No. 4-423

IN THE

Supreme Court of the United States

Larry Bridges

Petitioner,

v.

The State of Texas,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

Brief for Appellee

Carson Collins
Abigail Lovins
Austin Co-op

INTRODUCTION

This argument is directed to the Supreme Court of the United States.

STATEMENT OF THE CASE

Appellant Larry Bridges was charged with the attempted murder and aggravated assault of Thomas Hutton. He appealed this verdict on two grounds: (1) that the admission of Hutton's out-of-court testimonial statements violated his Sixth Amendment right to confrontation and (2) that if the statements were not testimonial, the court abused its discretion in admitting them under the excited utterance hearsay exception.

STATEMENT OF FACTS

Larry Bridges and Thomas Hutton, inmates at Shepard Correctional Complex, were being monitored by Sergeant Crane and Officer McMurty. Bridges joined Hutton in the laundry room, then walked out of view of the cameras. McMurty then exited the room. Almost immediately Officer McMurty looked through the window and saw Hutton staggering and grabbing his neck. He entered the room and assisted Hutton. Officer Johnson responded to the scene. Sergeant Crane and Officers McMurty and Johnson testified that Hutton had red marks on his neck and blamed Bridges. After several hearings, Hutton refused to testify in court, stating that he didn't believe that he was a victim in a crime.

ISSUES ON APPEAL

Issue 1: The admission of Hutton's out-of-court statements did not violate Bridges' Sixth Amendment right to confrontation.

Issue 2: Because the statements were not testimonial, the court did not abuse its discretion in admitting the statements under the excited utterance hearsay exception.

ARGUMENT

Argument 1: Hutton's statements were properly admitted because they did not violate Bridges's Sixth Amendment right to confrontation.

I. The Sixth Amendment allows the use of non-testimonial statements without confrontation.

Hutton's statements are admissible in court without confrontation. The Sixth Amendment states "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witness against him." U.S. CONST. amend. VI. The Supreme Court clarified in *Crawford v. Washington* that the Confrontation Clause prevents "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." 541 U.S. 36 (2004). But *Crawford* also provides that statements made during an ongoing emergency are not considered testimonial, and thus can be used in court without confrontation. Thus, if Hutton's statements were not testimonial, then they can be properly admitted. *Id.*

II. Because there was an ongoing emergency, Hutton's statements were not testimonial.

Hutton's statements were made during an ongoing emergency. Thus, they were not testimonial. The legal test for determining whether a statement is testimonial is to find the declarant's primary purpose of making such a statement. *Davis v. Washington*, 547 U.S. 813 (2006). If the primary purpose of a statement is

to assist in an ongoing emergency, the statement is not testimonial, and thus is admissible in court without confrontation. *Id*. According to *Davis*, statements are "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*. *Michigan v. Bryant* elaborates on this rule, stating, "To make this "primary purpose" determination, the Court must objectively evaluate the circumstances in which the encounter between the individual and the police occurs and the parties' statements and actions." *Michigan v. Bryant*, U.S. 131 S.Ct 1143 (2011). In our case, the circumstances when Hutton's statements were made—his trouble breathing and clear panic—clearly demonstrate an ongoing emergency.

The crux of determining whether the situation constituted an ongoing emergency revolves upon this question: were the statements Hutton made necessary to end a threatening situation? If they were, then his statements were not testimonial. *Id*. To determine this, the entirety of the circumstances of the encounter, including both Hutton's and the correctional officer's statements, must be considered.

Officer Johnson testified that "Hutton was panicked and had red marks on his neck. Hutton was gasping and barely able to speak, but when he was able to get words out he said "Bridges," and pointed toward the second tier of cells." Because Hutton was experiencing extreme difficulty breathing, indicating he was still feeling pain, it is unlikely that he was considering how his statement might affect a court ruling in the future.

Additionally, when considering Sergeant Crane's testimony, the ongoing emergency becomes even more clear. Crane testified, "Hutton had deep ligature marks on his neck and fingertips" and that "Hutton said he tried to pull the sheet off his neck and that while he was trying to do this at one point he turned, and Hutton saw Bridges. Hutton said that he was fighting and then he said that Bridges acted like he was sleeping." The markings on Hutton's body indicate that he was involved in a struggle.

