THE SUPREME COURT OF THE UNITED STATES

WILLIAM JERALD LYNDUSKI,	:	
	:	
Petitioner,	:	No. 11-703606
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	
	:	

ORDER GRANTING CERTIORARI

The Petition for Certiorari is hereby granted as to the following issues:

1. Whether the Third Circuit properly affirmed the admission of Officer Montez's trial testimony regarding statements made to him by Anders Holmvik as non-testimonial and therefore not inconsistent with the Confrontation Clause.
2. Whether the Third Circuit properly affirmed the admission of Principal Alice Murphy's trial testimony regarding statements made to her by Martin McCleary under the excited utterance exception to the hearsay rule.

IT IS SO ORDERED
DATED: December 1, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WILLIAM JERALD LYNDUSKI	:	
	:	
Petitioner,	:	No. 60-6703
	:	August 19, 2011
	:	
v.	:	
	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	
	:	
	:	

Before **BENSON, STABLER, MUNCH,** Circuit Judges.

BENSON and **STABLER** each concurring in part and dissenting in part.

OPINION OF THE COURT

MUNCH, Circuit Judge.

Appellant, William Jerald Lynduski, appeals his conviction and sentence. Lynduski contends that the district court improperly admitted, over his objection, testimony from two witnesses: Principal Alice Murphy's testimony concerning statements made to her by Martin McCleary, and Officer Walker Montez's testimony concerning statements made to him by Anders Holmvik. Lynduski argues that Murphy's testimony relayed inadmissible hearsay and that Montez's testimony relayed "testimonial" statements of Holmvik that violated the Confrontation Clause. We disagree, and affirm the district court's conclusions that (1) McCleary's statements to Murphy fit within the excited utterance exception to the hearsay ban, and (2) Holmvik's statements to Officer Montez were non-testimonial and their admission therefore did not violate the Confrontation Clause.

I. FACTUAL BACKGROUND

Based on the Record below, the jury could have reasonably found the following facts. Sweet Valley is a quiet town in the central part of the Commonwealth of Widener. The area includes several high schools with highly competitive sports programs and a local state university with a national reputation for its basketball program. At the time of his termination in 2011, Coach William Jerald Lynduski had been head basketball coach and a member of the staff at Sweet Valley North for over 15 years. His teams had won three state basketball championships and finished second twice. He was highly regarded in the community, not only as a successful coach but also for his volunteer work with underprivileged boys and girls.

In December 2010, Pat Jaterno was 16 years old and a member of Sweet Valley North's varsity basketball team. On December 1, 2010, Lynduski kept Jaterno after practice to work on his foul shots. Jaterno lived on the outskirts of Sweet Valley with his mom; his father disappeared right after he was born. His hometown, Happyville, hugs the state line of Widener and the State of Penn. After the foul-shooting session, Lynduski suggested that he help Jaterno stretch to alleviate the tension in his quadricep muscle. Jaterno agreed, and Lynduski led him to the weight room. Martin McCleary, a member of Sweet Valley North's athletic department and the assistant varsity basketball coach, was doing some last minute clean up on the basketball court when he heard noises coming from the weight room. McCleary testified that after hearing someone moaning, he went to investigate. He walked in and saw Lynduski lying on top of Jaterno, who was facing down with his leg bent back. He heard Jaterno say "Coach it's my quads, not my glutes," at which point McCleary backed out of the weight room and ran toward the main academic building. Upon exiting the building, McCleary testified that he was "frantic," he "wasn't sure exactly what was going on but he knew something wasn't right." McCleary

testified that at that time, he "didn't know what to do; Lynduski was one of the most respected men in Sweet Valley," and "no one would believe that he was acting inappropriately with a young boy after hours on school property, no one." McCleary further testified that he was also worried about his own reputation and job, as well as the reputation of the school. The more he thought about it, the less sure he was about what he saw, and he decided not to "make waves for no reason."

The next day after practice, and at Lynduski's request, Jaterno again stayed to practice his foul shots. This time his best friend Anders Holmvik stayed too, to work on his outside shot. While Holmvik practiced three-pointers at one end of the court, Jaterno and Lynduski worked on foul shots at the other end. McCleary was preparing for a tournament in the coaches office next to the weight room. At 7:00 p.m., after about 100 jump shots, Holmvik called it a night, said goodbye to McCleary on his way out and asked him to tell Lynduski he had gone home. McCleary did not know Lynduski was still there and decided to take a break from spreadsheets and budget requests to go tell Lynduski that Holmvik had gone home. He walked out to the court and didn't see anyone, but noticed the light in the weight room was on and the door was ajar. He began walking towards the weight room when he heard a voice cry out, "Coach, that hurts, I told you yesterday." In response, he heard Lynduski's voice say "It's okay Pat, it will feel good soon, just be patient." At this point, McCleary felt "certain" that there was "something inappropriate going on between Coach Lynduski and Pat Jaterno." He ran outside to the parking lot hoping to see some cars still there, but saw only Lynduski's.

