

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNIE L. MORGAN,

Defendant-Appellant.

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UNPUBLISHED

October 16, 2007

No. 272143

Macomb Circuit Court

LC No. 2005-005129-FH

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for intentional discharge of a firearm at a dwelling, MCL 750.234b. He was convicted following a jury trial and sentenced to 12 months' probation. We affirm.

I.

Defendant first argues that the admission into evidence of the audiotape of his wife's 911 telephone call as an excited utterance violated the marital communications privilege. We note that, in making his argument, defendant does not dispute that his wife's statements were "excited utterances." Defendant's wife, Karen Morgan, told a 911 dispatcher that she argued with her husband, he threatened to harm himself, she heard him fire a shot in their home, and she was concerned for his well-being.

Whether to admit evidence is within the discretion of the trial court, and we reverse a decision only when there is a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). We review preliminary questions of law regarding the admissibility of evidence de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). If the trial court admits evidence that is inadmissible as a matter of law, it is an abuse of discretion. *Id.*

The marital communications privilege is found in MCL 600.2162(7), which provides:

Except as otherwise provided in subsection (3), a married person or a person who has been married previously shall not be examined in a criminal prosecution as to any communication made between that person and his or her spouse or former spouse during the marriage without the consent of the person to be examined.

The prosecution conceded before trial that none of the exceptions of MCL 600.2162(3) applied, so the issue is simply whether the marital communications privilege barred the admission of the audiotape. We conclude that it did not.

Michigan law is clear that the marital communications privilege does not apply when the spouse is not a witness at trial. Our Supreme Court determined that the “phrase, ‘be examined,’ [in MCL 600.2162(7)] connotes a narrow testimonial privilege only—a spouse’s privilege against being questioned as a sworn witness about the described communications. In other words, the spouse must testify for the privilege to apply. The introduction of the marital communication through other means is not precluded.” *People v Fisher*, 442 Mich 560, 575; 503 NW2d 50 (1993).

In a case almost directly on point, we reversed the trial court’s decision to suppress the defendant’s husband’s statement to a 911 operator on the basis of the marital communications privilege. *People v Williams*, 181 Mich App 551, 554; 450 NW2d 85 (1989). In *Williams*, the prosecution argued that the husband’s statement that “[a] woman just shot her tenant” was admissible as “an excited utterance and, therefore, the 911 operator could testify as to the statement made” because the husband did not testify at trial. *Id.* (internal quotations omitted). We concluded that the marital communications privilege “is a testimonial privilege which is inapplicable here because defendant’s husband was not required to testify.” *Id.* Neither the 911 operator’s testimony nor the playing of the audiotape itself implicated the marital privilege. *Id.*

In this case, Karen did not testify at trial, thus, the marital communications privilege did not apply. The trial court did not abuse its discretion by allowing her statements to the 911 operator to be played for the jury as evidence. They were properly authenticated and it is not disputed that they were excited utterances, admissible under the hearsay exception of MRE 803(2). The excited utterance hearsay exception did not, as defendant states, “trump” the privilege; rather, the privilege simply did not apply.

## II.

Defendant also argues that the trial court violated his Confrontation Clause rights as articulated by the Sixth Amendment and by the United States Supreme Court in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and *Davis v Washington*, \_\_\_ US \_\_\_; 126 S Ct 2266; 165 L Ed 2d 224 (2006), when it allowed Officer Daniel Allen and Sergeant Sandra Laufle to testify regarding “testimonial” statements that Karen made to them at the scene. Defendant did not object to the admission of the challenged testimony on this ground at trial; thus, this issue is unpreserved. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). We review an unpreserved claim of constitutional error for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only if plain error seriously affects the fairness, integrity, or public reputation of the judicial proceedings or results in the conviction of an actually innocent defendant. *Id.* at 763.

The United States Supreme Court ruled that the Confrontation Clause of the Sixth Amendment forbids the admission of “testimonial” hearsay statements made in response to interrogation unless the statements were made by a witness who is unavailable and the defendant had an earlier opportunity to cross-examine the witness. *Crawford, supra* at 68. If the

statements are nontestimonial, the Confrontation Clause is not implicated, and state hearsay rules govern the admission of the evidence. *Id.* The Supreme Court provided guidance regarding whether a statement was testimonial in *Davis, supra* at 2273–2274, where it stated:

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.

