



## DPS TRAINING BULLETIN

LEGAL BULLETIN NO. 311

June 26, 2006

### ADMISSIBILITY OF TESTIMONIAL STATEMENTS

#### AS HEARSAY OF WITNESSES

#### NOT APPEARING AT TRIAL

<b><u>Reference:</u></b>	Adrian Martell Davis v. Washington	United States Supreme Court No. 05-5224 _____ U.S. _____ June 19, 2006
	Hershel Hammon v. Indiana	United States Supreme Court No. 05-5705 _____ U.S. _____ June 19, 2006

### **FACTS:**

This Bulletin addresses two cases involving statements made to 911 operators by victims of domestic violence. The court rules that one of the statements (by Michelle McCottry) was not testimonial and could be used at trial, but the other statement (by Amy Hammon) was testimonial and could not be used at trial.

McCottry called 911 to report she had been assaulted by her former boyfriend, Adrian Martell Davis. Police arrived within four minutes of her call. Davis had already left the scene, but police observed that McCottry was "in a shaken state and she had fresh injuries on her forearm and face." Davis was charged with felony violation of a domestic no-contact order. Police officers who responded testified at the trial. McCottry did not appear at court to testify. Over Davis' objections, the trial court admitted the recording of her exchange with the 911 operator and the jury convicted Davis.

When police arrived at the Hammon residence, they found Amy Hammon alone on the front porch appearing "somewhat frightened," but she told the officers that "nothing was the matter." Amy gave the officers permission to enter the

house. The officers saw "a gas-heating unit in the corner of the living room that had flames coming out of the front." There were also pieces of glass on the floor in front of the heating unit. Hershel was in the kitchen and told officers that he and his wife had been arguing but "everything was fine now and that the argument never became physical."

The officers separated Amy and Hershel. Hershel became angry and wanted to be present while police were talking to Amy, but police rebuffed his request. Amy told officers that Hershel "broke our furnace and shoved me down on the floor into the broken glass." She also said, "he hit me in the chest and threw me down and he broke our lamps and phone." Amy told the officers that Hershel "tore up my van where I couldn't leave the house and he attacked my daughter." Hershel was charged with domestic battery and with violating his probation. Amy was subpoenaed but did not appear at Hershel's trial. The police officer was allowed to testify as to what Amy had told him. Hershel objected, stating he was not allowed to cross-examine the person (Amy) purported to have made the statements.

**ISSUE #1:**

Were the statements identifying Davis as McCottry's assailant testimonial?

**HELD:** No--the portion of the 911 conversation in which McCottry identified Davis as her assailant was not testimonial; the interrogation on the phone was to enable police assistance to meet an ongoing emergency.

**ISSUE #2:**

Were the hearsay statements of Amy Hammon offered at trial by the police officer testimonial?

**HELD:** Yes--there was no emergency in progress; she told police when she arrived that everything was fine.

**REASONING:**

1. (Both cases) The confrontation clause bars admission of testimonial statements of a witness who did not appear at trial unless he was unable to testify, and the defendant

had a prior opportunity for cross-examination. (emphasis added)

2. (Both cases) Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when 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.

3. (Davis) McCottry was speaking to the 911 operator about events as they were actually happening; she was facing an ongoing emergency. The statements elicited were necessary to enable police to resolve the present emergency rather than simply learn what happened in the past. She was not acting a witness (when she called 911) or testifying.

4. (Hammon) Amy Hammon's interrogation at the scene was part of an investigation into possible criminal past conduct. There was no emergency in progress; she told police when they arrived that things were fine. The officer questioning her was seeking to determine not what was happening, but what had happened.

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