

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff,

VS.

DAVID PHILLIP,

Defendant.

)
) **CASE NO.: SX-08-CR-488**
)
) **CHARGE(S): MURDER FIRST**
) **DEGREE; ASSAULT FIRST**
) **DEGREE; RECKLESS ENDANGER-**
) **MENT FIRST DEGREE;**
) **POSSESSION OF AN UNLICENSED**
) **FIREARM DURING THE**
) **COMMISSION OF A CRIME OF**
) **VIOLENCE**
)
) **JURY TRIAL DEMANDED**
)
)

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's *Motion to Exclude Testimony* filed on March 24, 2010. For the following reasons, Defendant's motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

On or around June 28, 2008, Juan Berrios was shot in the vicinity of Little Fountain, St. Croix, Virgin Islands. Two Virgin Islands Police Department officers who were in the vicinity heard gunshots and made contact with a vehicle that had bullet holes in the driver's side door and had collided with a tree. A concerned citizen also heard the shots and reported the incident to 911 dispatchers at around 4:10 p.m. The first two police officers ("Officer 1" and "Officer 2") to arrive on the scene made contact with the victim, who had been shot in the leg, was bleeding profusely, and was going in and out of consciousness. The victim identified himself to Officer 1, and then the officer heard the victim identify the shooter as either "David Phillip" or "David Peters." The victim told Officer 1 that the shooter was driving a blue Dodge truck.

A third officer ("Officer 3") responding to the 911 call arrived on the scene after Officer 1 and Officer 2. Officer 3 observed the victim flailing around and saying, "I can't breathe, I can't breathe, I can't see, I can't see." Officer 3 stated that the victim's eyes kept opening and closing and the victim appeared very scared. Officer 3 asked the victim who shot him, and the victim said "David Peter." The victim also told Officer 3 that the shooter was driving a blue Dodge pickup truck. At approximately 4:17 p.m., an ambulance arrived on the scene. The ambulance left the scene to transport the victim to the hospital for medical treatment at around 4:46 p.m. While en route to the hospital, a fourth officer ("Officer 4"), who was riding in the ambulance with the victim and the medical technicians, observed a blue Dodge pickup truck following the ambulance. The victim died as a result of his injuries on July 1, 2008.

Defendant filed the *Motion to Exclude Testimony* on March 24, 2010. The motion requests a court order excluding the testimony of five police officers: Officers 1 – 4 and a fifth officer who signed and submitted the probable cause Affidavit. Defendant argues that the statements made by the victim to Officers 1 – 4 are inadmissible since the statements are hearsay that do not fall within any of the exceptions contained in Federal Rule of Evidence ("FRE") 804(b). Even if the statements do fall into one of the Rule 804(b) exceptions, Defendant argues that Court should exclude the statements under FRE 403 since the probative value of the statements is outweighed by the danger of misleading the jury.

The People argue that the statements made by the victim are admissible under FRE 803(1) as a present sense impression; FRE 803(2) as an excited utterance; FRE 804(b)(2) as a statement under the belief of imminent death; or the residual exception contained in FRE 807.

II. DISCUSSION

A. THE VICTIM'S STATEMENTS TO POLICE OFFICERS WERE NONTESTIMONIAL AND ARE NOT BARRED BY THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

“Hearsay” is a statement that is made other than while testifying at the trial or hearing that is offered into evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Hearsay is generally not admissible unless a federal statute, the Federal Rules of Evidence, or a Supreme Court rule provides otherwise. Fed. R. Evid. 802. The Confrontation Clause of the Sixth Amendment to the United States Constitution states: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The Sixth Amendment is binding on the Virgin Islands through Section 3 of the Revised Organic Act of 1954.¹ In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court of the United States held that the Confrontation Clause requires that for “testimonial statements” — including statements made to police officers during interrogations — to be admissible, the declarant must be unavailable and there must have been a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68.

In *Davis v. Washington* and *Hammond v. Indiana*, 547 U.S. 813 (2006),² the Supreme Court of the United States determined more precisely which police interrogations are “testimonial” and are barred by the Confrontation Clause. The court held that not all police interrogations are subject to the Confrontation Clause; only interrogations solely directed at establishing the facts of a past crime in order to identify or provide evidence to convict the

¹ The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1994), *reprinted in* V.I. Code Ann., Historical Documents, Organic Acts, and U.S. Constitution at 73-177 (1995 & Supp. 1997) (preceding V.I. Code Ann. tit. 1).

² The two cases were decided together in a single opinion; thus, the two cases share an identical citation.

perpetrator are testimonial in nature. *Davis*, 547 U.S. at 826. The court further held that:

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.

