No.

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

GARRY SMITH

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR A WRIT OF CERTIORARI

Michael C. O'Malley
Cuyahoga County Prosecutor
Daniel T. Van
Assistant Prosecuting Attorney
Counsel of Record
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7865
dvan@prosecutor.cuyahogacounty.us
Counsel for Petitioner State of Ohio

QUESTION PRESENTED

Because the Confrontation Clause affords criminal defendants the right during trial "to be confronted with the witnesses against" them, is the initial conversation with police officers, which was recorded on body-worn camera, nontestimonial when: (1) the injured person makes initial statements to responding officers while receiving emergency medical care for injuries of unknown origin; (2) the interaction lacks the formality and structure of an investigative interview; and (3) the statements fall within a "firmly rooted" hearsay exception indicating lack of testimonial intent?

PARTIES TO THE PROCEEDINGS

Petitioner is the State of Ohio. Respondent is Garry Smith. No party is a corporation.

RELATED PROCEEDINGS

Supreme Court of Ohio

State v. Smith, No. 2023-1289
(Dec. 10, 2024 – judgment entry)

Ohio Court of Appeals, Eighth Judicial District:

State v. Smith, No. 111274
(Mar. 2, 2023 – affirming convictions in CR-22-655568 and vacating convictions in CR-651674); (Apr. 4, 2023 – denying motion to reconsider); and (Aug. 8, 2023 – denying motion for rehearing en banc)

Ohio Court of Common Pleas, Cuyahoga County:

State v. Smith, No. CR-20-651674-A
(Jan. 19, 2022 – entering final judgment of conviction after bench trial)

State v. Smith, No. CR-655568-A
(Jan. 19 2022 – entering final judgment of conviction after bench trial)

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PETITION FOR A WRIT OF CERTIORARI

The State of Ohio petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is not yet reported but is available at 2024 Ohio LEXIS 2784 and through Ohio's internet reporter at 2024-Ohio-5745 and may be accessed at https://www.supremecourt.ohio.gov/Rod/docs/. It is reprinted in the Appendix ("App") at 1a -53a. The Ohio Court of Appeals decision is reported at 209 N.E.3d 883 and reprinted at App. 55a-128a.

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JURISDICTION

The Supreme Court of Ohio entered its judgment on December 10, 2024. The State of Ohio invokes the Court's jurisdiction under 28 U.S.C. § 1257. The Supreme Court of Ohio's decision remanded for additional proceedings. App. 24a-25a. But in applying *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975), the decision below is final.

As explained in *Cox Broadcasting Corp.*, a judgment is final when it falls within one of four categories: (1) when further state proceedings are pending but the federal issue is conclusive; (2) when a state's highest court has decided a federal question that requires resolution regardless of future state proceedings; (3) when a federal claim has been finally decided, with state proceedings to follow, but future federal review would be impossible; or (4) when state courts have decided a federal issue, and although

further proceedings might resolve the case on non-federal grounds, reversing on the federal issue would end all litigation on the claim. *Florida v. Thomas*, 532 U.S. 774, 776 (2001).

This case meets all four categories. First, despite the remand to the Ohio Court of Appeals and possible further remand for a new trial, the federal issue is conclusive. If the statements from the victim are non-testimonial, that would end the need for further proceedings. Second, the Supreme Court of Ohio's decision on the Confrontation Clause will remain regardless of what further proceedings take place in this case. The decision below could be read to bar prosecutors in Ohio from introducing body-worn camera evidence of victims speaking to police about emergencies that have not ended. Third, because the remand is to determine whether the interaction between EMTs falls under a hearsay exception and to determine whether harmless error applies, it leaves only two possibilities: (1) that a new trial will be ordered without the State admitting the body-worn-camera statements to police, or (2) the lower courts will find the statements to be harmless error. But the Ohio Court of Appeals previously found that the alleged Confrontation Clause violation was not harmless error. App. 105a-106a. So the only possibility is a new trial without the statements to police officers. In that case, the answer to the federal question is final. Finally, the state court's decision on the federal issue determines the admissibility of evidence in a potential retrial the Ohio Court of Appeals again finds that the Confrontation Clause error is not harmless beyond a reasonable doubt. But

reversal on the federal question would end litigation on the claim.

RELEVANT CONSTITUTIONAL PROVISION AND RELEVANT RULE OF EVIDENCE

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Section One of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Ohio R. Evid. 803(2) provides that:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . A statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition.

INTRODUCTION

Picture this: A woman, visibly injured, sits in an ambulance. As EMTs tend to her wounds, she describes to police officers in five seconds that she was injured by her fiancée. The entire six-minute interaction appears on body camera footage. The Supreme Court of Ohio split this fluid encounter into two parts: testimonial and nontestimonial based on the listener's employer.

The Ohio court ruled that the victim's quick reply to a police officer is testimonial. During the same brief encounter, her remarks to EMTs sail into evidence. But the distinction between the responses is not significant. The separation overlooks the full context. And here the encounter was far from formal and lacked testimonial intent.

The Confrontation Clause's guarantee that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." It was never interpreted literally and never intended to create artificial distinctions. Here, the officer asks the injured woman getting emergency care, "What happened?" She answers,

> My fiancé beat me up 'cuz I had an argument with his niece. Me and his niece had an argument. This is what he did. He pulled my hair up on the roots.

This is no formal deposition. No battery affidavit. No structured interview designed to build a case for prosecution. No intent to prepare a substitution for trial testimony. It's an informal, spontaneous

interaction that should fall outside the Confrontation Clause's core concerns.

The Petition should be granted.

STATEMENT OF THE CASE

I. Factual Background

On March 21, 2020, Cleveland police officer Brandon Soucek responded to an assault. App. 5a. The nighttime call was for a woman who had been assaulted. *Id.* Upon arrival, the woman was being escorted into an ambulance. *Id.* Officer Soucek activated his body worn camera and entered the ambulance. App. 5a-6a. The woman was visibly injured. App. 8a. She had a swollen face and eye. *Id.* There were spots of blood and glue where her hair had been ripped out. *Id.* The officer asked (perhaps as any human would ask upon this sight), "So what happened?" App. 6a, 66a.

The woman immediately answered, "My fiancée beat me up . . . . This is what he did. He pulled my hair up on the roots." App. 66a. The officer asked, "Do you live with him?" *Id.* She answered, "We do live together." *Id.* The EMT personnel treating her asked her to put her arm up. The EMT, referring to a woman outside the ambulance asked, "Is this your niece here? She said you're five months pregnant? Does that sound about right? Did you take any kicks or punches or anything to the stomach?" *Id.* The woman responded, "To my knee, to my chest, to my stomach. I no longer feel my baby moving." *Id.*

Meanwhile, Officer Soucek was conferring with his partner. The niece said that the woman wouldn't

tell her anything. The victim had showed up at her house, knocking on her door; the woman lived in a neighboring city. App. 6a.

With uncertainty as to what had happened, the following conversation occurred with the woman answering in a fragmented way:

Officer:	Where did this happen at?
Woman:	Outside.
Officer:	Outside where?
EMT:	In front of this house here?
Woman:	It happened down the street.
Officer:	On the street?
Woman:	Yeah.
Officer:	Do you live over here?
Woman:	No. We were on our way to her house, but it didn't happen in her house.
Officer:	But it happened down the street here?
Woman:	We had an argument and, you know, we were all, we were drinking. I'm not even supposed to be drinking.
Officer:	So, it happened in the car?
Woman:	Outside the car.
Officer:	So, is he still in the area, or did he drive away?

Woman: No. He drove away. He left.

App. 7a.

After this point the police asked the woman for her social security number, her name, and her date of birth. *Id.* The woman gave it. *Id.* After, the officer asked for her fiancée's name. App. 8a. She answered, "Garry Smith . . . two r's." *Id.* The EMT continued to administer care to the woman, now identified here by her initials B.B. *Id.*

Trying to understand why B.B.'s heart rate was high, the EMT tried to confirm that B.B. had been drinking and smoking. App. 8a-9a. B.B. confirmed alcohol and drug use. App. 9a. Another EMT was preparing a heart rate monitor and Officer Soucek asked, "Can you tell me exactly what he did at the car?" App. 9a. The conversation continued:

Officer: Can you tell me exactly what he did at the car?

B.B.: He punched me in my face and other people were trying to break it up and he pushed everybody away. He threatened to shoot me and said he would kill me. He was also intoxicated. Very intoxicated.

Officer: And he ripped out your hair?

B.B.: He ripped out my hair. This is what he did to me. He kneed me to the face, the chest, stomach.

[EMT INTERRUPTING]

Officer: He kneed you in the stomach?

B.B.:	Yes.
EMT:	You're feeling no movement from the baby, right?
B.B.:	No movement. And it was moving until this incident happened.

App. 9a-10a.

B.B. would be transported to a hospital where she was treated for her injuries. App. 68a. Photographs were taken. App. 69a. At the hospital while receiving medical treatment, B.B. stated that Smith had a gun on him that day and that she was assaulted previously. App. 69a. Medical records also document details of the assault. App. 70a. The case was formally assigned to a detective to investigate, but multiple attempts to contact B.B. were unsuccessful. App. 71a.

II. Procedural History

A. Trial Court Proceedings

Smith was indicted on two counts of domestic violence in violation of Ohio Rev. Code § 2919.25(A). App. 3a. The charges included sentencing enhancements for a pregnant victim and for a prior domestic-violence conviction. *Id.* While he was out on bond, he again assaulted B.B. on December 26, 2020. App. 57a. He was indicted for that incident as well. App. 57a.

Smith filed a motion in liminie seeking to preclude the body-worn camera from being introduced. App. 3a. As to the December 26, 2020 assault, Smith sought to preclude the admission of a 911 recording. *Id.* Smith's Sixth Amendment

challenge was denied. Important here is that before trial, the trial court found the statements on the body-worn camera to be non-testimonial. App. 62a-63a. The trial court deferred its ruling on whether the statement fell within a "firmly rooted hearsay exception." App. 63a. Later the statement would be admitted under an excited utterance exception. App. 11a.

After a bench trial, Smith was convicted as to both criminal occasions. App. 55a-56a, 83a-84a.

B. Convictions Reversed

The Ohio Court of Appeals vacated Smith's domestic-violence convictions relating to the March 21, 2020 assault. The court held that admitting B.B.'s statements to police—made while she was being treated in an ambulance—violated the Confrontation Clause. By then, the court reasoned, any emergency had ended: B.B. had walked away from the scene, was receiving medical care, faced no immediate threat from Smith, and was simply recounting past events to officers. App. 98a-99a. Following *Davis v. Washington*, 547 U.S. 813 (2006), the court deemed these statements "testimonial" and thus inadmissible without cross-examination. App. 100a-102a. And because these statements formed the backbone of the State's case, their admission was not harmless error. App. 105a-106a. The court left undisturbed Smith's convictions that stemmed from the December 26, 2020 assault.

C. The Opinion Below

The Supreme Court of Ohio reversed the intermediate appellate court and drew a sharp line

between statements made to police and EMTs. For statements to police, the Court decided that the police officer knew any active threat against the victim was over *before* asking any questions, such that the police officer knew he was investigating a past assault. App.19a, 21a. The Court held these statements to police were testimonial and properly excluded. App. 23a. But for the statements B.B. made to EMTs to seek medical care, the Court reached a different conclusion. App. 24a. Because B.B. made these statements to obtain treatment, not to build a case against Smith, they were nontestimonial. *Id.* The Court treated the Confrontation Clause analysis as distinct from traditional hearsay rules. It remanded for the Court of Appeals to examine whether the EMT statements, though constitutionally admissible, might still be barred by Ohio's hearsay rules. App. 24a-25a.

The dissent remarked that the encounter "had no trappings of a formal interrogation at police headquarters." App. 32a. The dissent also saw a more nuanced timeline. The dissent reasoned the police questioning had two distinct phases. During the initial phase—before B.B. told officers that Smith had left the scene—her statements were nontestimonial. App. 33a. Why? Because Officer Soucek couldn't have known whether Smith posed an ongoing threat until B.B. revealed he had fled. *Id.* But once B.B. disclosed Smith's departure, the interaction shifted. *Id.* The dissent pointed to a clear turning point: when Officer Soucek asked for B.B.'s Social Security number, his questions pivoted from addressing potential threats to building a case. After that moment, B.B.'s statements became testimonial and should have been excluded.

Id. The dissent described the majority's hindsight-based approach as "flawed." App. 34a.