When objectively evaluating the circumstances—Hutton's panicked state, the markings on his body indicating a struggle, and his extreme difficulty breathing, it becomes clear that this was an ongoing emergency. Because Hutton's statements were made during an ongoing emergency, they are admissible in court without confrontation.

Argument 2: Because the statements were not testimonial, the court did not abuse its discretion in admitting the statements under the excited utterance hearsay exception.

I. The Texas Court of Criminal Appeals' psychological justification for the excited utterance exception was present in this case.

Brito v. United States laid out two criteria for determining the authenticity of an excited utterance, and whether it fits the legal differentiation or if it is simply a statement that was "uttered excitedly".

An excited utterance is defined in *Salazar v. State* as "a statement related to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," or "in the grips of the event which caused the injury." 38 S.W.3d. 141. *United States v. Brito* laid out two criteria to

determine whether a statement qualifies as an excited utterance. The first criterion focuses on whether the declarant was under the stress of a startling event, and the second on assessing the circumstances surrounding the supposed excited utterance. Hutton's statement satisfies both criteria.

The first criterion that *Brito* lays out is that "the excited utterance inquiry focuses on whether the declarant was under the stress of a startling event." 427 F.3d 53 (2005). When Hutton whispered "Bridges," and pointed to the row of cells where the Appellant was, he was gasping for air and barely able to speak. He still had the rolled-up sheet around his neck, as well as red marks on his neck. Officer Johnson testified that Hutton was panicked and in distress, gasping, and trying to get his words out. It was then Hutton spoke, not when he was given the narcotics which calmed him down. Therefore, due to his strong emotions, Hutton was still under the stress of the moment, and his statement fits under the first criteria for the excited utterance exception.

The court in *Zuliani* lays out even more stringent criteria for analyzing the circumstances, and Hutton's statement meets these criteria as well. In addition to *Brito's* criteria, Hutton's statements also satisfy the psychological justification for the exception laid out in *Zuliani v. State*. In *Zuliani,* the court provided a psychological justification for the excited utterance: "the reason behind the excited utterance exception is psychological: when a person is in the instant grip of violent emotion, excitement, or pain, that person ordinarily loses the capacity for the reflection necessary for fabrication, and the truth will come out." 97 S.W.3.d 589. Similar to *Brito,* determining if this is the case requires a reviewing court to establish whether the statement was made "under such circumstances as would

reasonably show that it resulted from impulse rather than reason and reflection." When he was experiencing extreme anxiety and likely concern for his well-being, Hutton lacked reason and reflection. Additionally, he was so anxious that he was administered narcotics by the medical staff in hopes it would help him calm down. Not only were his emotions still intense, but the rolled-up sheet that had been used to strangle him remained around his neck when he made his initial statement. Hutton had just survived an alleged attempt on his life. He would not have been able to "appreciate the legal ramifications of his statement." *Brito* 427 F.3d.

Additionally, Hutton's statement fit the second criterion laid out by *Brito.* During the time when Hutton made his statement, a reasonable person would have regained the capacity to give testimony. *Brito* states: "if the statement so qualifies [as an excited utterance] the court then must look to the circumstances and assess the likelihood that a reasonable person would have either regained or retained the capacity to make a testimonial statement at the time of the utterance." By "assessing the circumstances," we again see that Hutton could not have retained such capacities. He had not yet been medically treated, he had been strangled less than three minutes before, and he still had the device of strangulation around his neck. Additionally, Nurse Peters and Officer Johnson testified that Hutton was panicked and in distress, gasping as he tried to speak. Hutton made his initial statement while experiencing anxiety—anxiety so severe that the medical staff eventually gave him narcotics to calm him down. A reasonable person, under such circumstances, would not be able to comprehend the ramifications of their words.

