IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-1564

STATE OF IOWA,

PLAINTIFF-APPELLEE

v.

MICHAEL SYKES,

DEFENDANT-APPELLANT

APPEAL FROM THE DISTRICT COURT
IN AND FOR SCOTT COUNTY

Honorable Cheryl Traum and Christine Dalton, Judges

BRIEF FOR THE APPELLANT

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STATEMENT OF ISSUES

I. Whether the 911 call and the statements by K.M. to the police officer were testimonial statements barred by the confrontation clause or otherwise inadmissible prejudicial hearsay.

II. Whether there is sufficient evidence to sustain the conviction for assault resulting in injury.

ROUTING STATEMENT

Michael Sykes seeks review of rulings made by the trial court concerning the right to confront his accusers guaranteed by the Sixth Amendment as required by *Crawford v. Washington* and the sufficiency of evidence to support the verdict. *Crawford v Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). There does not appear to be any circumstance that requires this case to be retained by the Supreme Court.

STATEMENT OF THE CASE

Nature of the Case

Michael Sykes appeals evidentiary rulings that the 911 call and statements by K.M. to police were not testimonial statements and admissible pursuant to hearsay exceptions and whether the conviction after a trial to the court for assault causing bodily injury is supported by sufficient evidence.

Relevant Events and Course of Proceedings

A trial information was filed December 12, 2017 charging misdemeanor offenses of Child Endangerment and Domestic Abuse. Mr. Sykes waived a jury trial in writing filed April 20, 2018. On May 1, 2018 he filed a motion in *limine* to prohibit the state or its witnesses from commenting upon or introducing evidence during the trial of statements made by K.M. to officer Stombaugh and to prohibit introduction of the 911 call. A. 7-9. On May 24, 2018 the court, the Honorable Cheryl Traum presiding, entered a ruling finding "that the primary purpose of the interrogation (by the 911 dispatcher) was to enable police and first responders to assist in an ongoing emergency.

The statements are therefore not testimonial and are not barred by the sixth amendment." Ruling on Motion in *Limini*, p.5, A. 14.

The matter proceeded to trial in May 25, 2018, the Honorable Christine Dalton presiding. The court granted defendant's motion for a directed verdict with respect to Count 1, child endangerment. The court granted a portion of the directed verdict with respect to count 2, domestic abuse when the court found there was insufficient evidence of a domestic relationship as defined by chapter 236.2, the Iowa Code. The court allowed the testimony of the officer concerning statements by K.M. because "he was asking questions to determine the level of care and level of safety for the people present and the EMTs and so he could prepare an accurate report." The person he spoke to, K.M., was described as highly emotional, crying, and rocking back-and-forth on her knees. She was very concerned about her son's safety. She was still actively bleeding from some of her wounds. While still crying and emotional, she told the officer Michael Sykes had beat her up. The court found her statements were excited utterances.

The trial court followed the prior ruling concerning defendant's motion in *limine* that the 911 statements were not testimonial in nature but instead were answers to questions necessary for the dispatcher to

assess what services she needed to send, where she needed to send services, how safe the citizens were and how safe the place would be when responders arrived as well as the medical condition of the injured person. The caller described present sense impressions "while he excitedly described what was going on." K.M. and the 911 caller did not testify.

Disposition of Case and Sentence

In its written ruling, (A. 16-19) the court found that much of the evidence is circumstantial, but persuasive and corroborated by the officer's observations. A. 18. The court found that defendant did commit an assault resulting in bodily injury in violation of Iowa code §§ 708.1, 708.2(2) and imposed a sentence of 120 days with sentence suspended and defendant placed on unsupervised probation for one year. Defendant was fined $315 plus court costs and 35% surcharge. Defendant was ordered to complete the batterers education program. Sentencing Order filed August 10, 2018. A. 24-27. Notice of appeal was filed on September 10th, 2018. A. 28-29.

STATEMENT OF RELEVANT FACTS

The Trial Testimony

The state called as its first witness Dennis Hoffman, a bailiff and reserve deputy for Scott County. Mr. Hoffman testified that on November 22, 2017 he served a warrant on Michael James Sykes. He was identified as the person wearing a light blue shirt with tie. TTX 7. On cross-examination he admitted that he would not recognize Mr. Sykes outside this courtroom. TTX 8. The state then introduced Exhibit 5, a mug shot of Mr. Sykes reportedly taken after the warrant was served upon him on November 2017. TTX 9.

The state called as its second witness Vickie Odean, a 911 dispatcher at the Scott County Emergency Communications Center. TTX 10. She testified that her purpose, when taking calls, is to gather information, the location, exactly what happened and then direct the appropriate response. TTX 12. Medical emergency calls are referred to MEDIC. TTX 11. She described that state's Exhibit 1A was a recording of the call on August 12 concerning the need for assistance at the Quality Inn in Eldridge. TTX 12-13. Defense counsel objected to the introduction of the exhibit for the reasons made during the motion in *limine* concerning sixth amendment confrontation rights and

the hearsay by unidentified and uncertain witnesses. TTX 13-14. The court requested that the hearsay objections be made again. Counsel described that none of the persons whose voices are heard on this tape are available for cross-examination so all the statements would necessarily be hearsay unless there is some other legitimate basis that avoided both the confrontation clause and hearsay prohibition. TTX 14.