REASONS FOR GRANTING THE WRIT

I. The Confrontation Clause: "Testimonial" Statements

For decades, courts have grappled with a constitutional riddle: What is a "testimonial statement" under the Sixth Amendment's Confrontation Clause?

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held that the Confrontation Clause bars testimonial statements unless the defendant had a prior opportunity for cross-examination. This landmark decision rejected the reliability-based approach of *Ohio v. Roberts*, 448 U.S. 56 (1980), which had allowed hearsay evidence falling within "firmly rooted exceptions" or bearing "guarantees of trustworthiness."

A. The Historical Foundation

The Sixth Amendment guarantees a criminal defendant "the right to be confronted with witnesses against him." The Court's 1895 decision in *Mattox v. United States,* 156 U.S. 237, 242–243 (1895), recognized that while this right aims to prevent ex parte affidavits, it "must occasionally give way to considerations of public policy and the necessities of the case." But the principal evil at which the Confrontation Clause was directed was the "civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." *Id.* at 50. And this Court has consistently rejected a "literal interpretation of the Confrontation Clause" that would bar any out-of-court statement

when the declarant is unavailable. *Idaho v. Wright,* 497 U.S. 805, 813 (1990).

B. The *Crawford* Framework

Crawford marked a dramatic shift. The Court determined that the Confrontation Clause targets "the civil-law mode of criminal procedure, particularly its use of ex parte examinations as evidence." *Crawford*, 541 U.S. at 50. While *Crawford* established that "testimonial" statements require cross-examination, it deliberately left "testimonial" undefined, preferring case-by-case development.

The Court determined that the proper inquiry should be on "those who bear testimony," but left for another day a "comprehensive definition" of what constitutes a testimonial statement. *Id.* at 51, 69. *Crawford* was significant because it departed from *Roberts*.

C. The Evolution of "Primary Purpose" Post-*Crawford*

Since *Crawford*, this Court has incrementally refined what constitutes "testimonial statements" through the "primary purpose" analysis:

1. *The Emergency Distinction*

In *Davis*, 547 U.S. 813, the Court established a critical distinction through two contrasting domestic violence cases decided together.

In *Davis* itself, Michelle McCottry called 911 in a panicked state under attack by her former boyfriend, Adrian Davis. The operator asked, "what's going on," and McCottry responded that Davis was "jumping on" her and "using his fists." *Id.* at 817. The assault

continued during the call itself. The Court found these statements nontestimonial because "circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822.

By contrast, in companion case *Hammon v. Indiana*, police responded to a domestic disturbance and found Amy Hammon alone on the porch, initially claiming "nothing was the matter." *Id.* at 819. Officers later separated her from her husband Hershel and obtained her detailed account of the assault and a handwritten affidavit. The Court deemed these statements testimonial because they were "deliberately recounted, in response to police questioning" after the emergency had ended, with the clear purpose of investigating a possible crime. *Id.* at 830.

The Court drew a bright line: 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." *Id.* at 822.

2. *Expanding "Ongoing Emergency"*

In *Michigan v. Bryant*, 562 U.S. 344, 373 (2011), the Court corrected lower courts that had "construe[d] ongoing emergency too narrowly." The facts were compelling: police found Anthony Covington in a gas station parking lot with a mortal gunshot wound. *Id.* at 349. Before dying, Covington told officers that "Rick" (Bryant) had shot him through a door at Bryant's house. *Id.* The Michigan Supreme Court had

deemed these statements testimonial, but this Court reversed.

The Court clarified that determining primary purpose requires "objectively evaluat[ing] the circumstances in which the encounter occurs and the statements and actions of the parties." *Id.* at 359. Given Covington's critical condition, the armed shooter's unknown location, and the informal, disorganized questioning that occurred, the Court found the primary purpose was addressing an ongoing emergency—not creating trial testimony. The relevant inquiry focuses on "the purpose reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred"—not subjective intent. *Id.* at 360. *Bryant* also distinguished situations involving suspects at large from the deliberate statements in *Hammon*. *Id.* at 357.

3. *Focus on Witness Intent*

More recently, the Court in *Ohio v. Clark*, 576 U.S. 237 (2015), reinforced analyzing the Confrontation Clause question by looking at whether a declarant intended to bear witness. When a child told his daycare teacher who had harmed him, the Court examined:

- The uncertain situation;
- Concern for the child's safety;
- The child's young age; and
- The conversation's informality.

Id. at 244–45. *Clark* established that non-testimonial statements can include identifying perpetrators of

past assaults under appropriate circumstances. The Court emphasized that "standard rules of hearsay, designed to identify some statements as reliable, will be relevant" and ultimately, the question is whether the "primary purpose" was to "create[e] an out-of-court substitute for trial testimony." *Id.* at 245 (alteration in original) (citations omitted). *Clark* properly understands that it was the child's teachers who bore testimony against Clark and that the child did not because he lacked testimonial intent.

II. Judicial Approaches to the Ongoing Emergency Doctrine Vary.

Even though determining whether there is an ongoing emergency is a fact-specific inquiry, courts approach the scope of an ongoing emergency differently. Contrast the decision below with the Supreme Judicial Court of Maine's decision in *State v. Sheppard*, 327 A.3d 1144 (Me. 2024). In *Sheppard*, the Supreme Judicial Court of Maine held that the victim's statements were non-testimonial and noted these facts:

- The victim was still visibly injured and distressed when encountered by police. *Id.* at 1153.
- The statement was made spontaneously and immediately upon the officer's arrival. *Id.* at 1156.
- The assault had occurred only about 20 minutes before the victim's encounter with police. *Id.* at 1148.

- The victim was "upset," "teary," and seemed "overwhelmed." *Id.* at 1146-1147.
- The encounter occurred in an informal setting on the street. *Id.* at 1166-1167.

In *Sheppard*, the victim's statements were non-testimonial even though she described past events. Although a factor, the court relying on its own precedent recognized that the "[a]n 'ongoing emergency' is by its nature broader than the attack itself; it includes the victim's untreated injuries, the ongoing stress of the event, and the possibility that the assailant is still at large and could attack the victim again." *Shepard*, 327 A.3d at 1156 (citing *State v. Kimball*, 117 A.3d 585, 593 (Me. 2015)). The court also considered that a testimonial statement is a solemn declaration made to establish or prove a fact, particularly if an objective witness would reasonably believe the statement would be used in a future trial. Maine's court of last resort held that the victim's statements were "made spontaneously and reflexively, without any opportunity for reflection or fabrication, and while coping with recent injuries-was not made for the primary purpose of giving evidence against *Sheppard*, but rather for the purpose of resolving a current and ongoing emergency." *Shepard*, 327 A.3d at 1156.

The Supreme Court of Ohio's decision contradicts the decision in *Sheppard*. In the case below, the Supreme Court of Ohio described the ongoing emergency, with the benefit of hindsight, as having ceased by the time the officer questioned the victim, as he arrived after the victim was safe (in the court's view) and was receiving help. The Supreme

Court of Ohio also found that the officer's primary purpose was documenting past events, making them inherently testimonial. On the other hand, the Maine Supreme Judicial Court viewed the situation as containing elements of an ongoing emergency, emphasizing the broader context including the victim's physical and emotion condition following the assault that occurred 20 minutes earlier.

Comparing the decision below with the decision in Maine compels a conclusion that jurists can view the existence of an emergency differently on a macro level. Often Confrontation Clause questions involve whether the declarant described contemporaneous events or past ones. Consider a few more examples:

- *United States v. Johnson*, 117 F. 4th 28 (2d Cir. 2023) (An email directed to corporate security at company reporting receipt of death threat was non-testimonial and was an excited utterance.)
- *United States v. Lundy,* 83 F. 4th 615 (6th Cir. 2023) (Statements to police officer on body worn camera were made during an ongoing emergency and deemed non-testimonial where defendant pointed gun at declarant earlier, defendant's location was unknown, nobody knew if defendant would return, indicating a broader view of an ongoing emergency.)
- *United States v. Latu,* 46 F.4th 1175 (2022) (Statements made to medical providers, an hour and twenty-five minutes after attack, about injuries were non-testimonial because

they were elicited to address the ongoing threat to victim's health, again indicating a broader view of an ongoing emergency.)

- *State v. Richards,* 928 N.W.2d 158 (Iowa Ct. App. 2019) (Statements on body worn camera were nontestimonial, where victim left her residence, sought emergency help, was distraught, crying, shaking, bleeding, transported to the hospital, and in response her statements deemed excited utterances, indicating broader view of ongoing emergency.)
- *Gutierrez v. State*, 516 S.W.3d 593 (Tex. App. 2017) (statements to 911 operator were testimonial when suspect had left the scene in his car and victim declined medical attention, indicating a narrow view of an ongoing emergency.)
- *Wright v. State,* 434 S.W.3d 401 (Ark. Ct. App. 2014) (statements to responding officer following domestic incident were testimonial even though the victim was severely injured with thirty lacerations including a stab wound to her abdomen because defendant supposedly "left the area," indicating a narrow view of an ongoing emergency.)
- *State v. Slater*, 939 A.2d 1105, 1114–1115 (Conn. 2008) (looking beyond ongoing emergency and concluding that victims statements regarding recent attack were nontestimonial because they were not a "solemn" declaration that established a

> record of past events but a cry meant to elicit help.)

Reviewing these cases, a central theme emerges. The arguments made in these cases often revolve around whether a declarant is speaking about contemporaneous facts or about a past event. The courts that view an ongoing emergency narrowly will often find testimonial statements where the declarant describes past events – even if it occurred minutes earlier. *Davis* describes a distinction between a question designed to determine "what is happening" as opposed to what happened." 547 U.S. at 830. But this is a distinction in form. The statement is not automatically testimonial because an officer asked a past-tense question. Here, the officer asked, "So what happened?" App. 6a. B.B. answered. *Id.* And her answer was testimonial. App. 23a. Contrast to *Richards*, 928 N.W.2d 158, where the body-worn camera captured the officer asking, "What's going on?" and the victim's response, "he beat me up" was non-testimonial. In both cases, the aftermath of the attack is ongoing. There is a visibly injured person in front of the police officer. One is testimonial. The other is not. Yet, the purpose of both questions is to determine the nature of the injury.

In applying the primary purpose question, the analysis needs to go further than whether a past event is being described. The question should ask if the statement is procured to be a substitute for trial testimony. It should look at the formality of the statement. This is consistent with the text of the Sixth Amendment, which entitles a criminal defendant to be confronted with "witnesses against him." Statements

made during an ongoing emergency or where the existence of an emergency is unknown, basic questions meant to evaluate the situation lack the solemnity and formality associated with testimonial statements.

The same can be said of an excited utterance or statement made for medical treatment. And as Petitioner explains later, the rationale of the "ongoing emergency" analysis is like the rationale of the res gestae doctrine which includes excited utterances and explains why statements, such as those made during an ongoing emergency, are non-testimonial.

III. The Statements Below Were Non-Testimonial.

An objective observer watching B.B. being treated by EMTs would recognize her immediate concern is her well-being. A question is asked. Her answers provided context about what was happening in a gradual, somewhat fragmented way. After the initial remark that her fiancée "beat her up" she states that the assault happened "outside" but then clarifies "down the street" rather than directly in front of the house where they currently are. App. 6a-7a. She adds that it happened, "on our way to her house" but then says, "it didn't happen in her house," and that it happened, "outside the car." App. 7a.

When discussing the incident, she introduces contextual information without being asked. App. 7a. She adds that she's "not even supposed to be drinking." *Id.* Finally, she adds that "he" (presumably referring to her fiancée) left the area. *Id.* And she does not even mention a gun until she is at the hospital. App. 69a. Her responses can be described as:

- Brief and informal;
- Fragmented with incomplete thoughts;
- Conversational in tone with filler phrases ("you know");
- Spontaneous with volunteered information (mentioning drinking when not directly asked) rather than a product of deliberate thought.

And police were asking questions to assess the situation unfolding before them, evidenced by the following:

- Medical emergency context: EMT's presence and questions about fetal movement which includes present-tense concerns ("You're feeling no movement from the baby, right?");
- Location questions: Questioning focusing on where they are and where the incident occurred would be necessary for emergency response;
- Threat assessment focus: The officer's questions about the perpetrator's location ("is he still in the area, or did he drive away?") indicates an assessment of immediate safety rather than building a case.
- Informal, spontaneous responses: Again, B.B.'s fragmented and conversational answers lack formality and point towards a nontestimonial purpose.