Id. at 822. Thus, after *Davis*, the inquiry as to whether a statement made during a police interrogation is testimonial or nontestimonial in nature hinges on whether the “primary purpose” of the interrogation is to enable police to meet an ongoing emergency. *Id.*

The parties in the case *sub judice* each argue the facts of *Davis* and *Crawford* to persuade the Court that the victim’s statements to the police officers were either testimonial or non-testimonial in nature. In a more recent opinion, the Supreme Court of the United States provided clear guidance on how to resolve this issue. In *Michigan v. Bryant*, 131 S. Ct. 1131 (2011), the Supreme Court clarified what *Davis* meant by the “primary purpose” of the investigation is to enable the police to meet an ongoing emergency. *Bryant* also involved a non-domestic dispute where the victim was found in a public location suffering from a fatal gunshot wound and the perpetrator’s location was unknown at the time the police located the victim. *Bryant*, 131 S. Ct. at 1156. In *Bryant*, police were dispatched to a gas station where they found the victim lying on the ground next to his car, suffering from a gunshot wound to the abdomen. *Id.* at 1150. The victim was in great pain and had difficulty speaking. *Id.* The officers approached the victim and asked him who the shooter was and where the shooting had occurred. *Id.* The victim stated that “Rick” had shot him at “Bryant’s house” (the defendant’s name was Richard Bryant). *Id.*

In *Bryant*, the Supreme Court held that the victim's identification of the shooter and description of the shooting were nontestimonial statements and did not violate the Confrontation Clause because the primary purpose of the statements was to enable the police to meet an ongoing emergency. *Id.* at 1152-67. To make the "primary purpose" determination, the court must objectively evaluate the circumstances in which the encounter between the individual and the police occurs, as well as the parties' statements and actions. *Bryant*, 131 S. Ct. at 1156-62. The court should look at the purpose that reasonable participants would have had, as determined by their statements and actions and the circumstances surrounding the encounter. *Id.* at 1156.

Whether there is an ongoing emergency at the time of the encounter involves not only a consideration of the threat to the victim, but also whether there is a continuing threat to the first responders and/or the public. *Id.* at 1157-60. In this case, the threat to the public and the first responders had in no way been neutralized at the time the victim identified the shooter. The police officers arrived on the scene with no knowledge of the shooter's location. The shooter could have still been in the vicinity at the time officers arrived. The threat to the public and the first responders continued after the officers arrived on the scene of the accident and continued even after the victim was transported from the scene by ambulance when a police officer riding in the ambulance observed a vehicle matching the victim's description of the shooter's vehicle following the ambulance.

Another consideration is the emergency's duration and scope. An emergency's duration and scope may depend on what type of weapon is involved. *Id.* For example, the scope of an emergency may not be as broad where the assailant used his fists instead of a gun. *Id.* *Bryant* noted that "[a]n emergency does not last only for the time between when the assailant pulls the trigger and the bullet hits the last victim." *Id.* at 1164. The court continued, "there was an

ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where police found [the victim].” *Bryant*, 131 S. Ct. at 1164. In this case, the motive and location of the shooter were also unknown. The officers had heard gunshots in the vicinity and arrived on the location within a few minutes of hearing the shots. The circumstances would indicate to a reasonable participant that the shooting had occurred at the scene of the accident only a few minutes prior to the officers’ arrival.

A victim’s medical condition is also important to the primary purpose inquiry since the victim’s ability to respond to questioning is an indication of the reliability of the statements. *Id.* “It also provides context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.” *Id.* During an ongoing emergency, the purpose of a victim’s statements is more likely to be to neutralize the ongoing threat rather than for the purpose of future prosecution. *Id.* at 1161. In this case, the victim was bleeding profusely from a gunshot wound to his leg and lapsing in and out of consciousness when the officers arrived on the scene. (Aff. ¶ 3(a).) The victim appeared “very scared” to the officers, and his eyes kept opening and closing. *Id.* ¶ 3(h). The victim was flailing about repeating, “I can’t breathe,” and “I can’t see.” *Id.* ¶ 3(i). The Court believes that the likely purpose of the victim’s statements was not for future prosecution, but to assist the officers in neutralizing the ongoing threat posed by the gunman or could have simply been reflexive given the victim’s physical condition at the time the statements were made.

In addition to the context of the situation, the informality of the interrogation is also a factor in determining an interrogation’s “primary purpose.” *Bryant*, 131 S. Ct. at 1157-60. The statements and actions of the declarant and the interrogators provide objective evidence of

the investigation's primary purpose. *Id.* at 1160-62. The questions posed by the officers in this case suggest that the investigators' primary purpose was to address an ongoing emergency. The identity and location of the shooter were unknown at the time of the interrogation, and the officers asked who the shooter was, where he went, and what type of vehicle he was driving. Without this information, the officers would have a difficult time neutralizing or assessing the urgency of the ongoing emergency. This was not a structured interrogation for purposes of future prosecution, but rather a series of questions designed to elicit basic information about the shooter's identity and whereabouts to determine whether there was a continuing threat.