Additionally, the events occurred in a very short time frame. The assault on Hutton occurred between 10:34 a.m. when Bridge entered the laundry room and

10:41 when Hutton emerged from the laundry room. He was signaling to the guards and gasping for breath. When he was finally able to speak, the initial statements that Hutton made to Officer Johnson were made while still under the stress of a startling event and relating to a startling event. By that definition, Hutton's statements are exceptions to the Hearsay Rule 803. Accordingly, Hutton would not have been in the mental state of mind to lie. Therefore, his words fit under the first criteria for the exception of Rule 803, and the court did not abuse its discretion by admitting Hutton's words.

II. The error was not plain enough to meet the standard of review.

Because Hutton's statement was "related to a startling event or condition" and made while he "was under the stress of excitement caused by the event or condition," the trial court did not abuse its discretion. An abuse of discretion occurs "only when the trial judge's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Zuliani v. State* quoting *Cantu v. State*, 842 S.W.2d 667, 682. There was no such error made. When Hutton spoke to the correction officers, he still had the rope around his neck, and minutes before, there was an alleged attempt to take his life. There were enough circumstances to show that Hutton was "under the stress of a startling event" and that "the event was speaking through the person." *Zuliani,* 97 S.W.3.d. Although there are, in theory, different ways of interpreting this, there was no plain error made by the trial court. Based on the facts, the trial court's decision was within the scope of reasonable disagreement. Because no plain errors were made, the court did not abuse its discretion.

CONCLUSION

In conclusion, Bridges' Sixth Amendment rights were not infringed, as Hutton's words were not testimonial. Additionally, Hutton's statements were excited utterances and were admissible as such, so the court did not abuse its discretion.

PRAYER

We pray that this Court will affirm the decision made by the Texas Supreme Court and deny the Appellant's appeal.

Respectfully Submitted By:

Carson Collins

Abigail Lovins

Attorneys for Appellee

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INTRODUCTION

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STATEMENT OF THE CASE

Appellant Larry Bridges was convicted of the attempted murder and aggravated assault of Thomas Hutton. He appealed these convictions on two grounds: (1) that the court's admission of Hutton's out-of-court testimonial statements violated his Sixth Amendment right to confrontation and (2) that if the statements were not testimonial, the court abused its discretion in admitting them under the excited utterance exception to the hearsay rule.

STATEMENT OF FACTS

Larry Bridges and Thomas Hutton, inmates at Shepard Correctional Complex, were being monitored by Sergeant Crane and Officer McMurty. Bridges joined Hutton in the laundry room, then walked out of view of the cameras. He then exited the room. Almost immediately Officer McMurty looked through the window and saw Hutton staggering and grabbing his neck. He entered the room and assisted Hutton. Officer Johnson responded to the scene. Sergeant Crane and Officers McMurty and Johnson testified that Hutton stated that Bridges had tried to strangle him. After several hearings, Hutton refused to testify in court, stating that he didn't believe that he was a victim in a crime.

ISSUES ON APPEAL

Issue 1: Hutton's statements were improperly admitted because they violated the Sixth Amendment right to confrontation.

Issue 2: The statements were not testimonial and the court abused its discretion in admitting the statements under the excited utterance hearsay exception.

ARGUMENT

Argument 1: Hutton's statements were improperly admitted because they violated the Sixth Amendment right to confrontation.

I. The Sixth Amendment prevents the use of testimonial statements without confrontation.

Hutton's statements are inadmissible because, even though they are testimonial, Bridges did not have the opportunity to cross-examine Hutton. The Sixth Amendment states "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witness against him." U.S. CONST. amend. VI. In *Crawford v Washington*, the Supreme Court held that the Confrontation Clause prevents "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36 (2004).

In *Crawford*, Michael and Sylvia Crawford confronted another man over allegations of rape, then Michael Crawford stabbed him. Police interrogated both Micheal and Sylvia, but Sylvia did not testify at trial. The lower court admitted statements Sylvia made in the duration of the police interrogation as evidence. The Supreme Court reversed this ruling, deciding that the Sixth Amendment requires that all statements and witnesses be cross examined, regardless of their apparent veracity. The court stated "[T]he only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." In this case, similar to *Crawford*, Hutton refused to testify at trial, and Bridges did not have the opportunity to cross examine him. Therefore, if

Hutton's statements are testimonial, then the trial court violated Bridge's constitutional right to confront witnesses by admitting them.