After a sleepless night, McCleary arrived at school at 7:00 a.m. the next day and went directly to Principal Alice Murphy's office. According to Murphy's testimony, McCleary flung the door open and said "Coach Lynduski molested Pat Jaterno last night. I think he did it the

night before too. I saw them, I saw him, I heard Pat tell the Coach to stop, oh my God, I saw Anders Holmvik hanging around after practice last night too, oh no." Murphy testified that McCleary was "breathless" and "highly agitated." Murphy further testified that McCleary said "I'm sorry I didn't say anything sooner, but I didn't want to rock the boat. Coach has an untarnished reputation and I didn't want to ruin his life. But after what I saw again last night, I couldn't hold back any more." Murphy called the police right away and spoke with Officer Montez who said he would come by the school as soon as possible to investigate the allegations.

Officer Montez arrived at Sweet Valley North around 10:00 a.m., right before the second period. He found McCleary sitting in the coach's office. McCleary explained what he saw on December 1st and what he heard the night before in the weight room. After asking a series of questions, Officer Montez thanked him and went to find Jaterno, who was studying in the library during his free period. Jaterno did not want to talk to Officer Montez at first, but eventually Jaterno stated that nothing happened and he did not know what Coach McCleary was talking about. Officer Montez responded that Jaterno should not be ashamed because it was not right for an adult man to do those things with a young boy. After additional questioning, Jaterno told Officer Montez that Coach Lynduski made him do stretches that he never did with any other coaches. He said they involved Lynduski taking off Jaterno's shorts and underwear and "doing things below the belt." Jaterno further explained that those "things" included Lynduski engaging in anal intercourse. Officer Montez testified that he then went back to talk to McCleary right away, out of concern that other students were being harmed too. He asked McCleary if there were any other students who routinely stayed after practice. McCleary told him that typically the students did not, but the day before, Anders Holmvik stayed after to practice his jump shots.

Officer Montez found Holmvik walking to the library after the bell rang to start third period. He explained why he was there and as they sat down, Officer Montez asked Holmvik if there was anything he wanted to tell him about Coach Lynduski. Officer Montez testified that at first "Holmvik said he wasn't sure what I was talking about." He further testified that he asked Holmvik about anything that might have seemed out of the ordinary after practice when no other teammates were there; Holmvik responded: "Coach never did anything weird to me, but I've seen him take Pat into the weight room after practice a bunch of times. He usually closes the door, but once I walked in and saw Pat lying down, face forward, with his basketball shorts at his ankles."

Lynduski was indicted on February 14, 2011, by a grand jury sitting in the Eastern District of Widener. The indictment charged Lynduski with one count each of unlawful contact with a minor, corrupting a minor, endangering the welfare of a child, and indecent assault. The school year ended on May 1, 2011, and Anders Holmvik moved with his family to Rome, Italy.

On May 15, 2011, Lynduski filed a pre-trial motion to exclude as hearsay the testimony by Murphy of any and all statements made to her by McCleary. The government argued that Murphy's testimony was permissible because McCleary's statements to her were an excited utterance under F.R.E. 803(2). Lynduski's motion also sought to exclude the testimony of Officer Montez regarding any and all statements made to him by Holmvik. The government argued that Holmvik's statements to Officer Montez were made during an ongoing emergency and not in a formal interview setting and therefore were non-testimonial and not in violation of the Confrontation Clause. The district court conducted an evidentiary hearing on Lynduski's motion on May 26, 2011.

The district court denied the motion on July 6, 2011. The court found that the statements by McCleary to Murphy were made while he was under the excitement of the incidents and fell under F.R.E. 803(2). The court also found that because Officer Montez spoke with Holmvik at Sweet Valley North, while he was investigating an ongoing emergency, and not in a formal interview setting at the police division, the statements made to the officer were non-testimonial and their admission at trial would not violate the Confrontation Clause. The government asserted that the statements were not being offered for hearsay purposes, but rather to show the police officer's course of action. Lynduski had no further objection at this time.