The court inquired of the prosecutor whether there were exceptions to the hearsay rules that would apply to the caller's statements on the 911 tape. The prosecutor responded that this is not a confrontation clause issue. She argued the exhibit should be admitted pursuant to rule 5.803 (6) as a record in the course of regularly conducted activity of a business, pursuant to rule 5.803 (1) for present sense impression, pursuant to rule 5.803 (2) for excited utterances and pursuant to rule 5.803 (4) for medical treatment and diagnosis. TTX 15.

Defense counsel responded that the exhibit did not qualify as a business record because the 911 center, like Facebook, might gather information or statements of other people. Those statements are not the transactions that the business is conducting. It is not monitoring

the businesses' own activities. These are collections of other persons information, and not a business record. Otherwise, everything on the Internet is a business record. Counsel argued that some 911 calls where the caller is an actual witness to an event and describing some feeling or emotion about the event might be a present sense impression. Counsel argued that the caller in this case is someone who did not see the events and who is not reporting their own present sense impressions. They were reporting things that were reported to him by other people. Much of this call is double hearsay or perhaps even triple hearsay.

Counsel argued that with respect to excited utterances, that might be true in some 911 calls but in this call the caller is not someone who was a witness to an occurrence, it was not somebody who was reporting an event occurring in front of them. With respect to the medical diagnosis claim, that is a statement made to a doctor, by a patient or someone receiving or seeking medical treatment. That is not what was happening in this case. Counsel suggested the court would have to listen and make a ruling later and the court responded that she will have to make a ruling based on the type of issues that were mentioned by counsel in his argument. TTX 17. The court

conditionally admitted Exhibit 1a. TTX 17. The court stated that she wished to do some research on the hearsay issue before listening to the tape. The court indicated she would listen to the tape later, and rule on the objections when she wrote the ruling.

On cross-examination Ms. Odean admitted that she had prepared scripts for the type of call received. If it was necessary to suggest emergency first aid that request for information would be transferred to medical dispatch. She acknowledged that scripts are provided from the priority dispatch and that her 911 agency can make allowances for certain circumstances to vary from the script depending upon the situation. TTX 19. She testified that they try to gather the caller's identity. TTX 20. No effort is made to verify the identity of the caller during the typical call to 911. TTX 20. They provide the name given to the responding officer and the officer can later confirm it. TTX 21. Ms. Odean testified she was not involved in the medic portion of exhibit 1a. She said she stayed on the call listening just in case the situation changed, and she needed to take the caller back for first responder safety concerns. TTX 21.

On redirect, Ms. Odean testified that 911 routinely tries to get information concerning the suspect and she was provided a name.

Defense counsel objected. TTX 21. The witness had to review her reports to refresh her recollection and then testified that the name provided for the suspect was Michael James Sykes. TTX 23. She also testified to the race and height provided. TTX 23. Asked on cross-examination by defense counsel if the name provided was "Donald Trump" how would that change any portion of the dialogue between Ms. Odean and the caller she admitted she would treat it as any other name provided with a description. TTX 23. She admitted that they do not need the name, date of birth or Social Security number of any suspect in order to provide 911 services. That information is taken to have available to send to first responding law enforcement for their investigation. TTX 24. Ms. Odean admitted the advice she gave and the procedures followed would not be affected whether someone said Mike Sykes, John Jones or Bill Smith as suspect unless perhaps it was a name they recognized or they were dealing with another situation where someone has already provided that same name for example, a secondary call or perhaps if the officers were familiar with the subject. TTX 24-25. When asked if this was an investigative matter rather than a response to an emergency matter Ms. Odean claimed that an officer might be familiar with a name. When asked if her decision to send a

medic had nothing to do with the name of the person that is reported as a suspect she claimed if it is a situation where they have potentially dealt with the suspect before an officer might be on the alert for a potential person. When asked if this was an investigative question she stated "well, it's also scene safety." TTX 26.

The state's third witness was Matthew Stombaugh, a police officer in the city of Eldridge. TTX 27. He testified that he was dispatched to the Quality Inn Hotel to a domestic disturbance taking place in one of the hotel rooms. TTX 28-29. He was advised an assault took place and a male subject left the hotel and he had a description of the suspect. When he arrived his first concern was to locate the suspect in the parking lot. His effort was to try to stop anyone from fleeing. TTX 29. When asked if there were any safety issues the officer responded, "there could be in a domestic situation." TTX 29. The officer testified he scanned the parking lot without seeing anyone that matched the description, so he went to the room. Four other officers were already on scene. They began to search the area. The suspect was never located. TTX 29-30.

When he walked into the hotel, the desk clerk told the officer what room was involved and he went to the room. TTX 31. When he

entered the room, he smelled the odor of alcohol and a coppery smell – a smell like blood. TTX 31. He observed a female subject on her knees, rocking back and forth, crying, very emotional. The room had an odor of an alcoholic beverage and fresh blood. There was blood on the carpet, the sheets and on the female's face and on her clothes. Some was fresh and some was dried. There was blood on the wall. There was blood pretty much all over the place in the room. TTX 31. He had a conversation with the female subject. TTX 31-32. He testified in response to a leading question that the subject was very emotional, that she had blood on her face and her face was swollen with fresh cuts and blood was still dripping from a cut on her forehead. When the officer started to testify what the subject said defense counsel objected that the officer was not to testify concerning statements made as that issue was resolved during the motion in *limine* by agreement. TTX 32. The prosecutor argued the motion in *limine* agreement referred to playing the squad video, not to testimony by the officer concerning what the subject said. TTX 32-33. Defense counsel argued if the audio recording of the occurrence was not allowed in evidence then the officer's memory of that conversation is less reliable and is barred by the confrontation clause and hearsay and

it was his understanding when the state indicated they were not going to play the tapes that we would not be listening to this conversation. The court inquired whether listening to tape was different than presenting testimony. Defense counsel argued that for sixth amendment and hearsay motion purposes there was no difference whether we were listening to the tape or the officer's testimony concerning the conversation.