With this context, the conversation was non-testimonial. The ambulance was not a Star Chamber. Objectively, there was no intent to be a witness, no battery affidavit, and this was not the type of formal solemn declaration used against Sir Walter Raleigh. Formal solemn declarations would typically be structured, complete, possibly sworn under oath, and would follow specific legal formatting or protocols. B.B.'s statements were none of these things.

No one sought to manufacture an out-of-court substitute for trial testimony. B.B. on that occasion was not a "witness against" Smith under the text of the Sixth Amendment. Police were asking questions to understand the person presently in front of them. By narrowly confining its inquiry into the existence of an ongoing emergency and rejecting other considerations, the Supreme Court of Ohio decided an important federal question in a way that conflicts with relevant decisions of the Court which warrants review under Rule 10.

IV. Hearsay Exceptions Still Relevant to Confrontation Clause Analysis.

The Court in *Crawford* questioned the rationale in *Roberts* that conditioned, "the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" *Crawford*, 541 U.S. at 39 (citing *Roberts*, 448 U.S. at 66). In rejecting the *Roberts* rule, the Court departed from a test based on a mere "judicial determination of reliability." *Id.* But the statement in *Crawford* involved a wife's statement against penal interest used against her husband. *Id.* at 40. This statement was admitted because it "bore

particularized guarantees of trustworthiness." *Id.* at 41. And the Court by this time determined that statements against penal interest that inculpate another criminal defendant are not within a "firmly rooted exception." *Lilly v. Virginia*, 527 U.S. 116, 133 (1999).

To read *Crawford* in a way that renders hearsay absolutely irrelevant to the Confrontation Clause analysis is incorrect for three reasons. First, the statement in *Crawford* was not within a firmly-rooted hearsay exception. Second, the Court in *Clark* reiterated that, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Clark,* 567 U.S. at 245 (citing *Bryant*, 562 U.S. at 358–359). Third, "the Confrontation Clause does not prohibit the introduction of out-of-court-statements that would have been admissible in a criminal case at the time of the founding." *Id.*

A. The Excited Utterance Exception is Firmly-Rooted.

The hearsay exception for spontaneous declarations, also known as excited utterances, has deep roots in Anglo-American jurisprudence. It is firmly established and currently recognized by the federal rules and under Ohio R. Evid. 803 as well as evidentiary rules in other states. The exception can be traced back three centuries. 6 Wigmore, Evidence § 1747, at 196 (Chadobum rev. 1976).

"The evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations…is that such out-of-court declarations are made in contexts that provide substantial

guarantees of their trustworthiness." *White v. Illinois,* 502 U.S. 346, 355, (1992); *Lilly*, 527 U.S. at 126. The rule is recognized under the federal rules as well as nearly every state. Fed. R. Evid. 803(2), Ala. R. Evid. 803(2), Alaska R. Evid. 803(2), Ariz. R. Evid 803(2), Cal. Evid. Code § 1240, Colo. R. Evid 803(2), Conn. R. Evid. 8-3(2), Del. R. Evid. 803(2), Fla. Stat. § 90.803(2), Ga. Code § 24-8-803(2), Haw. Rev. Stat. § 626-1-803(b)(2), Idaho R. Evid. 803(2), Ill. R. Evid. 803(2), Ind. R. Evid. 803(2), Iowa R. Evid. 5.803(2), Kan. Stat. § 60-460(d), Ky. R. Evid. 803(2), La. Code Evid. 803(2), Me. R. Evid. 803(2), Md. R. 5-803(b)(2), Ma. R. Evid. 803(2), Mich. R. Evid. 803(2), Minn. R. Evid. 803(2), Miss. R. Evid 803(2), Mo. Code. R. 26-10-803(2), Mont. Code. R. 26-10-803(2), Neb. Rev. Stat. § 27-803(2), Nev. Rev. Stat. § 51.095, N.H. R. Evid. 803(2), N.J. R. Evid. 803(c)(2), N.M. R. Evid. 11-803(2), N.C. R. Evid. 803(2), N.D. R. Evid. 803(2), Ohio R. Evid. 803(2), Okl. Stat., tit. 12, §2803(2), Or. Stat. §40.460(2), Pa. R. Evid. 803(4), R.I. R. Evid. 803(2), S.C. R. Evid. 803(2), S.D. Codified Laws § 19-19-803(2), Tenn. R. Evid. 803(2), Tex. R. Evid. 803(2), Utah R. Evid. 803(2), Vt. R. Evid. 803(2), Va. Sup. Ct. R. 2:803(2), Wash. R. Evid. 803(2), W.V. R. Evid. 803(2), Wis. Stat. § 908.03(2), and Wy. R. Evid. 803(2). Although uncodified, New York and the District of Columbia recognize the common-law rule. *People v. Del Vermo*, 85 N.E. 690 (N.Y. 1908), *United States v. Edmonds*, 63 F. Supp. 968 (D.C. 1946).

And many states have remarked that the excited utterance to be a firmly rooted hearsay exception. *State v. Mattox*, 390 P.3d 514, 529 (Kas. 2017); *State v. Castaneda*, 621 N.W.2d 435, 445 (Iowa 2001) (recognizing excited utterance as firmly rooted);

State v. Bryant, 38 P.3d 661, 665 (Kas. 2002), *State v. Gates*, 615 N.W.2d 331, 336-37 (Minn. 2000) (pre-*Crawford* recognized excited utterance as firmly rooted hearsay exception and satisfying constitutional requirements); *State v. Salgado*, 974 P.2d 661 (N.M. 1999) (pre-*Crawford* recognizing excited utterance as firmly rooted exception and satisfying Confrontation Clause requirements); *State v. Dennis*, 523 S.E.2d 173, 179 (S.C. 1999) (pre-*Crawford* recognizing excited utterance as firmly rooted and satisfying Confrontation Clause); *State v. Plant*, 461 N.W. 2d 253, 336 (Neb. 1990); *State v. Martinez*, 440 N.W.2d 783, 789 (Wisc. 1989) (same); *State v. Bawdon*, 386 N.W.2d 484 (S.D. 1986); *State v. Daniels*, 380 N.W.2d 777, 785 (Minn. 1986) (same); *State v. Jeffers*, 661 P.2d 1105, 1124 (Ariz. 1983) (expressing there is little doubt that the excited utterance qualifies as a firmly rooted hearsay exception).

What is now commonly referred to as the excited utterance exception is a close relative to the present sense impression and is grounded in the long-standing res gestate doctrine.

The Minnesota Supreme Court addressed this in a case that involved a woman who was choked, lost consciousness, and found her baby missing. Thirty minutes after the attack, she walked to a house exhausted, and while bleeding screamed that someone attacked her and took her baby. Her statements were allowed. The court explained, "Res gestae are events speaking of themselves through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants, under the immediate spur of a

transaction, becomes thus part of the transaction, because it is then the transaction that thus speaks…The question is: Is the evidence offered that of the event speaking through participants, or that of observers speaking about the event?" *State v. Alton*, 117 N.W. 617, 619 (Minn. 1908) citing Wharton, Crim. Ev. §262. As rationale for its admissibility, "a natural and instinctive declaration, made in close connection with [the event] and under circumstances precluding any suspicion of fabrication [is] admissible as part of the res gestae." *State v. Williams*, 105 N.W. 265 (Minn. 1905). In *State v. Childers*, 563 P.2d 999 (Kas. 1977), the Kansas Supreme Court found that a res gestae declaration by one spouse will be admissible against the other, even though the declarant would not have been a competent witness against his spouse and thus the wife's spontaneous statement to the police officer were part of the res gestae and admissible. The same statements today may be considered ones that were made to address the ongoing emergency.

One might also observe that the res gestae question asks whether the person bearing witness—speaking about the event as opposed to the event speaking through the participants. And consider how some of the Court's recent decisions shares a rationale with pre-*Crawford* cases. Take for example the admissible statements in *Smith v. State,* 798 S.W.2d 94 (Ark. 1990) involving the out-of-court statements of a three-year-old who witnessed a murder or *George v. State*, 813 S.W.2d 792 (1991) where a child said dinosaurs, "are going to bite me . . . like Papaw George bites me," and the facts of *Clark*, 576 U.S. 237 ("D did it").

So firmly rooted hearsay exceptions are relevant to the Confrontation Clause analysis. But the Supreme Court of Ohio and the Ohio Court of Appeals considers the constitutional question before addressing the evidentiary rule. App. 13a, fn. 2. The result is a truncated analysis – and here it ended when the Supreme Court of Ohio found the emergency ended.

B. Courts Approach Hearsay Exceptions Differently.

Setting Ohio's methodology aside, post-*Crawford* courts have taken different approaches on whether an excited utterance is non-testimonial. The opinion below ignored that the statements were admitted by the trial court as an excited utterance. But other courts have found that a statement's admissibility as an excited utterance is at least a factor to consider in determining whether a statement is non-testimonial. *See United States v. Brito,* 427 F.3d 53, 60–61 (1st Cir. 2005) (describing the three approaches).

First, under the categorical approach some courts routinely hold that excited utterances are never testimonial. This approach is adopted by the Eighth Circuit. *United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005) (because 911 call was an excited utterance it was nontestimonial under the circumstances); *United States v. Robertson,* 947 F.3d 912, 916 (8th Cir. 2020) ("911 calls are admissible as nontestimonial statements when they are "excited utterances."). This rule is consistent with some pre-*Crawford* decisions. *See, e.g.*, *State v. Robinson,* 773 A.2d 445, 451 (Me. 2001) (concluding because statements were admitted

pursuant to excited utterance, the Confrontation Clause was not violated); *State v. Dennis,* 523 S.E. 2d 173, 178-179 (S.C. 1999) (also concluding because statements were admitted as excited utterance, the Confrontation Clause was not violated).

On the other end of the spectrum, some courts treat the Confrontation Clause question as a distinct inquiry from the excited utterance inquiry. The opinion below took this approach. App. 13a, fn. 2. Other state courts appear to agree. See, e.g., *Raile v. People,* 148 P.3d 126, fn. 11 (Col. 2006).

While the opinion below addressed the Confrontation Clause question first, the Minnesota Supreme Court has addressed the hearsay question first in *Ct. of Appeals State of Minn. v. Tapper*, 993 N.W.2d 432, 439 (Minn. 2023) and *Bernhardt v. State*, 684, N.W.2d 465, 475-476 (Minn. 2004) where the court did not reach the Confrontation Clause question after finding the statements were inadmissible hearsay. The middle ground, which the State pressed below, considers that an excited utterance is interrelated. *Walls v. State*, 184 S.W.3d 730, 742 (Tex. Cri. App. 2006), *Brito,* 427 F.3d at 61.

And so, the Supreme Court of Ohio decided an important federal question in a way that conflicts with the decision of another state court of last resort and with a United States court of appeals. But which is the *correct* approach? The Court should provide the answer.

C. A Statement's Admission Under A Firmly-Rooted Hearsay Exception Should Be Considered.

As discussed, among the factors to consider when determining if a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Clark*, 576 U.S. at 245 (citing *Bryant,* 562 U.S. at 358–359). But the Supreme Court of Ohio found the Confrontation Clause question as a separate inquiry from the hearsay question, at least as to the excited utterance exception. The court indicated that it would consider the Confrontation Clause question first and before the evidentiary rule. App. 13a, fn. 2. The rationale for admitting an excited utterance aligns with the current Confrontation Clause framework and is consistent with the text and history of the Clause.

Consider the contradiction below. The Supreme Court of Ohio found B.B.'s statements to EMTs non-testimonial because they were statements made for the purpose of diagnosis. App. 24a. This too is a firmly rooted hearsay exception. *White*, 502 U.S. at 356-357. So the medical diagnosis exception favors non-testimonial status, while an excited utterance is irrelevant? All things considered, the Court should settle whether firmly-rooted hearsay exceptions affect a statements classification as non-testimonial.

V. The Question Is Important, Recurring, and Raises Policy Concerns.

The Court should also grant the petition for writ of certiorari because the case raises a recurring issue that implicates compelling state interest. The

Ohio Court of Appeals branded prosecutions such as the one here as "part of a disturbing trend." App. 102a. In an earlier case, the State sought to prosecute a defendant for actions that involved setting a victim on fire. Because the victim was unavailable due to medical frailty, the State introduced non-testimonial hearsay in the defendant's prosecution. The same court called this practice "reprehensible" referring to the case as a "victimless prosecution" as opposed to "evidence-based prosecution." *State v. Jones,* 208 N.E. 3d 321, 365 (Ohio Ct. App. 2023). And the admission of a 9-1-1 recording was deemed "abhorrent." *State v. Johnson,* 208 N.E.3d 949, 975 (Ohio Ct. App. 2023).