Lynduski went to trial, and through renewed objections, preserved his right to appeal the denial of his motion to exclude the testimony of both witnesses. His objections were overruled at trial. On August 7, 2011, Lynduski was found guilty on all counts. He was later sentenced to fourteen years in prison. Lynduski filed an appeal seeking this Court's review of the district court's denial of his motion to exclude evidence.

II. DISCUSSION

A. ANDERS HOLMVIK'S STATEMENTS TO OFFICER MONTEZ

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend VI. "The text of the Confrontation Clause applies to witnesses against the accused - in other words, those who bear testimony. Testimony, in turn, is [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford

v. Washington, 541 U.S. 36, 51 (2004). One accusing another of a crime and making a formal statement to that effect is bearing testimony; one who makes casual statements is not. Id.

Lynduski challenged the admission of testimony by Officer Montez regarding his conversation with Holmvik, arguing that the statements made by Holmvik were testimonial and that without an opportunity to cross-examine Holmvik himself; this evidence violated the Confrontation Clause. We do not agree. In Crawford, the witnesses were read Miranda warnings before they gave statements and issued two formal statements to detectives regarding the events that took place. Id. at 38. Holmvik was not formally interrogated for a crime, nor was he advised that his statement was being made under oath – he simply answered questions casually posed to him by a police officer at his school during his free period.

In addition, the primary purpose of the statement is at the forefront of concern regarding the Confrontation Clause of the Sixth Amendment. See Davis v. Washington, 547 U.S. 813 (2006). In Davis, the primary purpose test was described as follows:

> statements are non-testimonial 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 the later criminal prosecution.

Id. at 822. In our view, the Record is clear that when Officer Montez met with Holmvik, it was in response to an ongoing emergency. McCleary reported that on the two previous days he had heard or seen inappropriate sexual behavior occurring, and on one of these occasions Holmvik had also been present just minutes before. Thus, under the Davis standard, the conversation between Officer Montez and Holmvik was primarily an effort to resolve an ongoing emergency –

sexual misconduct on school property, not a formal interview by the officer. Much like the 911 call in Davis where the caller was relaying events as they were happening, Holmvik was giving Officer Montez information about a series of events. In Hammon, the case decided with Davis, the victim's statements to multiple responding officers after a domestic situation had ceased were deemed testimonial. See Davis, 547 U.S. at 829-830. Here, unlike Hammon, there was only one officer speaking with a young man to investigate re-occurring misconduct by his revered basketball coach.

The Davis primary purpose test was further clarified to require consideration of circumstances surrounding the statement to determine whether it was testimonial in nature. See Michigan v. Bryant, 131 S. Ct. 1143 (2011). In Bryant, the Court reasoned that "to determine whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency, which would render the resulting statements non-testimonial … the circumstances in which the encounter occurs and the statements and actions of the parties [should be objectively evaluated]." Id. at 1156. To this end, the formality, location, context of the statement, in addition to the parties' perception of the level of emergency are important considerations. Id. at 1160, 1162. The existence of an ongoing emergency is particularly relevant in determining whether statements are testimonial because it clarified whether the statements serve to explain what already happened or to "end a threatening situation." Id. at 1157. The Court aptly noted in Bryant that "an emergency does not last only for the time between when the assailant pulls the trigger and the bullet hits the victim. If an out-of-sight sniper pauses between shots, no one would say that the emergency ceases during the pause." Id. at 1165. Here, Officer Montez was embarking on a course of action to investigate the allegations, and speaking to Holmvik at the school was one step in the process. Officer Montez spoke with a number of people at Sweet

Valley North and when he learned that Holmvik had also stayed after practice, he went directly to speak with him. Therefore, Holmvik's statements to Officer Montez guided him in investigating the ongoing emergency.

The dissent argues that conversation between Holmvik and Officer Montez may have begun casually, but became formal questioning because no ongoing emergency was established. However, the Record shows that the officer continued his investigation at the school throughout the day, repeatedly reconnecting with McCleary because he was concerned that other students might be harmed. We agree with the Fifth Circuit that "a conversation which begins as an interrogation to determine the need for emergency assistance can evolve into testimonial statements once that purpose has been achieved." United States v. Proctor, 505 F.3d 366, 371 (5th Cir. 2007) (holding that statements made during a 911 call when the suspect with a gun fled the scene were made during an ongoing emergency because there were no assurances that he would not return). The present case involves child abuse of a sexual nature that occurred on school property after hours and was reported to the principal. Officer Montez was investigating those accusations and his conversation with Holmvik was, once again, a step in the process of gathering information.

