

20160349

**FILED**  
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**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

**MAR 14 2017**

Supreme Court No. 20160349  
Burleigh County No. : 08-2016-CR-00405

**STATE OF NORTH DAKOTA**

State of North Dakota,	)
	)
Plaintiff and Appellee,	)
	)
vs.	)
	)
Darrell Froelich,	)
	)
Defendant and Appellant.	)

**APPEAL FROM SEPTEMBER 16, 2016 JURY TRIAL  
CONVICTION AND CRIMINAL JUDGMENT**

**SOUTH CENTRAL JUDICIAL DISTRICT**

**HONORABLE JAMES S. HILL, PRESIDING**

**BRIEF OF APPELLEE  
STATE OF NORTH DAKOTA**

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**ISSUE PRESENTED FOR REVIEW**

[¶ 1] Whether the Defendant has the right to appeal to the Supreme Court.

[¶ 2] Whether the Defendant's Sixth Amendment right to confront witnesses was violated.

## **STATEMENT OF THE CASE**

[¶ 3] This case comes to this Court from a September 16, 2016, jury trial which resulted in the conviction of Darrell Froelich (hereinafter “Froelich”). Appellant’s Appendix at pages 1, 18-19 (hereinafter “App. 1, 18-19”). Froelich appeals the district court’s decision to admit the emergency call to 911 into evidence without the caller testifying at the trial. Appellant’s Brief ¶ 9.

[¶ 4] On February 10, 2016, Froelich was charged with Simple Assault – Domestic Violence (for a second or subsequent offense), a Class A Misdemeanor. App. 4. On September 16, 2016, a jury trial was conducted. App. 1-2. During the trial, the State introduced the recording of the emergency call from this incident. App. 5-17. The defense objected to the introduction of the emergency call. App. 5-17. The trial court received the recording of the emergency call into evidence. App. 12. Subsequently, the jury found Froelich guilty of Simple Assault – Domestic Violence. App. 1.

[¶ 5] A Notice of Appeal and Request for Transcripts was filed on October 12, 2016. App. 2, 20-21. The Appellant’s Brief was filed on February 16, 2017.

## **STATEMENT OF THE FACTS**

[¶ 6] On February 9, 2016, Krista Trehus called 911 to seek police assistance during an incident of domestic violence. App. 9, Trial Transcript at page 71 (hereinafter “Tr. 71”). Officer Senger of the Bismarck Police Department was dispatched to check on this domestic violence situation. Tr. 71. When Officer Senger arrived at the scene, Krista Trehus, stated that Joshua Ensslin was assaulted by Froelich. Joshua Ensslin also stated that Froelich attacked him. Tr. 43-45. Subsequently, Froelich was arrested for Simple Assault – Domestic Violence. On February 10, 2016, Froelich appeared before the

district court and pled not guilty to the offense. App. 1. The case went to trial on September, 16, 2016. App. 2.

[¶ 7] During the course of the trial, the State sought to introduce into evidence the emergency call made by Krista Trehus to 911. App. 5-17. The State originally intended to call Trehus to testify at the trial; however, when the time came she refused to testify at trial. App. 9. Therefore, the State had to lay the foundation for the emergency call through a number of witnesses. App. 8-9. Two of these witnesses were Samantha and Joshua Ensslin, who were present at the residence when the emergency call was made. App. 8-9, Tr. 35, 44. Both Joshua and Samantha Ensslin testified that Trehus made the emergency call. App. 8-9, Tr. 35, 44.

[¶ 8] The State also called Eric Moe, a Central Dakota Communications Center worker, who receives 911 emergency calls. App. 5-17. Moe testified that he received an emergency call on February 9, 2016, and the caller identified herself as Krista Trehus. App. 11. Moe also testified that the recording fairly and accurately represented the call that took place. App. 12. The defense originally objected to the introduction of the recording for hearsay reasons stating that Trehus had to testify to lay the foundation for the emergency call. App. 7. Later, the defense objected to the introduction of the recording because Trehus was not present to testify. App. 9. The Court received the recording of the emergency call into evidence, and the emergency call was played for the jury. App. 12.

[¶ 9] Aside from the emergency call, there was testimony from multiple other people about this domestic violence incident. Samantha Ensslin testified that Froelich was drinking throughout the day, came home a lot more erratic, and as the day went on

Froelich was getting irritated and hollering. Tr. 28-31. Samantha also testified that, after the incident occurred, Joshua's face had redness and there was blood on his face. Tr. 37. Joshua Ensslin testified that Froelich was the person who attacked him. Tr. 44-45. Joshua, further, testified that Froelich came at him with his arms out which caused scratches on his face, his skin to be scraped away, blood to come to the surface of his skin, and redness on his face. Tr. 45. Officer Senger testified that after the incident he observed three abrasions on Joshua's face, one abrasion on this cheek, and two abrasions to his forehead. Tr. 73. Froelich was, subsequently, found guilty of Simple Assault – Domestic Violence. App. 2, 18.

## **ARGUMENT**

### **I. The Defendant has the Right to Appeal.**

[¶ 10] Under N.D.C.C. § 29-28-03, and in conjunction with N.D.R.Crim.P 37, the State agrees that Froelich has the right to appeal to this Court.