A "victimless prosecution" or "evidence-based prosecution" is neither reprehensible, abhorrent, or disturbing. When the facts and evidence warrant such prosecution is essential and commensurate with societal values. Through granting certiorari, the Court has a profound opportunity to affirm legal and policy positions that harmonize victims' protection with the rights of the accused.

Domestic violence is a pervasive problem that transcends boundaries of race, gender, ethnicity, socioeconomic status, sexual orientation, and age. Caitlin Valiulis, Domestic Violence, 15 Geo. J. Gender & L. 123, 124 (2014). And domestic violence often results in criminal prosecution. Acts associated with domestic violence can include those designed to, "intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone." See Domestic Violence, Office of Violence Against Women at https://www.justice.gov/ovw/domestic-violence. These

dynamics might explain why some victims are reluctant to testify against their abuser in court.

That said, framing the case as a domestic violence case tends to allow defendants to argue that these cases are private disputes by drawing upon the Court's decision in *Bryant*, 562 U.S. at 365 (describing that a statement can evolve from nontestimonial to testimonial if what appeared to be a public threat is actually a private dispute). The result are opinions that describe domestic violence cases as private disputes and weighing in favor of testimonial statements. See *Sheppard,* 327 A.3d 1144, 1165 (dissent describing act of domestic violence as private dispute as factor pointing to testimonial statement and opining that a reasonable person would not perceive an emergency was still happening); *Andrade v. United States*, 106 A.3d 386, 391 (D.C. 2015) (citing *Bryant* as "suggesting there is no ongoing emergency if suspect involved in 'private dispute,' such as domestic violence incident, 'flees with little prospect of posing a threat to the public'.")

But acts of domestic violence or intimate partner violence may not be narrowly limited to the partner. Consider the following: one study of domestic violence victims in North Carolina found that "the relationship between the suspect and the victim changes the likelihood of suicide and of additional homicide victims in [intimate partner homicide]…A review of incident reports revealed that most additional victims were children or current partners of the victim." Smucker S, Kerber RE, Cook PJ. Suicide and Additional Homicides Associated with Intimate Partner Homicide: North Carolina 2004-2013. J

Urban Health. 2018 Jun;95(3):337-343, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5993704/.

Domestic violence abusers can pose dangers to the public including innocent bystanders. One study showed that 45 percent of women whose abusers threatened them with a gun had threatened others with guns as well, including strangers. T.K. Logan & Kellie Lynch, Exploring Abuser Firearm-Related Attitudes, Behaviors, and Threats Among Women with (Ex)Partners Who Threatened to Shoot Others, 8 J. Threat Assessment & Mgmt. 20, 27 (2021). Studies also indicate the dangers domestic abusers pose to law enforcement as well. Responding to calls of domestic violence can be dangerous to law enforcement as well. Nick Breul & Mike Keith, Deadly Calls and Fatal Encounters: Analysis of U.S. Law Enforcement Line of Duty Deaths When Officers Responded to Dispatched Calls for Service and Conducted Enforcement, 2010-2014, at 13 (2016).

Compare the decision below with the outcome in *State v. Wilcox,* 2024-Ohio-5719, 2024 Ohio LEXIS 2796. In *Wilcox,* the defendant killed his ex-girlfriend's boyfriend. The police officer who arrived at the scene of the murder asked the ex-girlfriend questions. Those initial statements were non-testimonial. It only became testimonial when information was received that the suspect may have been apprehended.

This highlights the importance of any first responder asking questions to evaluate the call for help. This assessment is designed to gauge the emergency's scope, particularly when confronting a

person with obvious injuries of unknown origin. Whether asking, "What's going on?" or "What happened?" the officer's primary purpose remains addressing the unfolding incident and should recognize that any "immediate threat" does not end simply because the victim indicates within five seconds, "My fiancée beat me up." And so, the Court should grant review to clarify the discussion in *Bryant* about private disputes.

VI. The Question Is Presented In An Ideal Vehicle.

This case offers a prime opportunity to examine and resolve the issues surrounding the Confrontation Clause. The core question of whether the statements were non-testimonial were presented and answered below. The persistence of the question presented throughout the proceedings underscores its centrality—from the initial objections at trial to a decision from the Supreme Court of Ohio. The court below did not decide the case on an independent state ground. And for the first time, the Court can consider a Confrontation Clause question through the "eyes" (body-worn camera) of a police officer. The complete record below includes transcripts of the proceedings but also contains the body worn camera footage admitted as evidence. The case involves statements made to people with different roles and arguably involves, according to the dissenting opinion below, an encounter that began with nontestimonial statements and ended with testimonial ones.

Increased implementation of body worn cameras may increase the availability of recorded police encounters with citizens. How many of the

statements recorded will be admissible at trial? The answer lies within the Confrontation Clause and evidentiary rules. But in the end, this case presents facts like an all too familiar fact pattern: any crime that begin a 911 call or dispatch for service with a police officer naturally asking an injured person, "What happened?" These reasons confirm the case as an appropriate one to review.

CONCLUSION

The Court should grant the petition to consider the Confrontation Clause question presented here.

Respectfully submitted,

Michael C. O'Malley
Cuyahoga County Prosecutor
Daniel T. Van
Assistant Prosecuting Attorney
Counsel of Record
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7865
dvan@prosecutor.cuyahogacounty.us

Counsel for Petitioner State of Ohio

APPENDIX

APPENDIX CONTENTS

APPENDIX A

NOTICE

The slip opinion is subject for formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Report of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections be made before the opinion is published.

SLIP OPINION NO. 2024-OHIO-5745

THE STATE OF OHIO, APPELLANT, V. SMITH, APPELLEE

[Filed December 10, 2025]

[Until this opinion appears in the Ohio Official Reports advance sheet, it may be cited as *State v.* Smith, Slip Opinion No. 2024-Ohio-5745.]

Criminal law-Confrontation Clause of the Sixth Amendment to the United States Constitution-Absent witness's statement to police officer captured on officer's body-camera video were testimonial because officer was not responding to an ongoing emergency when those statements were made, and admission of those statements at trial violated defendant's right to confrontation-Absent witness's statements to EMT's captured on the same body-camera video were nontestimonial because those statements were made for the purpose of receiving medical care, and admission of those statements at trial did not violate the

Confrontation Clause-Court of appeals' judgment reversed and cause remanded.

(No. 2023-1289-Submitted July 24, 2024-Decided December 10, 2024.)

Appeal from the Court of Appeals for Cuyahoga County, No. 111274, 2023-Ohio-603.

FISCHER, J. authored the opinion of the court, which DONNELLY, STEWART, and BRUNNER, JJ., joined. DETERS, J., concurred in part and dissented in part, with an opinion joined by KENNEDY, C.J., and DEWINE, J.

FISCHER, J.

[¶1] We examine in this case whether the admission at trial of statements made by a domestic-violence victim, B.B., that were captured by a law-enforcement officer's body camera violated appellee Garry Smith's right to confrontation. As explained below, we conclude that B.B.'s statements made to EMTs that were captured on the body-camera video were nontestimonial; however, we conclude that all B.B.'s statements made to Police Officer Brian Soucek were testimonial because those statements were not given to assist the officer in responding to an ongoing emergency situation but rather, to further the officer's investigation of a crime that had already occurred. We therefore reverse the judgment of the Eighth District Court of Appeals as it pertains to Smith's convictions for the March 21, 2020 incident, and we remand the case to the Eighth District to determine whether any

of the statements B.B. made in response to the EMTs' questions (i.e., the nontestimonial statements) were inadmissible hearsay, to conduct a harmless-error analysis, and to address Smith's third, fourth, and fifth assignments of error relating to the March 21, 2020 incident, as necessary.

I. BACKGROUND

A. Pre-Trial

[¶2] In November 2020, Smith was indicted on two counts of domestic violence in violation of R.C. 2919.25(A), a fourth-degree felony, with one pregnant-victim specification under R.C. 2941.1423, for an incident that occurred on March 21, 2020, in which Smith allegedly assaulted his pregnant fiancé, B.B. *See State v. Smith*, Cuyahoga C.P. No. CR-20-651674-A. Smith pleaded not guilty to the charges.

[¶3] Smith filed a motion in limine seeking to preclude the State from introducing B.B.'s statements that were recorded by police officers' body cameras without having B.B. testify at his criminal trial. Smith argued that such evidence would constitute hearsay and prevent him from being able to cross-examine B.B., thus violating his right to confrontation. The State informed the trial court that it had subpoenaed B.B. and intended to call her as a witness. The State acknowledged that if B.B. failed to appear at trial, then there could be hearsay and confrontation issues concerning B.B.'s statements that were recorded by the officers' body cameras, but the State argued that B.B.'s statements would fall under various hearsay exceptions. The trial court initially denied Smith's

motion in limine but reserved its final ruling until the evidence was introduced at trial

.

B. Trial

[¶4] Smith waived his right to a jury trial and the matter proceeded to a bench trial.[1] B.B. failed to appear, and the State tried its case without her.

1. The State's Case-in-Chief

[¶5] The State called two witnesses to testify about the March 21, 2020 incident: Detective William Cunningham and Officer Soucek, both of the Cleveland Division of Police. Detective Cunningham investigated the incident. He tried numerous times to speak with B.B. about the incident but was unable to get in touch with her. Detective Cunningham identified B.B.'s medical records and photos of B.B.'s injuries that were taken while she was being treated at the hospital as the ones he had obtained using a search warrant.

---

[1] In January 2021, Smith was indicted on two counts of felonious assault, in violation of R.C. 2903.11(A)(2), and one count of domestic violence, in violation of R.C. 2919.25(A), with at least one accompanying firearm specification for each count, for assaulting B.B. on December 26, 2020. *See State v. Smith*, Cuyahoga C.P. No. CR-20-655568-A. On the State's motion, the trial court consolidated Cuyahoga C.P. No. CR-20-655568-A and Cuyahoga C.P. No. CR-20-651674-A, and the cases were tried together. Smith was convicted of all counts in Cuyahoga C.P. No. CR-20-655568-A. However, because Smith's convictions in Cuyahoga C.P. No. CR-20-655568-A are not at issue here, we do not discuss the facts relevant to that case.

[¶6] Officer Soucek was the responding officer to the call for an assaulted female, and his body camera captured B.B.'s statements and demeanor on the night of the incident. Before Officer Soucek testified, Smith challenged the admission of the officer's body-camera video into evidence on confrontation grounds. The trial court acknowledged the objection but did not rule on it at that time.

[¶7] The State proceeded to examine Officer Soucek, who at the time of trial had been a patrol officer for 11 years. He testified that on the evening of March 21, 2020, he and his partner received a dispatch call to a home "for a female assaulted." He activated his body camera and arrived at the scene within a few minutes of the dispatch.

[¶8] The State then played Officer Soucek's body-camera video, starting it at the 12-second mark, which showed Officer Soucek arriving on the scene. Smith renewed his objection to the State's use of the body-camera video, on the ground that it violated his right to confrontation. The trial court again noted the objection but did not rule on it.

[¶9] The State skipped to the 1:02 mark of the body-camera video, which showed Officer Soucek entering an ambulance. The footage between the 12-second mark and the 1:02 mark captured a relatively calm scene. As Officer Soucek arrived, two EMTs walked with a woman from the front porch of a house to an ambulance. And as Office Soucek approached the ambulance, a witness spoke to Officer Soucek's partner outside the ambulance; the witness was

explaining that she had "called EMS because [B.B.] came on [her] doorstep."

[¶10] Officer Soucek entered the ambulance and saw a woman, whom he identified as the victim, B.B., being treated by two EMTs. Officer Soucek asked B.B., "So what happened?" Over Smith's objection, Officer Soucek testified about B.B.'s statement, relaying that B.B. told him that her fiancé had beaten her up because she had had an argument with his niece and that her fiancé had ripped out her hair.

[¶11] The State asked Officer Soucek, "Specifically, what else?" But then the State immediately said, "That's all right, I'll just hit play."