Defense counsel argued that at the motion in *limine* the state advised the tape of the conversation was not going to be introduced. Counsel then renewed and made the same objection to the conversation. When asked if counsel assumed that the officer wasn't going to testify concerning the conversation counsel responded "exactly." TTX 34. Defense counsel again described his sixth amendment confrontation objection and hearsay objections that he tried to raise pretrial in his motion in *limine.* When the motion hearing commenced, he was told that the state was not going to introduce a tape recording of the statements. The officer's testimony concerning observations, scents and smells were his personal observations and were not hearsay or confrontation issues. The confrontation issues started when the officer attempted to describe what was told to him.

The state argued that there were two squad videos provided to defense counsel and both contained only portions of what occurred outside the hotel, not what occurred inside the hotel. TTX 36. The conversation with the female subject was not captured on the squad video because it was out of range of the microphone and she claimed that defense counsel was aware of this out of range situation because you could not hear what was said. The prosecutor claimed that is why she did not object to defense counsel's motion to exclude the video – because there was nothing on it. TTX 36. The prosecutor argued the female subject was extremely emotional and upset and that there was a hearsay objection exception for present sense impression and excited utterance and the court agreed that these exceptions to the hearsay rule applied and she would overrule defense counsel's objection. TTX 37.

The officer testified the female identified herself. When asked if she told the officer what happened, the officer testified, I kept asking her. She was concerned about the nine-month-old son. She kept looking around the room asking where her son was and asking if he was okay. She was very emotional. The officer testified "I had to keep asking her what happened. When she finally answered, she said her

boyfriend, Michael Sykes, beat her up". TTX 37. The officer testified K.M. said they got into an argument because she had gotten a ride from a bar. The officer testified that it was very hard to understand a lot of what she was saying because her mouth was swollen but the officer gathered from what the subject said, that Michael was mad at her because she had gotten them a ride and he wanted to stay out and drink some more and that's how the fight started in the hotel room.

The officer took photographs of the injuries, states exhibits 2,3 and 4. A.21-23. Those exhibits were introduced without objection. TTX 39. The officer testified that he observed injuries on the female subject, a cut on her head, cuts on her face and her mouth was bleeding. He testified her mouth was almost swollen shut and she had a bite mark on her back. She said Michael bit her. Medic ambulance decided to transport her from the scene. TTX 40.

On cross-examination the officer said he asked questions of the female subject including her date of birth, her name, her son's name, and what caused her to summon police. The officer testified he asked the subject how her injuries were caused. When asked whether any of these answers were spontaneous, he claimed "I couldn't tell you". When asked whether she was responding to questions asked by the

officer he testified "Yes. She is answering my questions, as well as saying a lot of other things as well." The officer admitted that his notes described her responses as "she stated this" when answering questions from the officer. TTX 40-41. At the time she was making the statements there wasn't any danger presented to her by anyone and the purpose of asking the questions was to obtain information for later prosecution – "to figure out what happened, yes." The officer candidly admitted the questions were for the purpose of making a report and later prosecution. TTX 42.

Counsel then asked reconsideration of the court's ruling in light of this line of questioning, whether these statements were confrontation violations. Counsel argued the questioning was clearly for the purpose of seeking statements for prosecution as opposed to spontaneous declarations or excited utterances and that such testimony violated the *Crawford* and *Davis* decisions. TTX 42-43. *Crawford*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 244 (2006). The court stated, "the primary purpose was to figure out what happened" and noted that the officer "honestly admitted that it was to prepare reports and for further prosecution." The court claimed as

long as the questions don't go beyond figuring out what happened and as long as the questions don't go beyond that and determining safety of other people and himself and herself, it's going to be admitted". TTX 43. On redirect examination the officer admitted he was not aware that K.M. was not the person that called 911. TTX 43-44.

When asked whether medical treatment was delayed while asking K.M. these questions the officer claimed, "of course not". He claimed the subject was being treated at the time. TTX 44. When asked whether the subject was intoxicated, he said he had no idea, he did not take any time to figure out whether the alcohol he smelled in the room was emitting from her or not. TTX 45.

Defense counsel made a motion for a directed verdict of acquittal with respect to the child endangerment count. TTX 45. Defense counsel requested a directed verdict with respect to domestic abuse because of the lack of evidence concerning an assault that would be domestic abuse pursuant to chapter 236.2 sub 2. Defense counsel also moved for a directed verdict because there was no testimony under oath by any witness subject to examination that observed the event. This was a case of assumptions. There is no testimony concerning the circumstances that caused any injuries

reported in the record. There was insufficient evidence of an assault and unjustified assault as required by the Code. Defense counsel also moved for a directed verdict because there was insufficient identification of the assailant. Mr. Sykes was identified as someone arrested in response to a warrant. There has been no identification of Mr. Sykes with respect to his being present at the scene and no sworn testimony that he was present at the scene.

The court indicated she would not rule on the motion because she had not decided the admissibility of the contents of the 911 tape. The court indicated there was *prima facia* evidence of an assault taking place, she would need to listen to exhibit 1A to determine if it would be admitted and whether that adds to or subtracts from the *prima facia* case. TTX 48. After a brief recess the court indicated she could listen to the tape and make a ruling if possible so that Mr. Sykes might make an informed decision whether he proceeds to present further evidence. Defense counsel advised the court there were no further witnesses.