II. Because there was no ongoing emergency, Hutton's statements were testimonial.

Hutton's statements were not made during an ongoing emergency, and therefore are testimonial. Statements made outside of court are testimonial unless the declarant's primary purpose of making such a statement was to assist in an ongoing emergency. *Davis v. Washington*, 547 U.S. 813 (2006). *Id*. According to *Davis*, statements are "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*. In *Davis*, Adrian Davis was arrested after his wife, Michelle McCottry, called 911, telling the operator that he had beaten her. At trial, McCottry did not testify, but the 911 recording was admitted. The court held the 911 statements were not testimonial, and thus could be admitted. However, *Davis* is different from Bridges' and Hutton's situation. In *Davis*, McCottry's statements were made during a 911 call, a clear emergency. In this case, Hutton made his statements in a controlled environment after the emergency had ended.

Michigan v. Bryant elaborates on the rule set out in *Davis*, stating, "to make this "primary purpose" determination, the Court must objectively evaluate the circumstances in which the encounter between the individual and the police occurs and the parties' statements and actions." *Michigan v. Bryant*, U.S. 131 S.Ct 1143 (2011). In this case, Hutton's statements were not made during an ongoing emergency, and thus were primarily made to be relevant to later criminal

prosecution. In the course of Bridge's trial, Officer Johnson and Sergeant Crane, who were present at the scene, both testified to the statements Hutton made. Their testimonies illustrate that Hutton's statements were not made *during* an ongoing emergency, but *afterward*.

Officer Johnson stated in his testimony, "Hutton was panicked and had red marks on his neck. Hutton was gasping and barely able to speak, but when he was able to get words out he said 'Bridges.'" This statement is testimonial because it was not made in an emergency. The threat to Hutton's life had been eliminated when Bridges left the dayroom, and Hutton was surrounded by law enforcement officers and medical professionals. Additionally, the danger of the manner in which Hutton states he was attacked—strangulation—was eliminated once he was no longer actually being strangled; Hutton was no longer at risk of bodily harm. Because the threat to Hutton's life had been eliminated, and he was in a controlled environment, the statements Hutton made were to identify his attacker and were testimonial.

Officer Crane stated in his testimony, "that *after* catching his breath Hutton said, 'He tried to kill me.'" When Sergeant Crane asked who, Hutton said "Bridges." As in Officer Johnson's case, these statements were also made in a controlled environment; Hutton even had enough time to catch his breath, thus giving him the chance to understand the consequences his statements would have. This, like Officer Johnson's testimony, shows that Hutton's statements were not made during an ongoing emergency. Thus, Hutton's statements were testimonial, and the court erred in admitting them.

Argument 2: Because the statements were testimonial, the court abused its discretion in admitting the statements under the excited utterance hearsay exception.

I. Hutton was neither in an ongoing emergency nor present danger.

Hutton was not actively in any form of ongoing emergency, thus he likely understood the ramifications of his words. Since there was no such emergency, then a statement can have been "excitedly uttered" yet not hold up in court as a statement made without legal ramifications in mind. An excited utterance is defined by Tex. R. Evid. 803(2), as "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." *Brito v. United States* says: "Once the immediate danger has subsided, however, a person who speaks while still under the stress of a startling event is more likely to comprehend the larger significance of his words." *US v. Brito,* 427 F.3d 53 (2005). 38 S.W.3d. 141. This means that a statement can still qualify as an excited utterance in the absolute loosest sense, but also qualify as testimony. Hutton was not in any sort of emergency. Bridges had left the room, eliminating him as a threat. Once Hutton emerged from the room, he was in a completely controlled environment; prison guards surrounded him; medical staff rushed to him. He could not have been in any medical peril, as the only treatments given to him were "just to make him feel better" because he was "experiencing some anxiety". But, anxiety is not sufficient evidence of an ongoing emergency.

