not excited utterances. They were not made under the shock and stress of the event, but rather in response to questioning about the event.² A 911 operator is an agent of

² The State claims that Jackie gave an "unsolicited description of the night's activities," (Resp. Br. at 48), but the full 911 call in the unmarked State's Exhibit demonstrates that Jackie's description came only after she was asked by the operator whether she had been tied up (*See* App. Br. Appendix, A-6).

law enforcement when she conducts an interrogation of a 911 caller. *Davis v. Washington*, ___ U.S. ___, 126 S.Ct. 2266, 2274 n. 2 (2006).

State v. Hook is on point here, and is the only Missouri Supreme Court case ever to directly address the issue presented in this case. 432 S.W.2d 349 (Mo. 1968). As in *Hook*, the circumstances under which Jackie made her statements indicate a lack of spontaneity. A spontaneous statement implies a lack of prompting. *Id.* at 353. Jackie was prompted to tell about the details of the incident by the questions the 911 operator asked. The details she related were presented to the jury on an audiotape, State's Exhibit 1, and through the testimony of Michael and Laura, who were in the room listening to Jackie answer the operator's questions. It was all hearsay and should have been excluded.

Jackie did make a single statement to Michael Johnson outside of the residence before the 911 operator began questioning her. Jackie told Michael that her boyfriend had held her at gunpoint all night. Whether Michael is permitted to testify about this statement hinges on whether it is an excited utterance. This is a question of law which this Court may decide upon. *Walsh v. Table Rock Asphalt Construction*, 522 S.W.2d 116, 122 (Mo. App. S.D. 1975).

The true test of whether a statement is an excited utterance is whether it is a spontaneous exclamation produced by the exciting cause. *Id.* at 121. Factors to be considered are: 1) whether there was an occurrence startling enough to produce nervous excitement to render the utterance spontaneous and unreflecting; 2) whether the utterance was made before there has been time to contrive and misrepresent; 3) whether the utterance relates to the circumstances of the occurrence preceding it. *Truck Insurance Exchange v. Michling*, 364 S.W.2d 172, 173-74 (Tex. 1963), quoting *Wigmore on Evidence*, 3d Ed., §1750.

The problem in this case is that while Jackie *claims* that there was an “exciting cause,” there is not a preponderance of evidence that the events described by Jackie could have happened.³ The State points to Jackie’s half-nakedness, her stumbling, her extreme distress, Lamont’s “consciousness of guilt” by hiding in his apartment, and guns found in the

³ As pointed out by Respondent (Resp. Br. 49, n. 3), Appellant inadvertently misstated the *Post* standard for determining the admissibility of an excited utterance. *State v. Post*, 901 S.W.2d 231, 235 (Mo. App. E.D. 1995). The *Post* court ruled that an excited utterance is admissible only where there is a preponderance of evidence that the exciting event could have occurred. *Id.*

trash (Resp. Br. at 50). But there are a multitude of possibilities to explain Jackie's behavior.

Jackie claimed that Lamont was smoking crack, and said he was talking about how he was seeing people and that someone was going to come into the house and kill Jackie (State's Ex. at 6:00). It is quite possible that Jackie could have also been smoking crack and imagined herself to be held hostage. She stated that Lamont went in the bathroom and started getting "high," and that she went in there with him (State's Ex. at 5:48). Both of the Johnsons testified that this was the first time they had spoken to Jackie, they were not familiar with her "normal" demeanor, manner of speech, whether she suffered from a mental health condition, or if she used drugs (Tr. 142-43, 147-49).

Without further description of the nightgown she was wearing, it is impossible to know whether it was a type that might easily slip off her shoulders while she was running. Jackie never said that Lamont physically assaulted her, so the fact that she was topless, while startling, does not prove that there was a startling event. Finally, Lamont was also charged with possessing three stolen guns, and the State attempted to prove that those were the three guns found in the trash (LF 13; Tr. 152-55). If Lamont knew that the guns were stolen, the fact that he was surrounded

by police for over an hour before leaving his apartment provides an alternate explanation for why the guns were found in the trash can (Tr. 162, 169).⁴

There were no witnesses to Jackie leaving Lamont's apartment, so it is only by her word that we know she "couldn't get out till a while ago" (St. Ex. at :56). This evidence is insufficient to show by a "preponderance of evidence" that Jackie's story could have occurred. The State did not overcome the presumption that Jackie's statements are inadmissible, and there is insufficient proof that Jackie did not have time to reflect or premeditate on what she was going to say. *Post* 901 S.W.2d at 234. Her statement to Michael did not meet the requirements of an excited utterance, and it should have been excluded from evidence. Since the statement helped form the basis for Lamont's convictions for felonious restraint and unlawful use of a weapon, his convictions should be reversed and his case remanded for a new trial.

⁴ The jury convicted Lamont of that offense, but the conviction was overturned, and the charge eventually dismissed (LF 8, 10, 71).

CONCLUSION

Jackie's responses to the 911 operator's non-emergency inquiries were testimonial and should have been excluded from evidence. To the extent that any of Jackie's statements were not testimonial, they were still hearsay and could only be admitted if they met a hearsay exception. The admission of Jackie's statements as excited utterances was error because they were not spontaneous and the State did not show by a preponderance of evidence that a startling event could have occurred. Lamont's convictions, which were based on Jackie's out-of-court statements, 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 2,925 words, which does not exceed the 7,750 words allowed for an appellant's reply 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 September, 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 6th day of September, 2006, to Karen L. Kramer, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Margaret M. Johnston