Defense counsel advised the court that the motion in *limine* in paragraph two did advise his request that the statement from K.M. to the officer be suppressed and that the prosecutor apparently

mistakenly thought the motion raised only the playing of the tape recording at trial. TTX 49-50. The court responded that she read the motion the same way Judge Traum did. The prosecutor stated she did not realize hearsay objections were being raised at the motion in *limine* stage. TTX 50. The court acknowledged that the objections raised in the motion in *limine* were in fact raised and would be considered by the court at this time. TTX 51.

In final argument defense counsel argued that proof beyond a reasonable doubt was nearly impossible without sworn testimony from witnesses or participants to the assault. Without having testimony that an assault occurred without justification is a difficult burden for the state to accomplish. The state argued that evidence of justification has to be provided by the defendant and was not. TTX 51-52.

The 911 Call Exhibit

The dispatcher answers the phone by asking what is the address of the emergency? The caller asked another person for the address and states that “we need medic and police”. The operator inquires again for the address and the caller repeats the address and again requests medic and police. The caller appears to ask someone else “Are you

okay?" The caller says he's going to help the person that is injured. The dispatcher orders the caller to stay on the phone and requests the number that he is calling from and then tells the caller to tell me exactly what happened. The caller responds that there was a screaming in the room adjacent to his brother's. He says: "We pounded on the door and Mike came out and his girlfriend is beat up", that is all he can tell right now.

The dispatcher asks is this your brother's girlfriend? The caller says "yes". The dispatcher asked where's the suspect and the caller responded, out in the parking lot. The dispatcher asked whether he is armed, and the caller responds he doesn't believe so. The dispatcher asked if the caller knows who the suspect is. The caller says to hang on and the dispatcher says she needs the information. The caller then says the suspect is Michael James Sykes. The dispatcher asks again whether he has any weapons and the caller says I don't know, probably so. The caller says please send the medic. The dispatcher advises she has sent police and medic and she has a few more questions.

The dispatcher asked the caller whether Mr. Sykes is White or Hispanic and what he is wearing. The dispatcher asked if the caller

knows where Mike Sykes is going and he says he doesn't know, that he is taking care of “her”. The dispatcher asks the vehicle the suspect might be driving. The dispatcher advises the caller to lock the door and secure the room. The caller advises there are persons in the room to secure the room. These questions and responses require a bit less than four minutes.

The caller is apparently transferred to ambulance dispatcher who again asks the address and phone number. The ambulance dispatcher again requests “tell me exactly what happened”. The caller responds, “just get here”. The ambulance dispatcher again requests tell me what happened. At this point the caller responds, “Mike Sykes beat his girlfriend”. The caller is involved in other activities and tells the ambulance dispatcher to hold on. The ambulance service again asks to tell me exactly what happened. The caller responds from what I can tell it's a domestic. I don't really know.

At approximately 5 1/2 minutes, the initial caller has apparently given the phone to another unidentified person who starts talking to the ambulance dispatcher. The ambulance dispatcher asked the unknown person to tell me exactly what happened. The unknown person tells the ambulance dispatcher from what I can tell it's a

domestic and she suffered extensive injuries. I don't really know. I haven't even seen her. The unknown person advises there is a nurse caring for her. The dispatcher advises he is trying to gather as much information as he can.

At about six minutes and 14 seconds, the original caller apparently resumes the call. The ambulance dispatcher requests the caller to go to the patient's room to try to get information. The medic dispatcher askes how old is the injured person and if the victim is awake. There are questions about whether she is breathing. The ambulance dispatcher asked when this happened and whether the assailant is still nearby. The caller askes “who are you – who am I talking with?” The caller is advised this is the ambulance dispatcher. The caller responds this is a question for the police. The assailant is not here. The caller says he wants medic here. Why are you asking all these questions about the suspect? The caller again advises the place is secure. The dispatcher again asks is the suspect nearby and the caller inquires whether he should go down to the parking lot and look for him. The ambulance dispatcher asks whether weapons were involved and whether there is serious bleeding. The dispatcher asks whether the victim is completely alert, and the caller responds yes.

The caller advises the bleeding has subsided. The dispatcher advises not to let the injured person have anything to eat or drink and not to move her unless absolutely necessary and gives instructions to gather her medications if she has any for the medics and to call back if there is any change in her condition – medic is on their way. The caller advises the police are here. The call lasted about 11 minutes 19 seconds.

ARGUMENT

I. The 911 call and the statements by K.M. to the police officer were not made in response to an ongoing emergency but rather were testimonial responses to interrogation by the 911 dispatcher and the police officer barred by the confrontation clause and not admissible as hearsay exceptions.

II. There is insufficient properly admitted evidence to sustain the conviction for assault resulting in injury.

Introduction

Whether the disputed statements are testimonial and barred by the confrontation clause is the main argument presented in this brief. If any statement is not testimonial, the issue becomes whether there is

a proper foundation to allow the statement in evidence *via* an exception to the hearsay rule. Finally, whether there is sufficient evidence depends first upon whether the contested statements were properly admitted and then upon an evaluation of the quality and weight of the properly admitted evidence to sustain the conviction. The argument concerning sufficiency is addressed during the presentation of the confrontation and hearsay arguments since they are so factually intertwined.

Preservation of Error

Defendants motion in *limine* prior to trial (A. 7-9) and his renewed motions and objections at the trial (TTX 32-37, 42-43 and 49-51) have preserved error concerning the Confrontation Clause and hearsay issues and the motion for a directed verdict preserves error concerning insufficient evidence.