The Court finds that the statements and actions of the participants, together with the circumstances surrounding the interrogation, reveal that the primary purpose of the interrogation was to enable the police to meet an ongoing emergency. These statements are nontestimonial under *Bryant* and do not violate the Confrontation Clause. However, our inquiry does not end there; for the out-of-court statements to be admissible, an exception to the general rule of hearsay inadmissibility must apply.

B. THE HEARSAY STATEMENTS ARE ADMISSIBLE AS EXCITED UTTERANCES UNDER FRE 803(2).

Although hearsay is generally not admissible under the Federal Rules of Evidence, there are several exceptions whereby hearsay statements are admissible due to circumstances that indicate their inherent reliability. Fed. R. Evid. 802, 803. The "excited utterance" exception permits admission of statements "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Fed. R. Evid. 803(2). The reason for this exception is that statements made during a startling event without the opportunity for reflection are likely to be reliable. *Soto v. Gov't of the V.I.*, 344 F. Supp. 2d

C. THE STATEMENTS SHOULD NOT BE EXCLUDED UNDER FRE 403.

Federal Rule of Evidence 403 gives the court discretion to exclude relevant evidence if the probative value of the evidence is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence or if the fact is of consequence in determining the action. Fed. R. Evid. 401. The court “must appraise the genuine need for the challenged evidence and balance that necessity against the risk of prejudice to the defendant.” *U.S. v. Blyden*, 964 F.2d 1375, 1378 (3d Cir. 1992) (quoting *U.S. v. Scarfo*, 850 F.2d 1015, 1019 (3d Cir. 1988) (quotations omitted)).

The statements made to the police officers are relevant to the identity of the shooter, which is of consequence in determining this action. The jury may find the identity of the shooter more or less likely to be the Defendant based on the statements of the victim. Defendant argues that the statements are highly prejudicial based on the potential to confuse the issues or mislead the jury. Defendant contends that the uncertainty of the officers as to whether the victim identified “David Phillip” or “David Peter” as the shooter outweighs the probative value of the evidence. The Court disagrees. The victim may have been the only witness to this crime, and the probative value of the victim’s identification of his shooter is high. It is up to the jury, as the trier of fact, to determine how to evaluate the certainty of the identification. The Court believes that the probative value of the victim’s statements as to the identity of the shooter, the shooter’s description, and the description of the shooter’s vehicle outweighs the risk of prejudice in the form of confusion of the issues or misleading the jury.

III. CONCLUSION

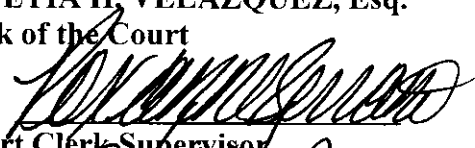
Based on the preceding discussion, the Court finds that the victim's statements to police officers regarding the identity of the shooter, his approximate location, and a description of the shooter's vehicle should not be excluded. The statements are nontestimonial and are not barred by the Confrontation Clause of the Sixth Amendment. The statements qualify as "excited utterances" under Federal Rule of Evidence 803(2) and are an exception from the general rule of hearsay inadmissibility. The probative value of the statements outweighs the risk of prejudice to the Defendant in the form of confusion of the issues or misleading the jury. Accordingly, Defendant's *Motion to Exclude Testimony* will be denied under separate Order of even date.

Dated: August 21st, 2012



DARRYL DEAN DONOHUE, SR.
PRESIDING JUDGE

ATTEST:
VENETIA H. VELAZQUEZ, Esq.
Clerk of the Court

By: 
Court Clerk Supervisor

Date: 8/24/12

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ORDER

THIS MATTER is before the Court on Defendant's *Motion to Exclude Testimony* filed on March 24, 2010. For the reasons fully explained in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant's *Motion to Exclude Testimony* is **DENIED**; and it is finally

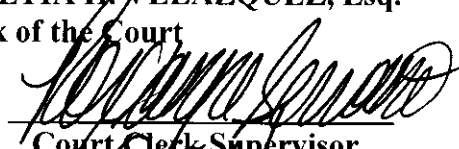
ORDERED that a copy of this Order be served on the parties.

DONE SO AND ORDERED this 21st day of August, 2012.



DARRYL DEAN DONOHUE, SR.
PRESIDING JUDGE

A T T E S T:
VENETIA H. VELAZQUEZ, Esq.
Clerk of the Court

By: 
Court Clerk Supervisor

Date: 8/24/12