Hutton's statement does not fit the psychological definition of an excited utterance provided by *Zuliani v. State*. As he was not in the "heat of the moment", but rather, in a controlled environment, a reasonable person would have regained

the capacity to testify. *Zuliani* wrote that "the reason behind the excited utterance exception is psychological: when a person is in the instant grip of violent emotion, excitement, or pain, that person ordinarily loses the capacity for the reflection necessary for fabrication, the truth will come out." 97 S.W.3d 589 (Tex. Crim. App. 2003). A person often loses the capacity for the reflection necessary to formulate a lie when in the *instant* grip of strong or violent emotions.

The word key here is "instant." Hutton was no longer being strangled. The startling event was over. He was no longer in any danger. While he may have still experienced stress, he was no longer experiencing the intense emotion of the moment. Bridges had left, and within three minutes of Hutton emerging from the laundry room he received minor medical treatment. The medical treatment he received was given "just to make him feel more comfortable," not out of urgent medical need. While the medical team was treating Hutton, he was saying "that he had been strangled and Bridges had done it." The medical team had "treated" his anxiety, and, at this point, a reasonable person would have recognized the legal ramifications of his words. Thus as Hutton would have regained the mental capacity to form a lie, the psychological justification for an excited utterance, as provided by *Zuliani*, does not apply in Hutton's case, as he was not "in the grip" of any instant emergency, emotion, or pain. Additionally, Hutton's statement does not meet any of *Brito's* criteria.

II. Hutton's statement met none of the factors for determining an excited utterance laid out by previous Texas cases.

Because Hutton's statement does not follow the various criteria laid out by previous cases, his statement is testimony. As the court in *Brito* wrote: "If the

record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature." *U.S v. Brito* citing *Drayton*, 877 A.2d at 149-50. If the declarant can comprehend the ramification of their words, a statement can qualify as an excited utterance—in the absolute loosest sense—but also still be testimony.

In other cases, such as *Brito v. United States*, *Ricondo v. State*, and *Zuliani v. State*, factors were laid out that supported a finding of incomprehension. These factors were not present in this case. In *Brito*, those factors were: "The immediacy of the threat, the existence of a clear and present danger, and the fact that no substantial time had elapsed." *Id*. In *Brito,* an anonymous 911 caller reported the Appellant shooting a gun in a parking lot. Sections of the 911 call were admitted into court on the basis that the call was an excited utterance. The caller stated she had "just" heard gunshots. Her words suggested that she was in immediate peril when calling 911. The declarant's words were a call for help because she was in *present* danger. She was in an *ongoing emergency*, whereas Hutton was not. Also, the 911 caller was calling for help, not to accuse a suspect.

In *Ricondo v. State,* the inquiry focused on whether the declarant was out of danger. The words of the victim were admitted into Court as an excited utterance. In *Ricondo*, the victim was beaten and one hour away from dying when he was found by a deputy. When the deputy asked what had happened, the victim named the appellant as the one who had beaten him. *Ricondo v. State* 475 S.W.2d 793 (Tex. Crim. App. 1971). The difference between Hutton's and Perkins' situations is that Perkins was not out of danger. Though his attackers had left, Perkins was minutes away from death because of the appellant's actions. *Ricondo,* 475 S.W.2d.

Once Hutton staggered out of the room, he may have been flustered, but he was no longer in "immediate medical danger." He was not about to die, nor was he even severely injured.

III. The court made a plain error and abused its discretion.

The record supports that Hutton comprehended that his accusation against Bridges would support a case against him. Naming the appellant did not help Hutton get medical treatment. In fact, it did nothing but build a case against Bridges. The questions from medics and correction officers about what happened and Hutton's statement were obtained to aid in a case against Bridges. Hutton, who had been calmed down, would have been able to understand that. Therefore, the Court abused its discretion in admitting his statements.

CONCLUSION

In conclusion, Bridges' Sixth Amendment rights were infringed, as Hutton's words were testimony. Additionally, Hutton's statements were not excited utterances and were not admissible as such, so the court did abuse its discretion.

PRAYER

We pray that this Court will reverse the Texas Supreme Court and render a decision in favor of the Appellant, Larry Bridges.

Respectfully Submitted By:

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