Standard of Review

The defendant's claims based on the Confrontation Clause violation are reviewed *de novo*. *State v. Schaer*, 757 N.W.2d 630 (Iowa 2008).

The defendant's hearsay claims are reviewed for errors at law. Hearsay must be excluded as evidence at trial unless admitted as an exception or exclusion under the hearsay rule or some other provision. Subject to the requirement of relevance, the district court has no discretion to deny the admission of hearsay if it falls within an exception, or to admit it in the absence of a provision providing for admission. Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006).

Challenges to the sufficiency of evidence are reviewed for correction of errors of law. *State v. Yeo*, 659 N.W.2d 544, 547 (Iowa 2003). We will uphold the jury's verdict if there is substantial evidence to support it. Evidence is substantial if it would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. We review the record in the "light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record." *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002). The State has the burden to "prove every fact necessary to constitute the crime with which the defendant is charged." *Id*. "The evidence must raise a fair inference of

guilt and do more than create speculation, suspicion, or conjecture." *Id*.

AUTHORITY

Introduction

Two cases decided by the Supreme Court of the United States are necessary and sufficient to decide the confrontation issues raised in this appeal. The first case, *Crawford v. Washington*, established modern sixth amendment confrontation principles. The second, *Davis v. Washington*, instructs us that the statements to the 911 dispatcher and the responding officer were testimonial responses to police interrogation and subject to sixth amendment confrontation clause challenge to their admissibility when the alleged victim, KM, and the 911 callers did not testify at the trial of Mr. Sykes and were not otherwise available for cross-examination.

Crawford v. Washington

Crawford v Washington observed the Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *Crawford*, 541 U.S. at 42, 124 S.Ct. at 1359. This bedrock procedural guarantee applies to both federal and state

prosecutions. (Internal citations are omitted in this discussion of *Crawford*). When testimonial statements are involved, the Framers did not leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. The clause commands, not that evidence be reliable, but that reliability be assessed in a particular manner, that is by testing in the crucible of cross-examination. The Clause thus reflects a judgment how reliability can best be determined. Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes. *Crawford* notes in a footnote very relevant to the decision in *Crawford* and this appeal that involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern

hearsay exception, even if that exception might be justifiable in other circumstances. See *Id.* 541 U.S. at 56, 124 S.Ct. at 1367 n.7. It must also be remembered that when the court used the term "interrogation" in *Crawford*, the term was used in its colloquial, rather than any technical legal sense. The *Crawford* court also observed that there are various definitions of "testimonial" as well. See *Id*. 541 U.S. at 53, 124 S.Ct. at 1365 n.4.

Davis v. Washington and *Hammon v. Indiana*

These consolidated cases (547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)) required the Supreme Court to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are "testimonial" and thus subject to the requirements of the Sixth Amendment's Confrontation Clause. The facts will be reviewed in the following sections of this brief.

The 911 Statements in *Davis*

The statements at issue in *Davis v. Washington*, were made to a 911 emergency operator. When the operator answered the initial call, the connection terminated before anyone spoke. She reversed the call, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic

disturbance with her former boyfriend Adrian Davis, the petitioner in this case:

“911 Operator: Hello.

“Complainant: Hello.

“911 Operator: What's going on?

“Complainant: He's here jumpin' on me again.

“911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?

“Complainant: I'm in a house.

“911 Operator: Are there any weapons?

“Complainant: No. He's usin' his fists.

“911 Operator: Okay. Has he been drinking?

“Complainant: No.

“911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?

“Complainant: I'm on the line.

“911 Operator: Listen to me carefully. Do you know his last name?

“Complainant: It's Davis.

“911 Operator: Davis? Okay, what's his first name?

“Complainant: Adrian

“911 Operator: What is it?

“Complainant: Adrian.

“911 Operator: Adrian?

“Complainant: Yeah.

“911 Operator: Okay. What's his middle initial?

“Complainant: Martell. He's runnin' now.”

As the conversation continued, the operator learned that Davis had “just r[un] out the door” after hitting McCottry, and that he was leaving in a car with someone else. McCottry started talking, but the operator cut her off, saying, “Stop talking and answer my questions.” She then gathered more information about Davis (including his birthday) and learned that Davis had told McCottry that his purpose in coming to the house was “to get his stuff,” since McCottry was moving. McCottry described the context of the assault, after which the operator told her that the police were on their way. “They're gonna check the area for him first,” the operator said, “and then they're gonna come talk to you.” The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the “fresh injuries on her forearm and her face,” and her “frantic efforts to

gather her belongings and her children so that they could leave the residence."

The State charged Davis with felony violation of a domestic no-contact order. "The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries." McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear. Over Davis's objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of her exchange with the 911 operator, and the jury convicted him.

The statements to the responding officers in *Hammond*

In the *Hammon v. Indiana*, portion of *Davis,* police responded to a "reported domestic disturbance" at the home of Hershel and Amy Hammon. They found Amy alone on the front porch, appearing " 'somewhat frightened,' " but she told them that " 'nothing was the matter,' " She gave them permission to enter the house, where an officer saw "a gas heating unit in the corner of the living room" that had "flames coming out of the ... partial glass front. There were pieces

of glass on the ground in front of it and there was flame emitting from the front of the heating unit."