[¶12] On the body-camera video, Officer Soucek next asked B.B., "Do you live with him?" B.B. replied, "We do live together." One of the EMTs then asked B.B., "Is this your niece here? She said you're five months pregnant? Does that sound about right? Did you take any kicks or punches or anything to the stomach?" B.B. answered, "To my knee, to my chest, to my stomach. I no longer feel my baby moving."

[¶13] While an EMT was asking B.B. questions concerning her physical condition, Officer Soucek had a conversation with his partner, who was standing to his left, outside the ambulance and off camera. Officer Soucek asked his partner, "Did it happen here?" His partner responded, "The niece said that [B.B.] wouldn't tell her anything, she just showed up at her house and knocked on her door and that [B.B.] lives in East Cleveland and that [the niece] doesn't know him

at all." Upon receiving this information, Officer Soucek initiated the following exchange:

> Officer: Where did this happen at?
>
> B.B.: Outside.
>
> Officer: Outside where?
>
> EMT: In front of this house here?
>
> B.B.: It happened there down the street.
>
> Officer: On the street?
>
> B.B.: Yeah.
>
> Officer: Do you live over here?
>
> B.B.: No. We were on our way to her house, but it didn't happen in her house.
>
> Officer: But it happened down the street here?
>
> B.B.: We had an argument and, you know, we were all, we were drinking. I'm not even supposed to be drinking.
>
> Officer: So, it happened in the car?
>
> B.B.: Outside the car.
>
> Officer: So, is he still in the area, or did he drive away?
>
> B.B.: No. He drove way. He left.

Following that exchange, Officer Soucek asked B.B. for her Social Security number, her name, and her date of birth.

[¶14] The State paused the video at the 3:04 mark, and Officer Soucek testified about B.B.'s

injuries, noting her swollen face and eye and "little spots of blood and glue" where her hair had been ripped out. He described B.B.'s clothing as disheveled, ripped, and dirty and stated that it appeared to him "that she [had been] in a fight."

[¶15] The State continued to play the body-camera video. On the video, Officer Soucek asked B.B. for her fiancé's name. B.B. answered, "Garry Smith . . . two r's." During this exchange, the EMTs told B.B. that she could keep talking but that they needed her to lie down on the gurney. While the EMTs moved B.B. from her seated position in the ambulance to lie down on the gurney, Officer Soucek continued questioning B.B., and she provided him with Smith's date of birth and the address where she lived with Smith. Officer Soucek told his partner to "call the boss for photos."

[¶16] Meanwhile, the EMTs continued to provide care to B.B. One EMT asked B.B. whether Smith had ripped out her hair, and B.B. confirmed that he had. The other EMT told B.B. that he was going to put her on a heart-rate monitor because her heart was beating so fast.

[¶17] After B.B. answered an EMT's question concerning her health insurance, Officer Soucek asked B.B. how far along she was in her pregnancy. B.B. responded that she was five months pregnant and that Smith was the father. One EMT followed up Officer Soucek's question by asking B.B. the due date of her baby. She told him that her baby was due in July. Officer Soucek then asked B.B. whether she and Smith had other children together. B.B. responded that they did not.

[¶18] After a discussion between the officers and the EMTs concerning where B.B. would be transported to receive further medical care, one EMT tried to confirm with B.B. that she had said she had been smoking and drinking; as the EMT proceeded to ask B.B. a follow-up question about her reported substance use, she shushed him. The EMT who asked B.B. those questions looked at Officer Soucek and B.B. shushed him again. The EMT then asked B.B. whether she had taken any drugs. B.B., in a hushed tone, replied, "I snorted cocaine. . . . When he beat me up, I. . . I snorted a couple lines of cocaine." The EMT explained that the question was asked to better understand why her heart rate was so high.

[¶19] While one EMT prepared the equipment to monitor B.B.'s heart rate, the other EMT asked B.B. how many times she had been pregnant, and B.B. responded to his questions. Officer Soucek then inquired more about the incident:

> Officer: Can you tell me exactly what he did at the car?
>
> B.B.: He punched me in my face and other people were trying to break it up and he pushed everybody away. He threatened to shoot me and said he would kill me. He was also intoxicated. Very intoxicated.
>
> Officer: And he ripped out your hair?
>
> B.B.: He ripped out my hair. This is what he did to me. He kneed me to the face, the chest, stomach.

The EMT who had prepared the heart-rate-monitoring equipment interrupted B.B. to connect the

equipment to her, but he informed B.B. that she could keep talking to Officer Soucek. The officer then continued questioning B.B.:

> Officer: He kneed you in the stomach?
>
> B.B.: Yes.
>
> EMT: You're feeling no movement from the baby, right?
>
> B.B.: No movement. And it was moving until this incident happened.

[¶20] The State played the body-camera video until the end of this exchange, stopping it at the 6:42 mark. The State did not play the remainder of the video for "judicial economy" reasons. The remainder of the video shows the EMTs continuing to provide B.B. with medical care and Officer Soucek asking B.B. for a phone number where he could reach her. Officer Soucek left the ambulance to speak with B.B.'s family member who had called 9-1-1, telling her that B.B.'s assailant had "beat her up pretty good." As the ambulance drove away, Officer Soucek's partner informed him that their boss was coming to the scene to take photographs but that since the ambulance had left, they would all meet at the hospital. At trial, Officer Soucek confirmed that his body-camera video was a fair and accurate depiction of what he saw that night.

[¶21] Officer Soucek testified that he and his supervisor met B.B. at the hospital to take photographs for "the domestic violence part of the report." Over Smith's objection, the State asked Officer Soucek whether B.B. had "indicated on the

body cam footage that [Smith had] threatened to kill her, threatened to shoot her," to which Officer Soucek replied, "Yes." Officer Soucek further testified, again over Smith's objection, that B.B. had told him that Smith possessed a weapon and that Smith had assaulted her previously.

[¶22] At the close of the evidence, Smith's counsel again objected to admission of the body-camera video into evidence, on the ground it violated Smith's right to confrontation. The trial court overruled the objection, explaining that B.B.'s statements on the video were nontestimonial and were being "admitted under an excited utterance hearsay exception."

2. The Defense

[¶23] Smith testified in his own defense at trial. Regarding the March 21, 2020 incident, he denied hitting B.B. He maintained that when he left home that night, B.B. was "fine." And he suggested that B.B. had accused him of attacking her as a means of getting back at him because she thought he had cheated on her.

[¶24] During cross-examination, Smith acknowledged that he and B.B. had children together. Smith testified, "We say we married because we been together so long. We been together since 2002."

[¶25] At the trial's conclusion, the court found Smith guilty as charged and sentenced him accordingly.

C. Appeal to the Eighth District Court of Appeals

[¶26] Smith appealed his convictions to the Eighth District. 2023-Ohio-603, ¶ 71 (8th Dist.). He argued that the admission of Officer Soucek's body-camera video into evidence violated his right to confront witnesses against him and that the statements made in the video were inadmissible hearsay. Smith also challenged the manifest weight of the evidence of his conviction.

[¶27] The State argued that B.B.'s statements captured on Officer Soucek's body-camera video should be considered nontestimonial and admissible hearsay because they were made during a police interrogation under circumstances that indicated that the primary purpose of the interrogation was to respond to an ongoing emergency. The State argued that the statements captured on the body-camera video were admissible as present-sense impressions or as excited utterances.

[¶28] The appellate court concluded that the totality of the circumstances surrounding Officer Soucek's interrogation of B.B. demonstrated that the primary purpose of B.B.'s statements to the police—statements in which B.B. identified Smith as her assailant and described what he had done to her—was to provide an account of the assault that had allegedly occurred (i.e., to document past events for purposes of a later criminal investigation or prosecution) and that the statements were therefore testimonial. *Id.* at ¶ 93. The appellate court thus concluded that the admission of all B.B.'s statements that were captured on the

body-camera video violated Smith's confrontation rights. *Id.* at ¶ 101.

[¶29] Because its decision regarding Smith's confrontation-rights challenge was dispositive, the court of appeals did not consider Smith's challenge to the trial court's admission of B.B.'s statements on hearsay grounds or his challenge regarding the weight of the evidence for the March 2020 offenses.[2] 2020-Ohio-603 at ¶ 112 (8th Dist.). The court of appeals reversed the trial court's judgment as to the March 2020 incident, vacated Smith's convictions related to that incident, and remanded the case to the trial court for a new trial on the charges in Cuyahoga C.P. No. CR-20-651674-A. 2020-Ohio-603 at ¶ 143 (8th Dist.).

[¶30] The State moved for reconsideration and en banc consideration. The Eighth District denied the State's motions.

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[2] The Eighth District's approach to analyzing Smith's challenge to the admission of Officer Soucek's body-camera video as a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution before addressing whether the video was admissible under the Ohio Rules of Evidence was reasonable. Such an analysis is consistent with our approach to these types of challenges: "Because certain testimonial statements are barred by the Confrontation Clause of the Sixth Amendment to the United States Constitution irrespective of their admissibility under the Rules of Evidence, we undertake the constitutional inquiry first." *State v. Jones*, 135 Ohio St. 3d 10, 2012-Ohio-5677, ¶ 136, 984 N.E.2d 948; *see State v. Wilcox*, 2024-Ohio-5719, ¶ 17, fn. 1 (lead opinion). We have applied this same analytical approach to combined evidentiary and Confrontation Clause arguments in other cases.

D. The State's Appeal to this Court

[¶31] The State appealed to this court. We accepted jurisdiction over the State's sole proposition of law:

> The primary purpose of the statements from a domestic violence victim were not intended as substitutes for trial testimony but rather to meet an ongoing emergency. The arrival of the police and the fact that the suspect was not on scene did not render the victim's statements testimonial.

See 2024-Ohio-163.

II. LAW

[¶32] We consider whether the admission at Smith's criminal trial of B.B.'s statements made to the EMTs and to Officer Soucek as captured on Officer Soucek's body-camera video violated Smith's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. We review this issue of law de novo. *See State v. McKelton*, 2016-Ohio-5735, ¶ 172.

[¶33] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court explained that the key question for determining whether a Confrontation Clause violation has occurred is whether an out-of-court statement is "testimonial." *Id.* at 59, 68. If a statement is testimonial, its admission into evidence will violate the defendant's right to confrontation if

the defendant does not have an opportunity to cross-examine the declarant. *Id.* at 53-56.

[¶34] To determine whether a statement is testimonial, courts must look to post-*Crawford* decisions to ascertain whether the statement bears indicia of certain factors that would make it testimonial. "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." *Davis v. Washington*, 547 U.S. 813, 822 (2006). 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.* For example, the primary purpose of a testimonial statement is to create an out-of-court substitute for trial testimony. *Ohio v. Clark*, 576 U.S. 237, 245 (2015). That primary purpose must be measured objectively by the trial court, accounting for the perspectives of the interrogator and the declarant. *Michigan v. Bryant*, 562 U.S. 344, 367-368 (2011).

[¶35] The most important factor in informing the primary purpose of an interrogation in a domestic-violence case is whether the statement was made during an ongoing emergency, i.e., whether there was a continuing threat to the victim. *See id.* at 363. This is because domestic-violence cases "often have a narrower zone of potential victims than cases involving threats to public safety." *Id.* A conversation that begins as an interrogation to determine the need

for emergency services may evolve into a testimonial statement once the purpose of rendering emergency assistance has been achieved. *Davis* at 828.

[¶36] Examining two domestic-violence cases in *Davis*, the United States Supreme Court held that the statements the victim in *Davis* made to police during a 9-1-1 call were nontestimonial on several grounds, including that the victim "was 'speaking about events *as they were actually happening*, rather than "describ[ing] past events,"' that there was an ongoing emergency, that the 'elicited statements were necessary to be able to *resolve* the present emergency,' and that the statements were not formal." (Emphasis and brackets added in *Davis*.) *Bryant* at 356-357, quoting *Davis* at 827, quoting *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion). And in *Indiana v. Hammon*, the second domestic-violence case resolved in *Davis*, the Supreme Court held that statements the victim made to police from inside her home while her abuser was still present but was relegated to another room were "'part of an investigation into possibly criminal past conduct.'" *Bryant* at 357, quoting *Davis* at 829. The Supreme Court found that there was "'no emergency in progress,'" because the officer questioning the victim "'was not seeking to determine . . . "what is happening," but rather "what happened."'" *Id.*, quoting *Davis* at 830. Because the victim's statements "'were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation,'" the Supreme Court held that those statements were testimonial. *Id.*, quoting *Davis* at 832.