In *Davis*, the Court concluded that the beginning of a 911 telephone call between a domestic abuse victim and the operator where the victim explained why she needed assistance was not testimonial because the operator’s questions were designed to elicit information to resolve an emergency. *Id.* at 2270-2271, 2276-2277. In the companion case, *Hammon v Indiana*, however, the Court found that statements made to police officers after the parties involved in a domestic abuse situation were separated and the emergency was over, were testimonial. *Id.* at 2272-2273, 2278. The questions after-the-fact in *Hammon* were designed to establish past facts to discover whether a crime was committed and to develop evidence against the suspect, and the questioning took place some time after the incident was over. *Id.* at 2278-2279.

Not all police inquiries at a scene will yield testimonial answers. A distinction should be made between questions “‘necessary to secure [police] safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.’” *Davis, supra* at 2277, quoting *New York v Quarles*, 467 US 649, 658-659; 104 S Ct 2626; 81 L Ed 2d 550 (1984). “We have already observed of domestic disputes that ‘[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.’” *Davis, supra* at 2279, quoting *Hiibel v Sixth Judicial Dist Court of Nevada, Humboldt Co*, 542 US 177, 186; 124 S Ct 2451; 159 L Ed 2d 292 (2004). “Such exigencies may *often* mean that ‘initial inquiries’ produce nontestimonial statements.” *Davis, supra* at 2279. Where the statements are in essence, a “cry for help” or intended to provide information that enables an officer to immediately “end a threatening situation,” they are not testimonial. *Id.* Once the “information needed to address the exigency of the moment” is obtained, however, statements in response to police questioning become testimonial. *Id.* at 2277. Thus, this Court has held that statements relayed to a 911 operator by the neighbor of a victim immediately after the victim escaped from her apartment and live-in boyfriend were not testimonial because their primary purpose was to obtain help. *People v Walker (On Remand)*, 273 Mich App 56, 59-60, 63-64; 728 NW2d 902 (2006). While the operator attempted to obtain detailed information about the location of the home, the circumstances of the beating, the name of the perpetrator/defendant and his location, the location of the victim’s son, and if her son was still inside the home with the defendant, the primary purpose of the questions was to enable police to properly respond to the ongoing emergency, assist the victim, and ensure that others potentially at risk were protected. *Id.* at 64. The statements were, therefore, nontestimonial and were properly admitted at trial. *Id.*

In contrast, the victim’s later statements to police and to her neighbor were testimonial because they were made after the emergency was addressed and in response to inquiries that were “investigatory in nature.” *Id.* at 64-65. Even though some of the information provided in

the statements was necessary to enable the police to respond to the emergency, under the circumstances, they were “generally testimonial” and inadmissible. *Id.* at 65.

Here, Officer Allen arrived only a few minutes after Karen’s 911 telephone call and was the first to speak with Karen. He was aware that a gunshot had been fired and was told that the “gunman” was still in the home. Officer Allen needed to know whom he was dealing with in order to assess the situation, the threat to the officers’ safety, and of any possible danger to potential victims. *Hiibel, supra* at 186. His questions regarding what happened, who shot the weapon, whether others were inside the house, and how many weapons defendant owned, were relevant, not primarily to build a case against defendant in the future, but to obtain sufficient information to allow police to “address the exigency of the moment.” *Davis, supra* at 2277; *Walker, supra* at 64. Thus, Officer Allen’s testimony was properly admitted and did not offend defendant’s constitutional rights.

Conversations that begin as nontestimonial, however, may progress into testimonial statements, *Davis, supra* at 2277, and we conclude that Karen’s later statements to Sergeant Laufle were more testimonial in nature. By the time Sergeant Laufle arrived on the scene, Officer Allen had already spoken with Karen and officers were securing the perimeter of the home. There was arguably no need for more information to address the “volatile” situation; Karen had already answered those pressing questions. Thus, we conclude that Karen’s statements to Sergeant Laufle were testimonial and their admission violated defendant’s confrontation clause rights.

Nevertheless, we affirm defendant’s conviction because he has failed to show that Sergeant Laufle’s testimony regarding Karen’s statements seriously affected the fairness, integrity, or public reputation of the judicial proceedings or resulted in the conviction of an actually innocent defendant. *Carines, supra* at 763. Sergeant Laufle’s testimony was merely cumulative to the information on the 911 telephone call, Officer Allen’s testimony, and the physical evidence found at the scene, specifically a bullet casing and evidence of a “fresh” bullet hole in the home. The admissible evidence was sufficient for a jury to believe beyond a reasonable doubt that defendant intentionally fired his weapon inside his home. See MCL 750.234b. Thus, any error did not affect defendant’s substantial rights.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Stephen L. Borrello  
/s/ Jane M. Beckering