Hershel, meanwhile, was in the kitchen. He told the police "that he and his wife had 'been in an argument' but 'everything was fine now' and the argument 'never became physical. By this point, Amy had come back inside. One of the officers remained with Hershel; the other went to the living room to talk with Amy, and "again asked [her] what had occurred." Hershel made several attempts to participate in Amy's conversation with the police but was rebuffed. The officer later testified that Hershel "became angry when I insisted that [he] stay separated from Mrs. Hammon so that we can investigate what had happened." After hearing Amy's account, the officer "had her fill out and sign a battery affidavit." Amy handwrote the following: "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."

The State charged Hershel with domestic battery and with violating his probation. Amy was subpoenaed, but she did not appear at his subsequent bench trial. The State called the officer who had questioned Amy and asked him to recount what Amy told him and to

authenticate the affidavit. Hershel's counsel repeatedly objected to the admission of this evidence. At one point, after hearing the prosecutor defend the affidavit because it was made “under oath,” defense counsel said, “That doesn't give us the opportunity to cross examine [the] person who allegedly drafted it. Makes me mad.” Nonetheless, the trial court admitted the affidavit as a “present sense impression,” and Amy's statements as “excited utterances” that “are expressly permitted in these kinds of cases even if the declarant is not available to testify,”. The officer thus testified that Amy “informed me that she and Hershel had been in an argument. That he became irate over the fact of their daughter going to a boyfriend's house. The argument became ... physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical, he threw her down into the glass of the heater. “She informed me Mr. Hammon had pushed her onto the ground, had shoved *her* head into the broken glass of the heater and that he had punched her in the chest twice I believe.”

The *Davis* Analysis

To decide the confrontation clause issues presented above, the Court reviewed its holding in *Crawford.* The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford*, we held that this provision bars "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*, 541 U.S. at 36, 124 S.Ct. at 1355. A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, the Court stated it suffices to decide the present cases

to hold as follows: 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 any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it.

The question before the Court in *Davis*, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford*, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to

convict) the perpetrator. *Id.* at 53, 124 S.Ct. at 1365. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford,* '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance. *Id.* at 71, 124 S.Ct. at 1375.

The difference between the interrogation in *Davis* and the one in *Crawford* is apparent on the face of things. In *Davis,* McCottry was speaking about events *as they were actually happening,* rather than describing past events. Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. 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

bona fide physical threat. Third, the nature of what was asked and answered in *Davis,* again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; 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.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness;* she was not *testifying*. What she said was not "a weaker substitute for live testimony" at trial, like Lord Cobham's statements in *Raleigh's Case,* 2 How. St. Tr. 1, 27 (1603), or Jane Dingler's *ex parte* statements against her husband in *King v.*

Dingler, 2 Leach 561, 168 Eng. Rep. 383 (1791), or Sylvia Crawford's statement in *Crawford*. *Davis*, 547 U.S. at 828, 126 S.Ct. at 2277. In each of those cases, the *ex parte* actors and the evidentiary products of the *ex parte* communication aligned perfectly with their courtroom analogues. McCottry's emergency statement does not. No "witness" goes into court to proclaim an emergency and seek help.

Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. 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 Davis drove away from the premises. *Id.* at 828, 126 S.Ct. at 2277. The operator then told McCottry to be quiet and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*. *Id.* at 829, 12 S.Ct. at 2277. This presents no

great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. *Id.* Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. *Id.* Davis's jury did not hear the *complete* 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial.

Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task, since they were not much different from the statements we found to be testimonial in *Crawford*. It is entirely clear from the circumstances that the interrogation was part of an investigation into possible criminal past conduct—as, indeed, the

testifying officer expressly acknowledged. There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officer *should* have done.

The statements in *Davis* were taken when McCottry was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. McCottry's present-tense statements showed immediacy; Amy's narrative of past events was delivered at some remove in time from the danger she described. And after Amy answered the officer's questions, he had her execute an affidavit, in order, he testified, "[t]o establish events that have occurred previously."

The dissenting opinion commented that the Court's repeated invocation of the word "objectiv[e]" to describe its test suggests that the Court may not mean to reference purpose at all, but instead to inquire into the function served by the interrogation. Certainly such a test would avoid the pitfalls that have led us repeatedly to reject tests dependent on the subjective intentions of police officers. Additionally, it would shift the ability to control whether a violation occurred from the police and prosecutor to the judge, whose determination as to the "primary purpose" of a particular interrogation would be unpredictable and not necessarily tethered to the actual purpose for which the police performed the interrogation. *Id.* at 834, 839, 126 S.Ct. at 2280, 2283.

The *Davis* opinion explained in a footnote that our holding refers to interrogations because the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. *Davis*, 547 U.S. at 822, 126 S.Ct. at 2274 n.1. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended

questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning. *Raleigh's Case*, 2 How. St. Tr. 1, 27 (1603).) And even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

The Court also noted in a footnote that if 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in *Crawford*, therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial."

The Court's opinion also noted in a footnote that police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency

exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial *use* of and not the *collection* of, *ex parte* testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

Analysis in Sykes

In ruling on defendant's motion in *limine* with respect to the 911 call, Judge Traum found that the dispatchers were attempting to elicit information from the caller that would assist the first responders as they arrived on the scene. The court claimed that information concerning how the victim sustained her injuries, the nature and extent of the victim's injuries, the security of the victim and the scene and the identity, location and potential dangerousness of the suspect were necessary to ensure the safety of the paramedics and police when they arrived at the scene and to assist the paramedics to effectively treat the victim once they reached the hotel. The court found the primary purpose of the interrogation was to enable police and first responders to assist in an ongoing emergency. The court improperly concluded the statements were therefore non-testimonial and not barred by the sixth amendment. The ruling ignored the primary

purpose analysis performed by the Supreme Court upon nearly identical cases factually and the caution in *Davis* that one might call 911 to provide a narrative report of a crime absent any imminent danger. The ruling ignored the instruction in *Davis* that a conversation that begins as an interrogation to determine the need for emergency assistance can evolve into a testimonial statement.