[¶37] And in examining a case concerning a mortally wounded victim in *Bryant*, the United States Supreme Court reiterated the importance of ascertaining whether the statements were made during an ongoing emergency: "The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecution'" (brackets added in *Bryant*), *id.*, 562 U.S. at 361, quoting *Davis*, 547 U.S. at 822. The Court emphasized that the existence of an ongoing emergency must be "objectively assessed from the perspectives of the parties to the interrogation at the time" and "not with the benefit of hindsight." *Id.* at 361, fn. 8.

[¶38] Another factor that should be considered is the degree of formality of the interrogation. *Id.* at 366. The Supreme Court noted that the questioning in *Bryant* occurred in a public area before emergency services arrived, as opposed to at police headquarters. *Id.* "The informality suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted [the witness] to or focused him on the possible future prosecutorial use of his statements." *Id.* at 377.

[¶39] Additionally, courts should consider the "statements and actions of both the declarant and interrogators." *Id.* at 367. The interaction between the interrogators and the witness provides insight into how the witness believes his or her statements will be used. *See id.* at 368-378; *see also id.* at 378-379

(Thomas, J., concurring in the judgment); *id.* at 379-395 (Scalia, J., dissenting); *id.* at 395-396 (Ginsburg, J., dissenting).

[¶40] Thus, "when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." *Bryant*, 562 U.S. at 370.

III. ANALYSIS

A. B.B.'s Statements to Officer Soucek Were Testimonial

[¶41] To properly analyze the Confrontation Clause issue presented here, we must look at the situation from both Officer Soucek's and B.B.'s perspectives to determine whether the primary purpose of the officer's interrogation of the victim was to enable police to respond to an ongoing emergency. *See Bryant* at 361, fn. 8 ("The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight.") Reviewing the facts of this case from Officer Soucek's perspective, we find no evidence of an ongoing emergency when B.B. was responding to Officer Soucek's questions.

[¶42] Officer Soucek testified at trial that he had received a dispatch call to respond to a female who had been assaulted and that "as [he] arrived on the scene,

the female was already being escorted into the EMS wagon." Additionally, Officer Soucek's body camera captured a witness explaining to Officer Soucek's partner that she had "called EMS because [B.B.] came on [her] doorstep." The body-camera video captured a relatively calm scene with one witness speaking to Officer Soucek's partner outside the ambulance and two EMTs walking with a woman to an ambulance; there was no shouting, arguing, or overall commotion. *See Davis*, 547 U.S. at 830. So before his interrogation of B.B. began, Officer Soucek (1) knew from his dispatcher that a female had been assaulted, (2) heard from a witness that the victim had arrived at the 9-1-1 caller's home already battered, and (3) observed the victim walk with EMTs to the ambulance where she began receiving medical care. An objective assessment of this information demonstrates that Officer Soucek knew that any active threat against the victim, B.B., had been eliminated and that he was investigating a situation in which a female *had been assaulted*.

[¶43] It is true that "[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue," *Bryant*, 562 U.S. at 363. And generally, such an assessment could not have occurred until Officer Soucek ascertained what had happened to B.B. However, Officer Soucek's approach to interrogating B.B. confirms that he did not believe that he was responding to an ongoing emergency.

[¶44] At trial, Officer Soucek testified that he "began to interview [B.B.] about the incident," and he

did so by asking, "So what happened?" After B.B. confirmed that she had been assaulted by her fiancé, whom she later identified as Smith, Officer Soucek did not follow up with questions that would allow him to further assess the situation or determine whether Smith presented any possible threat to his own safety or the safety of others, such as by asking B.B. questions about Smith, where the incident occurred, or whether Smith had a weapon. Instead, Officer Soucek asked B.B., "Do you live with him?"

[¶45] This follow-up question did nothing to establish whether Smith presented a danger to others. And Officer Soucek did not need to eliminate Smith as an ongoing threat to B.B., because she was safe with Officer Soucek and the EMTs in the ambulance. This question is relevant only when an officer is considering whether to pursue an arrest warrant or seek prosecution against a person, *see* R.C. 2935.09, since a person can be charged with domestic violence only if the victim is a family or household member, *see* R.C. 2919.25. This question had no bearing, at least in this case, on whether there was an ongoing emergency.

[¶46] And while Officer Soucek eventually questioned B.B. about Smith and the location of the attack, he did so only after he received information from his partner that the assault had not occurred inside the home from which B.B. had just exited. There is no evidence in the record that Officer Soucek or his partner sought more information about Smith to ensure that he was not a threat to others. Indeed, there is no evidence that Officer Soucek or his partner called for backup or ordered a search for Smith while B.B. was receiving medical care in the ambulance. As

demonstrated in the body-camera video, no other officers arrived on the scene, and Officer Soucek told his partner to call their supervisor only to photograph B.B.'s injuries.

[¶47] The facts of this case demonstrate that Officer Soucek had information that he was responding to a female who had been assaulted and was being treated by EMTs prior to his arrival at the scene, and his actions demonstrate that he did not treat the assault on B.B. as an ongoing emergency but rather, as an investigation into past criminal conduct of B.B.'s assailant. As the United States Supreme Court has stated, "the emergency is relevant to the 'primary purpose of the interrogation' because of the effect it has on the parties' purpose, not because of its actual existence," *Bryant*, 562 U.S. at 361, fn. 8.

[¶48] And B.B. did not treat the situation as an ongoing emergency, as demonstrated by her own statements and actions. B.B. knew she was pregnant at the time of the incident. She knew that Smith had hit her, ripped out her hair, then drove away, leaving her near a family member's home. And after the fight, B.B. snorted "a couple lines of cocaine" before her family member called 9-1-1.

[¶49] The body-camera video demonstrates that B.B. sought assistance from her family member and medical attention from the EMTs before the police interrogation began inside the ambulance. At no time does the body-camera video show B.B. actively calling for help or providing police with information that would indicate that Smith was a continued threat to her or others. *See Davis*, 547 U.S. at 828-832. And

while B.B. had not informed Officer Soucek of the full extent of the situation prior to the interrogation, it is apparent that she or her family member had already discussed the situation with the EMTs, given the extent of their questions during the first few minutes of the body-camera video.

[¶50] B.B. knew that Smith was not a threat to her at the time of the police interrogation. The body-camera video shows that B.B. spoke to Officer Soucek about the incident without reservation and that she was much more hesitant to answer questions when it came to her own criminal activity: B.B. shushed an EMT when he asked her about the extent of her drug use. B.B.'s selective disclosure of information and hesitancy to admit her own criminal activity in front of a police officer demonstrates that she had testimonial intent when she made statements to the officer concerning the assault. *See Davis* at 830 ("statements [made during] an official interrogation are an obvious substitute for live testimony because they do precisely *what a witness does* on direct examination" [emphasis in original]). These facts demonstrate that B.B.'s purpose in answering Officer Soucek's questions was not to aid in the officer's response to an ongoing emergency but rather, to tell her account of the incident.

[¶51] Additionally, the formality of the encounter between Officer Soucek and B.B. is far from the harried 9-1-1 call that was at issue in *Davis*. The interaction between Officer Soucek and B.B. in this case more closely resembles the interrogation in *Hammon*, in which the officer interviewed the victim inside her home while she was separated from her

husband, questioned her about what had happened, and had her sign a battery affidavit. *See Davis* at 819-820, 830.

[¶52] Officer Soucek's interrogation of B.B. was not conducted at the police station; B.B. spoke to Officer Soucek in the back of an ambulance where she was being attended by EMTs—away from any witnesses to the assault and safely away from her attacker. And while Officer Soucek did not ask B.B. for a signed affidavit, his body camera recorded the entire exchange. Officer Soucek's body camera recorded him actively taking handwritten notes of B.B.'s answers. And as discussed above, B.B. freely spoke with Officer Soucek about the incident but was hesitant to answer questions when it came to her own criminal activity.

[¶53] Reviewing these facts objectively from both Officer Soucek's and B.B.'s perspectives, and considering the formality of the interrogation, we do not find that the primary purpose of Officer Soucek's interrogation of B.B. in the ambulance was to respond to an ongoing emergency. Rather, the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution of B.B.'s assailant. We therefore conclude that B.B.'s statements to Officer Soucek captured by the officer's body camera were testimonial in nature and that their admission into evidence at Smith's criminal trial violated Smith's right to confrontation.

B. B.B.'s Statements to the EMTs Were Nontestimonial

[¶54] Officer Soucek's body camera recorded not only B.B.'s responses to his questions but also B.B.'s responses to the EMTs' questions concerning her medical history. We have held that statements made for purposes of medical diagnosis and treatment are nontestimonial and that their admission into evidence at trial does not violate the Confrontation Clause. *State v. Arnold*, 2010-Ohio-2742, ¶ 41.

[¶55] B.B. was actively receiving medical care when her statements were captured by Officer Soucek's body camera. Every statement B.B. made in response to the EMTs' questions was for the primary purpose of receiving medical care, not creating a record for use at trial. So those statements were nontestimonial and the admission of those statements at Smith's trial did not violate Smith's right to confrontation.

IV. REVERSE AND REMAND TO THE EIGHTH DISTRICT

[¶56] We conclude that the Eighth District Court of Appeals erred in its determination that all statements made by B.B. that were captured by Officer Soucek's body camera while B.B. was in the ambulance must be excluded on constitutional grounds. Only those statements that B.B. made in response to Officer Soucek's questions should have been excluded on that basis. We therefore reverse the judgment of the court of appeals as it pertains to Smith's convictions for the March 21, 2020 incident.

[¶57] Because this appeal is limited solely to the Confrontation Clause issue, we decline to address admissibility issues pertaining to B.B.'s statements under the Ohio Rules of Evidence. Instead, we remand the case to the Eighth District. On remand, the court of appeals must determine whether any of the statements B.B. made in response to the EMTs' questions (i.e., the nontestimonial statements) were inadmissible hearsay, thereby addressing Smith's second assignment of error. After making that determination, the Eighth District must revisit its harmless-error determination and address Smith's third, fourth, and fifth assignments of error relating to the March 21, 2020 incident, as necessary.

Judgment reversed and cause remanded.

DETERS, J., joined by KENNEDY, C.J., and DEWINE, J., concurring in part and dissenting in part.

[¶58] The majority correctly concludes that B.B.'s statements to the EMTs that were captured by a police officer's body camera were nontestimonial and that the Eighth District Court of Appeals erred when it held that those statements should have been excluded from evidence in appellee Garry Smith's criminal trial. And the majority is correct that the case needs to be remanded to the court of appeals for a determination whether B.B.'s nontestimonial statements were inadmissible hearsay. Where the majority goes astray is in its conclusion that all B.B.'s statements to Police Officer Brian Soucek should have been excluded from

evidence because they were testimonial. I therefore respectfully concur in part and dissent in part.

The Confrontation Clause and statements made by unavailable witnesses

[¶59] The Sixth Amendment to the United States Constitution guarantees an accused the right "to be confronted with the witnesses against him." "The 'primary object' of this provision is to prevent unchallenged testimony from being used to convict an accused . . . ." *State v. Carter*, 2024-Ohio-1247, ¶ 27, *Mattox v. United States*, 156 U.S. 237, 242 (1895), and *Crawford v. Washington*, 541 U.S. 36, 53 (2004). In *Crawford*, the United States Supreme Court reviewed the history of the Confrontation Clause with respect to unavailable witnesses. The guiding principle gleaned from that history is this: "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine," *Crawford* at 59. The Court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial.' " *Id.* at 68. But the Court did instruct that "[w]hatever the term ['testimonial'] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

[¶60] In later cases, the Court described more fully the contours of the term. In *Davis v. Washington*, 547 U.S. 813 (2006), the Court considered two cases that had been consolidated for decision involving the admission of out-of-court statements made by witnesses who did not appear at trial. In the first case,

Davis v. Washington, the recording of a 9-1-1 call was admitted at trial. On the recording, the victim told the operator that her boyfriend was assaulting her. In response to questions from the operator, the victim identified her attacker as Adrian Davis. When the victim told the operator that her boyfriend had left the residence, the operator continued to question the victim, obtaining more information about Davis and a description of the events leading up to the attack. The trial court admitted the recording over Davis's objection that doing so violated his confrontation rights. The Washington Court of Appeals and the Washington Supreme Court affirmed the trial court's judgment. *Id.* at 819.