The only issue before us is whether Holmvik's statements to Officer Montez were testimonial and thus in violation of the Confrontation Clause of the Sixth Amendment. Non-testimonial statements are not subject to constitutional scrutiny and are permissible at trial if no other objection is raised as to their admissibility. As far as Officer Montez knew, the reports of inappropriate sexual activity by Lynduski could have recurred that very day, with Jaterno or some other vulnerable victim at Sweet Valley North. Due to the circumstances surrounding the statements and the ongoing emergency established in the Record, we do not agree with

Lynduski's argument that the statements made by Holmvik to Officer Montez were testimonial, and we affirm the district court's rejection of that argument at trial. Again, the question whether Holmvik's statements were hearsay is not before us.

B. MARTIN MCCLEARY'S STATEMENTS TO PRINCIPAL MURPHY

The Federal Rules of Evidence provide that hearsay is a statement that the speaker makes out of court, not while testifying at the current trial or hearing, and a party offers in evidence to prove the truth of the matter asserted in the statement. F.R.E. 801(c)(1)(2). One of the many exceptions to the hearsay ban is a statement relating to a startling event or condition, made while the speaker was under the stress of excitement that it caused. F.R.E. 803(2).

There is no question that McCleary's statements to Murphy were hearsay. The government offered them to prove the truth of what they asserted – that McCleary had seen and heard Lynduski engaging in inappropriate sexual conduct. The issue, however, is whether McCleary was overwhelmed by the excitement of a startling event when he spoke with Murphy. The Record reflects that Murphy testified that McCleary was "breathless" and "highly agitated" when he burst into her office and blurted out the information. The statements in the Record do not appear to have been previously rehearsed, nor were the statements self-serving in any way; rather, they appear to resemble a spontaneous type of utterance.

There are three elements necessary to qualify for the excited utterance exception: "first, there must be an event startling enough to cause nervous excitement; second, the statement must be made before there is time to contrive or misrepresent; and third, the statement must be made while the person is under the stress of the excitement caused by the event." United States v. Ballew, No. 11-5528, 2012 WL 3156445 at 2 (6th Cir. Aug. 6, 2012) (quoting United Stated v. Arnold, 486 F.3d 177, 184 (6th Cir. 2007); See also Haggins v. Warden, 715 F.2d 1050, 1057

(6th Cir. 1983). Here, McCleary's statements satisfy all three prongs and were properly admitted under the excited utterance exception. First, the event he perceived was startling enough to cause excitement. Surely, witnessing a young person in such a vulnerable scenario is startling. Second, the Record indicates that McCleary went to Murphy's office early on the morning after he witnessed the event to offer his information, leaving no time to fabricate the events. Third, McCleary shouted his description of these events to Murphy. He did not calmly explain what he saw and heard – he burst into her office, without knocking and rattled off the events that took place.

The dissent argues that the time frame is too long for the statements to fall under the excited utterance exception. What the dissent does not consider is that the excited utterance exception does not require that the statement be made contemporaneously with the startling event. Rather, in ruling on the exception, we should consider the totality of the circumstances to determine if the speaker was still under the stress or excitement of the startling event at the time the statement was made. See United States v. Berkman, 433 Fed.Appx. 859, 863 (11th Cir. 2011). Here, McCleary testified that he was unsure of what he saw on the first occasion, but that after the second occasion, he was certain. According to the Record, McCleary did not have any option but to wait until the next morning because no one else was at school at 7:00 p.m. the night before. McCleary told Murphy as soon as he could, first thing the next morning, when he was, as Murphy testified, "breathless" and "highly agitated" by what had happened between Lynduski and Jaterno.

Additionally, the number of minutes and hours that pass is not the only factor in determining whether a person is under the stress or excitement of a startling event. In White, the Court allowed a female rape victim's babysitter, mother, and investigating officer to testify about

the victim's statement concerning the rape, reasoning that the victim's statements were made while she was still under the stress of the event, even though some of the statements were made up to four hours after the incident. White v. Illinois, 502 U.S. 346, 350 (1992). The Court noted that "a statement that has been offered in a moment of excitement-without the opportunity to reflect on the consequences of one's exclamation-may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom." Id. at 356. Surely McCleary's statements the morning after the incident are a compelling example.