The trial judge, Christine Dalton, applied the ruling on the Motion in *limini* concerning the 911 tape and further ruled that the hearsay was admissible as a present sense impression. The trial court also ruled the officer's testimony was admissible at trial because "he was asking questions to determine the level of care and level of safety for the people present and the EMTs and so he could prepare an accurate report" and that K.M.'s statements were excited utterances.

The 911 call and the officer's testimony concerning K.M.'s statements were improperly found to be nontestimonial admissible hearsay. The rulings of both judges ignored the application of the primary purpose test and the findings and holding of *Davis*. Judge Traum's ruling on the motion in *limine* cites *Ohio v. Clark*, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015) and claims to apply the "primary purpose" test. 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. *Ohio v. Clark* considered statements by a child to a schoolteacher. The ongoing emergency was the protection of a child from further injuries by a caretaker when the child was released from school. There was no ongoing emergency in the case involving Mr. Sykes. The scene was secured prior to the 911 call. The caller was not speaking about events as they were actually happening. The caller was not even describing an assault that he witnessed. The caller requested police and medical assistance. This was not treated by the dispatcher as a medical emergency.

The initial 911 operator spent several minutes interrogating the caller, following a script, and insisting that the caller tell 911 what happened even when the caller did not know. There is no claim or explanation of personal knowledge or observation. The caller described noises coming from a room next to Mr. Sykes and that Mr. Sykes left the scene. The basis for his opinions and statements are not identified. When repeatedly pressed for details the caller eventually made statements to the effect that Mike Sykes beat his girlfriend, perhaps in frustration to get the dispatcher to send police and medic.

There is no indication that the caller either witnessed an assault or was in any imminent danger. K.M. was reportedly being treated by a nurse at the time of the call and she was able to be questioned by the police officer while she was being treated by medic. The initial question by the 911 dispatcher was for the address of the emergency. The caller asked another person for the address and stated that we need medic and police. The caller again requested medic and police. When the caller advises he is going to apparently help the person that is injured, the dispatcher orders the caller to stay on the phone and then begins an interrogation of the caller to "tell me exactly what happened." The caller advised there was screaming in a room adjacent to his brothers and when he pounded on the door Mike came out and his girlfriend is pretty beat up. That is all the caller could say "right now."

The dispatcher continues her series of questions, how was she beat up, is this your brother's girlfriend and eventually where is the suspect now? The caller reported he was out in the parking lot. The dispatcher asked whether he was armed. The caller replied I don't believe so. The caller attempts to leave the call and the dispatcher says she needs this information. To this point, the dispatcher has not even

inquired concerning any injuries to the alleged victim. The only questions necessary to dispatching aid were the location and nature of the emergency and any danger presented. The questions focus instead on the factors relevant to a police investigation beginning immediately with the 911 dispatcher reading a script that is obviously prepared by a police officer and not a doctor. Someone calling 911 for a medic should not have to answer 25 questions to "solve the crime" before a single question about the severity of injuries that prompted the request for medic.

A question concerning the location of an assailant and whether the assailant was armed might be primarily to assess the possibility of continuing or future harm to the caller or first responders. The identity, height, weight and race of an assailant are primarily to investigate a crime so that the police might be able to apprehend a suspect. It is part of the script provided to 911 operators who are part of the emergency communications and dispatch for Scott County law enforcement agencies. All the questions beyond the location of the crime, the caller's identity and phone number and the presence or absence of the suspect and whether he was armed were primarily designed to gather historical facts to investigate an apparent crime.

Unfortunately, the judges in this matter failed to recognize the point at which, for sixth amendment purposes, statements in response to interrogations become testimonial. The statements should have been excluded. *Davis*, 547 U.S. at 826-827, 126 S.Ct. at 2276-2277.

When officer Stombaugh arrived at the scene, he first attempted to locate the suspect in the parking lot. Several officers were already at the scene. Any criminal event was concluded, and the suspect had departed the scene. The alleged victim was secure and being treated for her injuries. Like the responding officers in *Davis,* officer Stombaugh could not testify with personal knowledge as to the cause of the injuries. Officer Stombaugh was not providing or directing medical treatment to K.M. The police emergency was over before the police arrived. Officer Stombaugh admitted that his questions to K.M. were intended to investigate a crime and prepare a report for future prosecution. The Trial Judge was impressed or surprised at this candid admission. The primary purpose of his questions was not to enable police assistance to meet an ongoing emergency. The responses 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

the criminal prosecution. *Davis*, 547 U.S. at 821-822, 126 S.Ct. at 2273-2274. The responding officer's testimony about the statements of Amy Hammond to them were introduced by the trial court as excited utterances and an affidavit obtained by the police was admitted as a present sense impression. The Supreme Court thought the decision in *Hammon* was a much easier task as they are not much different than the statements found to be testimonial in *Crawford*. It was "entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct – as, indeed, the testifying officer expressly acknowledged. There was no emergency in progress; the interrogating officer testified that he heard no argument or crashing and saw no one throw or break anything." *Davis*, 547 U.S. at 829-831, 126 S.Ct. at 2278. There was no immediate threat. The officer was not attempting to determine "what is happening" but rather "what happened". The Supreme Court held, using the primary factor test, the primary, if not indeed the sole purpose of the interrogation was to investigate a possible crime. Amy Hammon's statements were neither a cry for help nor the provision of information enabling officers to end the threatening situation. The fact they were made at a crime scene and were "initial inquiries" is

immaterial to Confrontation Clause analysis. It is evident during her on the record comments that Judge Dalton did not apply the primary purpose test to determine whether the statements were testimonial. Judge Dalton declared on the record that the primary purpose (of the questions) was to figure out "what happened." She found the officer "honestly" admitted "it was to prepare reports and for further prosecution." TTX 43.