[¶61] In the second case, *Hammon v. Indiana*, police responded to a domestic disturbance and found the victim alone on the porch appearing somewhat frightened. The victim told police that nothing was wrong, but after being questioned by officers, she described to them what had happened and attested in an affidavit that her husband had shoved her to the floor, hit her in the chest, and attacked her daughter. The trial court admitted the victim's statements as testified to by the officer as an excited utterance and admitted the statements contained in the affidavit as a present-sense impression. The Indiana Supreme Court concluded that the victim's verbal statements were nontestimonial and admissible as an excited utterance. *Davis* at ¶ 821. However, the Indiana Supreme Court concluded that the statements in the affidavit signed by the victim were testimonial and had been wrongly admitted into evidence but that the

affidavit's admission was harmless beyond a reasonable doubt. *Id.*

[¶62] The United States Supreme Court set forth what would become known as the "primary purpose test":

> 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.

Davis at 822. The Court reserved for another day the question "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id.* at 823, fn. 2.

[¶63] The Court in *Davis* also recognized the fluidity of interrogations involving ongoing emergencies: "This is not to say that conversation which begins as an interrogation to determine the need for emergency assistance cannot . . . 'evolve into testimonial statements,' . . . once that purpose has been achieved." *Id.*, 547 U.S. at 828. The Court explained that it was for trial courts to determine whether portions of statements are testimonial and to exclude those portions. *Id.* Applying these principles, the Court affirmed the Washington Supreme Court's judgment in *Davis v. Washington* and reversed the

Indiana Supreme Court's judgment in *Hammon v. Indiana*, remanding that matter for further proceedings. *Davis* at 834.

[¶64] The United States Supreme Court refined its explanation of what constitutes a testimonial statement in *Michigan v. Bryant*, 562 U.S. 344 (2011). In that case, the Court considered statements made to police officers by a mortally wounded victim. The officers found the victim at a gas station. When they asked what had happened, the victim identified the person who had shot him, and he told officers where the shooting had occurred. The victim died shortly after the police found him. The Michigan Supreme Court held that admission of the victim's statements into evidence violated the defendant's confrontation rights because there was not an ongoing emergency at the gas station when he made the statements and because the police officers' questions were directed at determining what had already happened. *Id.* at 351.

[¶65] The United States Supreme Court vacated the Michigan court's judgment and remanded the case for further proceedings. *Id.* at 378. In doing so, the Court provided guidance on how courts should determine whether statements are testimonial.

[¶66] The Court reiterated the importance of ascertaining whether the statements were made during an ongoing emergency: "The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecution.' " (Brackets added in

Bryant.) *Id.* at 361, quoting *Davis*, 547 U.S. at 822. Relevant to the case before us is the Court's note that

> [t]he existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause. The emergency is relevant to the "primary purpose of the interrogation" because of the effect it has on the parties' purpose, not because of its actual existence.

Id. at 361, fn. 8.

[¶67] Although the existence of an ongoing emergency is important to the inquiry whether a statement is testimonial, it is not the sole factor to be considered. "[W]hether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Bryant*, 562 U.S. at 366.

[¶68] Other factors that should be considered are the degree of formality of the interrogation, *id.*, and "statements and actions of both the declarant and interrogators," *id.* at 367. Regarding the former factor, the Court noted that the questioning in *Bryant* occurred in a public area before emergency services arrived, as opposed to at police headquarters. *Id.* at 366. "The informality suggests that the interrogators' primary purpose was simply to address what they

perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted [the witness] to or focused him on the possible future prosecutorial use of his statements." *Id.* at 377. As to the latter factor, the interaction between the interrogators and the witness also provides insight into how the witness believes his or her statements will be used. *See id.* at 368-378; *see also id.* at 378-379 (Thomas, J., concurring in the judgment); *id.* at 379-395 (Scalia, J., dissenting); *id.* at 395-396 (Ginsburg, J., dissenting).

[¶69] In short, "when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." *Id.* at 370.

Where the majority gets it wrong

[¶70] Keeping these principles in mind, I will explain where the majority goes wrong in its decision.

[¶71] First, the majority ignores the United States Supreme Court's directive in *Bryant* that whether an ongoing emergency existed at the time of police questioning is but one factor to be considered when determining whether a witness's statements are testimonial. *See Bryant*, 562 U.S. at 366. That "there was no shouting, arguing, or overall commotion" occurring while B.B. spoke with Officer Soucek, majority opinion, ¶ 42, is important, but it is not the only consideration in determining whether B.B.'s

statements to the officer were testimonial. Seemingly discounted by the majority is that Officer Soucek questioned B.B. in an ambulance while she was receiving medical care. Other than the fact that a police officer was asking the questions, the encounter had no trappings of a formal interrogation at police headquarters.

[¶72] More troublingly, the majority makes the same mistake as did the Eighth District by using hindsight to inform its determination whether B.B.'s statements to Officer Soucek were testimonial, rather than focusing on what the parties knew at the time of the questioning. The majority attaches great weight to Officer Soucek's testimony that he was responding to a call reporting "a female assaulted." The majority emphasizes that the report of the assault was made in the past tense, stressing that "a female *had been assaulted*." (Emphasis in original.) *Id.* Presumably the argument propounded by the majority is that because the 9-1-1 caller did not report that a female was currently being assaulted, Officer Soucek knew there was no ongoing emergency when he began questioning B.B.

[¶73] While we know now, having the benefit of Officer Soucek's investigation, that there was no ongoing emergency while B.B. was being questioned in the ambulance, Officer Soucek could not have known that until he ascertained from B.B. that her assailant, whom she identified as Smith, had left the area. Had Smith remained in the area, Officer Soucek could reasonably have had concerns that Smith—who had allegedly just beaten a pregnant woman—posed a continuing threat not only to B.B. but also to Officer

Soucek, people who lived at the home with Smith and B.B., and others in the area. And only after B.B. told Officer Soucek that Smith had left the area did the officer know there was no ongoing emergency. I would conclude that up to that point, B.B.'s statements captured by the officer's body camera were nontestimonial.

Where the majority gets it right

[¶74] As discussed above, the United States Supreme Court has cautioned that interrogations can evolve as the need to respond to an ongoing emergency is eliminated. Therefore, each statement in such situations must be considered separately to determine its purpose.

[¶75] After B.B. told Officer Soucek that her attacker had left the scene, the purpose of her statements evolved. There was no longer a question of a continuing threat to B.B.: she was in the ambulance, and Smith had left the scene. Moreover, because there was no indication that Smith was armed or that the incident went beyond a domestic-violence attack, Smith did not present a threat to the public. Officer Soucek's request for B.B.'s Social Security number marked the turning point when his questioning was directed toward creating a record for trial. He asked B.B. how many children she and Smith had together—a question relevant for a domestic-violence prosecution. And he asked what "exactly" occurred during the attack. That question and the response it elicited were not primarily for a nontestimonial purpose. I agree with the majority that B.B's statements after Officer Soucek asked for her Social

Security number were testimonial and should have been excluded from evidence at Smith's trial.

[¶76] The majority gets it right on another point too. B.B.'s statements to the EMTs differ from those she made to Officer Soucek. B.B. was acting to receive medical care when her statements to the EMTs were captured by Officer Soucek's body camera. Thus, all the statements she made in response to the EMTs' questions were for the primary purpose of receiving medical care, not creating a record for use at trial. So those statements were nontestimonial. However, they are still subject to review for admissibility under the Ohio Rules of Evidence.

Conclusion

[¶77] The majority's review of B.B.'s statements to Officer Soucek with a hindsight perspective is flawed. Considered "in light of the circumstances in which the interrogation occur[red]," *Bryant*, 562 U.S. at 370, some of the statements made by B.B. early in her encounter with Officer Soucek were not made with the primary purpose of creating a record for trial and so were nontestimonial. I therefore respectfully concur in part and dissent in part.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kristen Hatcher and Daniel T. Van, Assistant Prosecuting Attorneys, for appellant.

Cullen Sweeney, Cuyahoga County Public Defender, and Michael Wilhelm and John T. Martin, Assistant Public Defenders, for appellee.

Steven L. Taylor, urging reversal for amicus curiae Ohio Prosecuting Attorneys Association.

Alexandria M. Ruden and Tonya Whitsett, urging reversal for amici curiae Legal Aid Society of Cleveland, Alliance for HOPE International, and Ohio Domestic Violence Network.

Calfee, Halter & Griswold, L.L.P., Jason J. Blake, and Gretchen L. Whaling, urging reversal for amici curiae AEquitas and Joyful Heart Foundation.

APPENDIX B

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

COA NO. 111274
LOWER COURT NO. CR-20-651674-A
CR-20-655568-A

MOTION NO. 562771

[Filed August 28, 2023]

JOURNAL ENTRY

This matter is before the court on appellee's application for en banc consideration. In addition to the arguments raised by appellee, the court also sua sponte considered whether the panel decision conflicts with the holdings of *State v. Tomlinson*, 8th Dist. Cuyahoga No. 109614, 2021-Ohio-1301 and *State v. Harris,* 8th Dist. Cuyahoga No. 111940, 2023-Ohio-1892, on the admissibility of body camera recorded

testimony. Pursuant to App.R. 26, Loc.App.R.26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue of law that is dispositive of the case and in which en banc consideration is necessary to secure and maintain uniformity of this court's decisions.

Appellate Rule 26(A)(2)(a) provides that a majority of the en banc court may order that an appeal or other proceeding be considered en banc. Upon review, a majority has not been reached on the issues raised.

Therefore, en banc consideration is denied in this case.

/s/ Anita Laster Mays

ANITA LASTER MAYS, ADMINISTRATIVE JUDGE

Voting to Deny En Banc Review:

LISA B FORBES, J.,

EILEEN A GALLAGHER, J.,

EMANUELLA D. GROVES, J.

MARY EILEEN KILBANE, J.,

ANITA LASTER MAYS, A.J., and

MICHAEL JOHN RYAN, J.

Voting to Grant En Banc Review on the Issues Raised By Appellee As Well As the Sua Sponte Conflict Issue:

MARY J. BOYLE, K.,

FRANK DANIEL CELEBREZZE, III., J.,

EILEEN T. GALLAGHER, J.,

SEAN C. GALLAGHER, J., and

MICHELLE J. SHEEHAN, J.

SEAN C. GALLAGHER, J., DISSENTING (WITH SEPARATE OPINION): The state raises several substantive conflicts in the black letter law between *State v. Smith,* 2023-Ohio-603, 209 N.E.3d 883 (8th Dist.), and two other panel decisions *Cleveland v. Merritt*, 2016-Ohio-4693, 69 N.E.3d 102, ¶ 40 (8th Dist.), and *State v. Steele,* 8th Dist. Cuyahoga No. 91571, 2009-Ohio-4704, ¶ 27, that this court should clarify in order to provide harmony in this district's reliance on the primary purpose test for resolving Confrontation Clause issues. As it stands, and as will be explained below, panels will be required to choose between applying Smith or applying *Merritt* and/or *Steele* creating endless loops of conflicting analysis. There is no factual distinction of legal significance that harmonizes the three cases. Requiring this either-or approach promotes ambiguity and generates confusion for litigants and lower courts.

Further, and although not addressed by the state, *Smith* conflicts with *State v. Tomlinson*, 8th Dist. Cuyahoga No. 109614, 2O21-Ohio-1301, ¶ 37, 43, on

whether introducing statements recorded on police body camera of non-testifying witnesses is permissible or violates the Confrontation Clause. Smith declared it did. *Id.* at ¶ 94 (concluding that body camera video cannot be used "to supplant the in-court testimony of witnesses"); see also *State v. Jones*, 2023-Ohio-380, 208 N.E.3d 321, ¶ 129 (8th Dist.) (under the Confrontation Clause analysis, "statements recorded by police body cameras cannot be used either to supplement the testimony of a witness or as a substitute for the testimony of a witness"). *Tomlinson* declared otherwise. *Tomlinson* at ¶ 37, 43 (body camera video memorializing statements of non-testifying witnesses does not violate the Confrontation Clause).

Panels from this district routinely permit the admission of body camera evidence in lieu of a witness's trial testimony. *See*, *e.g.*, *State v. Harris,* 8th Dist. Cuyahoga No. 111940, 2023-Ohio-1892, ¶ 21 (witness did not appear, but her statements recorded on a police body camera were nonetheless admitted at trial). That routine application of what was settled law is not questionable. Notably, the trial court expressly relied on *Tomlinson* in reaching its conclusion that the statements in *Smith* were admissible.