We agree with the Sixth Circuit that excitement can even be renewed after the actual event has ceased. In Arnold, the court held that statements made when the victim saw her attacker after he left and returned to the scene were admissible as excited utterance. United States v. Arnold, 486 F.3d 177, 186 (6th Cir. 2007). The court said that "the district court permissibly admitted [the] statement as part of the same emotional trauma that captured [her] earlier statement to the officers." Id. Here, McCleary saw inappropriate sexual conduct on December 1st and was troubled by the events, but testified that he "decided not to make waves for no reason." When he heard what he thought were those same events occurring the next night, his excitement was renewed by the events, but he was left with no recourse due to the late hour. He spoke with the principal at his earliest opportunity the next day. Considering the totality of the circumstances, this Court finds that those statements were made when McCleary was still under the excitement of the startling event.

For the foregoing reasons, the judgment of the district court is affirmed.

BENSON, concurring in part and dissenting in part.

With regard to the admission of Holmvik's statements to Officer Montez, I dissent. It is erroneous for the majority to hold that the conversation between Holmvik and Officer Montez was non-testimonial. The admission of such testimony is a violation of the Sixth Amendment to

the United States Constitution. Officer Montez went to the school in uniform to sit down with Holmvik, in a one-on-one setting. Although the facts differ from Davis, the officer here essentially conducted an interview with Holmvik about the events in the weight room, asking him questions to gain information about what happened the night before. The emergency situation was not ongoing at the time; Officer Montez was gathering information about an event that had already transpired, for purposes of a possible later prosecution. The Court in Davis found that an interrogation was formal enough when it was conducted in a separate room, away from the alleged attacker (who tried to intervene) with the officer receiving replies for use in his investigation. Davis, 547 U.S. at 830. Here, Officer Montez interviewed Holmvik to gather information about a past event. Thus, "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford, 541 U.S. at 68.

Further, under the primary purpose analysis the majority uses, it is clear that Officer Montez's primary purpose was to investigate past occurrences, not resolve an ongoing emergency. The interview took place during the school day, not after school when Jaterno or any other student was in Lynduski's care. The majority asserts that the determination centers on ending a threatening situation but here we do not have that. The situation at issue had ceased.

Even analyzed in a light most favorable to the government, the interaction may have begun as a casual conversation but the statements became testimonial when Holmvik gave specific details of what he saw. "This evolution may occur if, for example, a speaker provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency…" Bryant 131 S.Ct. at 1159. While the perception of the parties involved is an important characteristic of the testimonial nature of the statements, as the majority points

out, I do not see how a young man would have any other perception than that his statements to a police officer would be used against Lynduski upon his arrest. In order for Holmvik's statements to be admissible at trial, he must testify in order to provide Lynduski with an opportunity to cross examine him as provided by the Sixth Amendment to the United States Constitution.

With regard to Martin McCleary's statements to Principal Murphy, I concur in judgment.

STABLER, concurring in part and dissenting in part.

With regard to Martin McCleary's statements to Principal Murphy, I dissent. I cannot agree with the majority that those statements fall within the excited utterance exception to the hearsay ban. The majority relies on White and the time frame in which the incident was reported, but those facts differ vastly from this case. McCleary waited roughly 12 hours before he told Murphy what he heard and saw in the weight room. In White, the hearsay testimony at trial was that of at most a four-hour span after the incident. White, 502 U.S. at 350. McCleary went home, went to sleep, woke up, went to school, and told Murphy about the incidents. This is not consistent with an acceptable time frame for excitement from a startling event.

While it is not required that the statements be made contemporaneously with the startling event, one of the necessary elements is that "the statement must be made while the person is under the stress of the excitement caused by the event." Ballew, 2012 WL 3156445 at 2. This element requires a certain demeanor of the speaker. In Ballew the court noted that the speaker was described as "screaming" and "very scared." Id. Further, the Sixth Circuit in Arnold, held that the statements the victim made to the 911 operator, statements made to police upon their arrival at the scene, and statements made upon her attacker's return to the scene were admissible under the excited utterance exception. Arnold, 486 F.3d at 180. The speaker was described as

"hysterical," "visibly shaken," and "crying" when she spoke with the police officers shortly after her mother's boyfriend pulled a gun on her. Id. Additionally, unlike the speaker in Arnold, McCleary's statements were made many hours after the event and it is improbable that he was still under the stress and excitement necessary to meet the elements of excited utterance. Without questioning McCleary's veracity here, he certainly had more than enough time to contrive, misrepresent, or even just forget. Therefore, I cannot agree with the majority that his statements were admissible as an excited utterance.

With regard to Anders Holmvik's statements to Officer Montez, I concur in judgment.