### **II. The Defendant's Sixth Amendment Right to Confront Witnesses was Not Violated by the Admission of the Emergency Call.**

[¶ 11] “The Confrontation Clause of the Sixth Amendment to the Constitution of the United States, applicable to the States through the Fourteenth Amendment, declares ‘In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.’” State v. Blue, 2006 ND 134, ¶ 6, 717 N.W.2d 558 (quoting U.S. Const. amend. VI.) The standard of review for a claimed violation of a constitutional right, including the right to confront witnesses, is de novo. Id.

[¶ 12] “Under Crawford, the admission of out-of-court testimonial statements in criminal cases is precluded, unless, the witness is unavailable to testify and the accused has had the opportunity to cross-examine the declarant.” Id. at ¶ 8 (citing Crawford v.

Washington, 541 U.S. 36, 59 (2004)). The Supreme Court has examined the difference between testimonial and nontestimonial statements. See Davis v. Washington, 547 U.S. 813 (2006). In Davis, the Supreme Court stated, “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” Id. at 822. “[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.

[¶ 13] In Davis, the Supreme Court held that a victim’s statement identifying her attacker to a 911 operator during an incident of domestic violence was a nontestimonial statement. Id. at 828-829. In Hammon, a companion case to Davis, the Supreme Court held that a victim’s affidavit made during a police investigation when the victim was removed from any threat of immediate danger was a testimonial statement. Id. at 831-832. The Supreme Court of Minnesota has, similarly, addressed this issue and concluded that emergency calls to 911 operators do not constitute testimonial statements. See State v. Wright, 726 N.W.2d 464, 473-475 (Minn. 2007).

[¶ 14] The facts in this case are essentially identical to the facts in Davis. In this case, Ms. Trehus’ statements were made to the 911 operator during an incident of domestic violence. The primary purpose of Ms. Trehus’ statements were to enable police assistance to meet an ongoing emergency. Ms. Trehus’ statements were not made after she was removed from the immediate danger nor were her statements made to prove past events



potentially relevant to later criminal prosecution. Ms. Trehus' statements were not testimonial, so Froelich's Sixth Amendment right to confront witnesses was not violated.

[¶ 15] If this Court; however, does conclude that Ms. Trehus' statements were testimonial and should not have been admitted, the State contends the error was harmless. Rule 52(a) of the North Dakota Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." N.D.R.Crim.P 52(a). Federal constitutional errors do not automatically require reversal if it is shown that the error was harmless beyond a reasonable doubt. Blue, 2006 ND 134, ¶ 29 (citing State v. Frankfurth, 2005 ND 167, ¶ 35, 704 N.W.2d 564 (Kapsner, J., concurring)). "Before determining an error is harmless beyond a reasonable doubt, the court must review the entire record and determine, in light of all of the evidence, the probable effect of the alleged error upon the defendant's rights." Id. A federal constitutional error may be declared harmless beyond a reasonable doubt if the court is convinced that the error did not contribute to the verdict. Id.

[¶ 16] In this case, the admission of the emergency call would amount to a harmless error beyond a reasonable doubt. The emergency call was not a central piece of evidence before the jury. The emergency call did provide some insight into what was happening during this incident of domestic violence, but there was more than sufficient evidence without the emergency call to support the conviction. In this case, the emergency call was not made by the victim of the domestic violence; instead, the emergency call was made by a third party who was present to the incident. Joshua Ensslin, the actual victim of the domestic violence, testified at the trial that Froehlich was the person who assaulted him and caused his injuries. Samantha Ensslin testified about Froelich's behavior leading up


to the incident and Joshua's injuries resulting from the incident. Additionally, Officer Senger testified that Joshua had various injuries and as a result of the incident. The other evidence introduced, in this case, is sufficient to sustain the conviction in this case. Therefore, if Ms. Trehus' statements were testimonial, and should not have been admitted into evidence, the admission of the emergency call amounts to harmless error because it did not contribute to the verdict.

### CONCLUSION

[¶ 17] For the above reasons, Froelich's Sixth Amendment right to confront witnesses was not violated by the admission of the emergency call into evidence. Therefore, the State respectfully requests that this Court uphold Froelich's conviction.

RESPECTFULLY SUBMITTED:

Dated this 14<sup>th</sup> day of March, 2017.

  
\_\_\_\_\_  
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State of North Dakota, )  
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 Plaintiff/Appellee, )  
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 -vs- ) Supreme Court No. 20160349  
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 Darrell Froelich, ) District Court No. 08-2016-CR-00405  
 )  
 Defendant-Appellant, )  
 ..... )

STATE OF NORTH DAKOTA )  
 )ss  
 COUNTY OF BURLEIGH )

Michelle E. Leary, being first duly sworn, depose and say that I am a United States Citizen over 21 years old, and on the 14th day of March, 2017, I deposited in a sealed envelope a true copy of the attached:

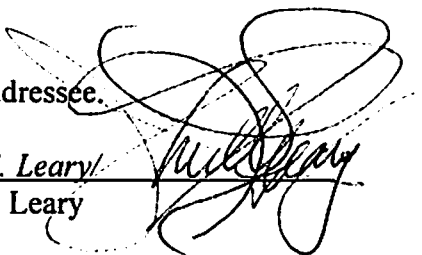
- 1. Appellee’s Brief; and
- 2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Thomas J. Glass  
Attorney at Law  
418 East Rosser Avenue, Ste 102  
Bismarck, ND 58501

which address is the last known address of the addressee.

/Michelle E. Leary/  
Michelle E. Leary



Subscribed and sworn to before me this 14<sup>th</sup> day of March, 2017.

/Denise Upham /  
Notary Public  
Burleigh County, North Dakota