The 911 dispatcher demanded the caller to "tell me exactly what happened", "is this your brother's girlfriend", "where is the suspect" and whether the caller knows where Mr. Sykes is going and the vehicle the suspect might be driving. Finally, the dispatcher advises the caller to secure the room and not to leave. The medic dispatcher again demands the caller to tell me what happened. Another person takes possession of the phone and the dispatcher tells the unknown caller to tell me exactly what happened. The dispatcher explains he is trying to gather as much information as he can. Finally, more than six minutes into the call, the dispatcher requests information concerning the physical condition of the injured person. The original caller asks the medic dispatcher "why are you asking all these questions about the suspect?" At the end of the call the medic

dispatcher finally advises that the injured person should not have anything to eat or drink and should not be moved unless absolutely necessary.

Even if some of the 911 statements survive proper Confrontation Clause and hearsay foundation and exception analysis, the context of the statements is so uncertain that a proper exception to the hearsay rule cannot be proven for the statements to allow their admission. Even if admitted, they are not reliable enough or supported by other direct or circumstantial evidence as to the identity of the assailant or the circumstances of the injuries to be sufficient evidence to uphold the conviction.

CONCLUSION AND RELIEF REQUESTED

The ruling on the motion in *limine* concerning the 911 tape fails to properly evaluate and determine what statements were testimonial. The judges did not properly apply the test and holdings of *Davis* in nearly identical circumstances when deciding the pretrial motion and objections at trial. The trial court relied upon K.M.'s identification of the defendant as having assaulted her and causing the observed injuries and the 911 caller report that defendant beat his girlfriend. The trial court further found the 911 caller's statements a present

sense impression when they were nothing more than speculation concerning past events. The trial court ruled the officer's testimony concerning K.M.'s statements admissible at trial "so he could prepare an accurate report." Order, A. 16-19 at p. 18. The statements were testimonial and should not have been admitted over the proper Confrontation Clause objection. Furthermore, the 911 caller's statements were not a present sense impression and the statements of K. M. are not excited utterances. They were in response to police questioning. That rule excepts from the general prohibition of hearsay statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Iowa R. Evid. 803(1). The underlying theory of this exception is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation. The 911 caller did not see or perceive an assault. He was describing his assumptions about a past event. Being excited (or frustrated with a dispatcher) does not make a statement an excited utterance or present sense impression, particularly when the statement is in response to interrogation.

Iowa R. Evid. 803(2) excepts from the hearsay rule "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This exception applies generally to statements made under the influence of the excitement of an incident, rather than on reflection or deliberation. *State v. Stevens,* 289 N.W.2d 592, 596 (Iowa 1980). A declarant's participation in the incident is not required; "a non-participant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor." Fed. R. Evid. 803(2), Advisory Committee Note. The admission of hearsay under this exception lies largely within the discretion of the trial court, which must initially determine whether the out-of-court statements were induced by the excitement caused by the startling event which is being described. *State v. Ogilvie,* 310 N.W.2d 192, 196 (Iowa 1981) *State v. Paulsen,* 265 N.W.2d 581, 586 (Iowa 1978) . Other factors properly to be considered include the extent to which questioning elicited statements that otherwise would not have been volunteered, the age and condition of the declarant, the characteristics of the event being described, and the subject matter of the statements. *United States v. Iron Shell,* 633 F.2d 77, 85-86 (8th

Cir.1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). The Court in Sykes did not have a sufficient foundation to allow the statements. Pertinent here is a comment in an early Iowa case concerning the effect of questioning on the voluntary nature of a declarant's statements: Where the circumstances indicate that but for the questioning there would probably have been no voluntary complaint, the answer is inadmissible. *State v. McGhuey*, 153 Iowa 308, 314, 133 N.W. 678, 681 (1911), quoted in *State v. Grady*, 183 N.W.2d 707, 714 (1971).

In conclusion, none of K.M.'s statements to officer Stombaugh survive Confrontation Clause analysis. Few if any of the statements to the 911 dispatcher survive Confrontation Clause and hearsay analysis. Even the evidence that was improperly admitted, when properly evaluated, is not sufficient to sustain the conviction. When the improperly admitted evidence is stricken from the record, there is certainly insufficient evidence to support the conviction. Mr. Sykes requests this Court to vacate his conviction because prejudicial and improper evidence was admitted in violation of his right to confront his accusers and he requests this Court to direct a verdict of acquittal.

STATEMENT CONCERNING ORAL ARGUMENT

Counsel is always willing to appear for oral argument if it will assist the presentation of this appeal. The record is modest and the legal analysis and authority reasonably well established so oral argument may not be necessary.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitations of Iowa Rules of Appellate Procedure 6.903(1)(g)(1) because this brief contains 10,809 words.

This brief complies with type-face requirements of Iowa Rules of Appellate Procedure 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Times New Roman type style.