For these reasons, I respectfully dissent from the denial of en banc review. En banc review is necessary to ensure harmony in the law of this district with respect to the admissibility of statements stemming from emergency calls for assistance or the initial statements made to responding emergency personnel, including those recorded in police body cameras,

under the Confrontation Clause of the federal Constitution. We must now solely rely on the state's ability to present this issue to the Ohio Supreme Court to unify the law of this district. "[B]y refusing to resolve the conflict and definitively decide the issue, [we have once again] sent a message of chaos and confusion to all common pleas court judges in Cuyahoga County * * *." *State v. Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, 17 N.E.3d 528, ¶ 8.

I. The background, black letter law

The Confrontation Clause generally precludes the introduction of testimonial statements at trial. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Although the Supreme Court has not defined what constitutes a "testimonial" statement, it has been held to apply to "'prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and responses to police interrogations.'" *State v. Dixon,* 4th Dist. Scioto No. 15CA3680, 2016-Ohio-1491, ¶ 45, 63 N.E.3d 591, quoting *State v. Mills,* 2d Dist. Montgomery No. 21146, 2006-Ohio-2128, ¶ 17. There are two overriding notions to be considered: (1) "not all those questioned by the police are witnesses and not all 'interrogations by law enforcement officers' * * * are subject to the Confrontation Clause." *Michigan v. Bryant*, 562 U.S. 344, 355, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011), quoting *Davis v. Washington*, 547 U.S. 813,126 S.Ct. 2266,165 L.Ed.2d 224 (2006); and (2), "[a] 911 call * * * and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establish or prove' some

past fact, but to describe current circumstances requiring police assistance." *Davis* at 827.

Whether statements to police officers are testimonial depends on the primary purpose of the interrogation. "[S]tatements are nontestimonial 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." *Davis*, 547 U.S. at 817. Further, police interrogations of witnesses and victims can be deemed nontestimonial after the initial encounter if an ongoing emergency exists. *Id.* An ongoing emergency can exist after the original threat to the victim has ceased to exist if there is a potential threat to the victim, police, or the public, or the victim needs emergency medical services. *Bryant*, 562 U.S. at 376. "[T]he Supreme Court has never defined the scope or weight of the 'ongoing emergency.'" *Woods v. Smith*, 660 Fed.Appx. 414, 428 (6th Cir. 2016). The outer bounds of what is considered an "ongoing emergency" is purposely not defined and is instead based on a "highly context-dependent inquiry." *Bryant*, 562 U.S. at 363.

Notwithstanding, concluding that there is no ongoing emergency does not end the inquiry. *Merritt*, 2016-Ohio-4693, 69 N.E.3d 102, at ¶ 22. There is another step under the primary purpose test that reviewing courts must consider.

"[I]n addition to whether there is an ongoing emergency, other relevant considerations to the primary purpose test include the formality versus informality of the encounter, and the statements and actions of both the declarant and the interrogators, in

light of the circumstances in which the interrogation occurs." (Emphasis added.) *Ohio v. Clark*, 576 U.S. 237, 245, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015), citing *Bryant*, 562 U.S. at 360.

II. *Smith* and *Merritt* conflict based on *Smith's* narrow focus on one aspect of the primary purpose test and *Smith's* reliance on analysis used by the *Merritt* dissent.

Smith did not discuss *Merritt*, but the cases are factually similar. *Merritt* determined that the initial questioning of a domestic abuse victim by an officer responding to an emergency call for help was not testimonial despite the fact the officers determined that the scene was secured upon their arrival through the initial questioning. *Smith* concluded that because the victim of abuse was separated from the attacker and she was safe because emergency responders arrived, although the victim was being treated for her injuries during the questioning, *any and all* questioning by the first officer to respond to the emergency call was testimonial.

According to the state's argument, *Smith* rejected the broader definition of "ongoing emergency" as used by the *Merritt* majority, and then essentially adopted the analysis provided by the dissent in *Merritt* to arrive at the conclusion that there was no ongoing emergency at the time the responding officer first interacted with the victim, and therefore according to Smith, the victim's statements to the police officer and EMT were testimonial.

a. *Smith* solely relied on its determination that no ongoing emergency existed to the exclusion of the required totality of the primary purpose analysis.

The *Smith* majority determined that the entire interaction recorded on the initial responding police officer's body camera was testimonial. The majority made no distinction as to any differences between the first questions posed by the responding officer (who had no information as to why he was responding) and any later questions posed by him or the EMT. The black letter law is unambiguous; "[a] 911 call * * * and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establish or prove' some past fact, but to describe current circumstances requiring police assistance." *Davis*, 547 U.S. at 827, 126 S.Ct. 2266, 165 L.Ed.2d 224. Although that rule is not entirely without exception, the law generally favors the admissibility of the witness or victim's initial interaction with either a police officer responding to emergency calls for assistance or an EMT providing emergency medical treatment. This, at the least, permits officers to obtain basic information to enable the appropriate level of response and ensure everyone's safety and it also recognizes that the primary purpose of a victim's seeking medical care for undisputed injuries is not to memorialize formal trial testimony. Notably, the *Smith* majority was unable to cite a single case, from anywhere in the country, that excludes all initial statements to the first arriving emergency responders.

According to the *Smith* majority, admissibility of the victim's initial statements to the responding police officer was an all-or-nothing proposition. At a minimum, however, statements made to emergency responders are considered on a continuum. *Merritt* and *Steele* recognize that although at some point an emergency responder could veer into investigatory questioning, statements made at different points of the interrogation must be reviewed independently. Smith simply declared that the first question posed by a police officer responding to an emergency call for assistance was testimonial because the emergency had already ended based on the victim's subsequent answers to the officer's initial questions.

There is no precedent supporting that form of analysis. On the contrary, according to *Merritt*, which relied on generally accepted applications of black letter law, the initial interaction with police officers responding to emergency calls for assistance are not testimonial because "'officers called to investigate need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.'" *Merritt* at ¶ 24, quoting *Davis*, 547 U.S. at 832, and *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). Thus, the initial questions of the first officer responding to an emergency call for help are ordinarily not testimonial when the officer is simply obtaining the information necessary to determine the appropriate response. *See* id.

That the answers to those initial questions reveal that the danger potentially subsided does not impact

the analysis. The primary purpose test considers the statements and actions of both the declarant and the interrogators in light of the circumstances in which the questioning occurs. It does not consider the circumstances after the interrogation concludes. *Merritt* at ¶ 21-22 (appellate courts "must review the facts and circumstances at the time the statements were made. That a post hoc review reveals" information demonstrating that the scene is secured and safe does not alter or inform the primary purpose inquiry). The *Smith* majority concluded that because the answers to the initial questions posed by the responding police officer revealed that the physical emergency had arguably ended (the victim was still being treated by EMS), the questions were testimonial despite the undisputed fact that the responding officer had no way to know anything about the nature of the officer's response until asking a preliminary set of questions.

Smith's application of the Confrontation Clause analysis is overly broad, quite possibly a unique application that does not exist in any jurisdiction in this country, and conflicts with Merritt on the issue of whether a court can review the answers to the initial questions to determine whether an officer's initial question in response to the calls for emergency assistance constituted an ongoing emergency (*Smith*'s analysis) instead of reviewing the circumstances in which the questioning occurred (*Merritt*'s analysis).

Moreover, the *Smith* majority declared that no ongoing emergency existed, and therefore, the statements were testimonial for the purposes of the primary purpose test despite omitting the remainder

of the required analysis. *Smith*, 2023-Ohio-603 at ¶ 91-92 ("from [the victim's] perspective, the 'emergency' for which she needed police assistance had effectively ended before police began questioning her"). Although what constitutes an ongoing emergency is part of the inquiry, there are other factors that must be considered before an ultimate conclusion on the Confrontation Clause question can be drawn. As the Supreme Court has concluded, "whether an ongoing emergency exists is simply one factor — albeit an important factor — that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." (Emphasis added.) *Byrant* at 366. The inquiry does not end upon reaching a conclusion as to the existence or absence of an ongoing emergency as *Smith* concluded. See, e.g., *Merritt*, 2016-Ohio-4693, 69 N.E.3d 102 at ¶ 22.

In short, in *Smith* the primary purpose analysis ended with a determination that there was no ongoing emergency. Under *Merritt*, there are additional factors under the totality of the primary purpose test that must be considered before the appellate analysis ends. *Smith* blurs the distinction between the totality of the analysis, analysis that goes beyond consideration of the existence or absence of an ongoing emergency. In situations where one panel does not perform the required analysis or blurs distinctions in the settled analysis, a conflict is created. In *State v. Jones*, 148 Ohio St.3d 167, 2016-Ohio-5105, 69 N.E.3d 688, ¶18, for example, this court sitting en banc resolved a conflict in the black letter analysis for preindictment delay that imputed the state's inaction into the prejudice prong of the analysis before declaring the existence of preindictment delay; in other words, this

court en banc shortened the two prongs of analysis and created a new standard.[1] Before that, an offender was required to demonstrate actual prejudice before the burden shifted to the state to demonstrate a reasonable basis for the delayed prosecution. *Id*. The Ohio Supreme Court ultimately concluded that this court improperly created a less stringent test for the prejudice prong of the analysis, but at the least, we provided an answer to alleviate any confusion pending the Ohio Supreme Court's ultimate review. *Jones,* 148 Ohio St.3d 167 at ¶ 22; *see also Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, 17 N.E.3d 428, at ¶ 30 (O'Donnell, J. dissenting) ("Each appellate district is to decide the law on given substantive legal questions for itself.").

In this case the *Smith* majority failed to conduct the totality of the analysis as required under *Merritt* with its conclusion as to the absence of an ongoing emergency. Under settled law, however, *Smith* failed to conduct the totality of the Confrontation Clause analysis thereby creating a less stringent test than used by *Merritt* in particular. Future panels will have to choose which case to follow, and whichever case is chosen, a conflict will arise given the differing analysis applied in each case. En banc review is required to clarify the scope of the analysis required for Confrontation Clause issues in this district.

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[1] This court sua sponte initiated the en banc proceeding before issuing the panel decision in light of the potential conflict that would have been created by the panel. See *id.* at ¶ 1.

b. *Smith* adopted the dissenting judge's analysis in Merritt in concluding that no ongoing emergency existed to the exclusion of the ongoing-emergency factors set forth in *Davis*.

As the state alluded to in its motion for en banc review, in narrowly focusing on the ongoing-emergency inquiry to the exclusion of the totality of the primary purpose analysis, *Smith* adopted the same reasoning and analysis applied by the dissent in *Merritt*; elevating a dissent's analysis over that which was provided by the majority therein.

In presenting its argument to the *Smith* panel, the appellant relied on *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 15, citing *Davis*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224, which provided four factors to consider in determining whether an ongoing emergency exists. Appellant's Brief at p. 6. In *State v. Jacinto,* 2020-Ohio-3722,155 N.E.3d 1056, ¶ 66 (8th Dist.), as an example of the *Arnold* analysis, the panel recognized these four factors: "(1) the declarant describes contemporaneous events rather than events that occurred hours earlier, (2) an objective emergency exists, (3) the questions asked of the declarant are necessary to resolve the emergency and (4) the interview is of an informal nature." *Id.*, citing *Cleveland v. Johnson*, 8th Dist. Cuyahoga No. 107930, 2019-Ohio-3286, ¶18 (citing *Davis*).

Had the *Jacinto* analysis been performed, it would have been concluded that the victim in *Smith* was being questioned contemporaneous with the

emergency responder's questioning (broadly defined as "occurring in the same period of time" as opposed to hours or days later); the police officer's questions were posed immediately upon his arrival in responding to the emergency call for assistance; the officer was not aware of the extent of the danger posed by the assailant at the time he questioned the victim; and although the victim's answers enabled the officer to determine that the emergency arguably had ended, the questioning was informal and directed toward permitting the officer to determine the proper course of response needed to address the emergency call for the assault that occurred minutes earlier. Instead of applying those factors, the *Smith* majority followed the *Merritt* dissent's approach to finding the absence of an ongoing emergency.

In reaching the dissent's conclusion in *Merritt*, the dissenting judge would have found that introducing the initial statements made to responding officers at trial violated the Confrontation Clause because there was no ongoing emergency. According to the dissent, this was because the answers to the officer's initial questions revealed that (1) the dispute was largely private between two individuals; (2) the assailant was known to the victim; (3) nothing in the record indicated that the assailant posed a threat to the public because the assailant was already detained and there was no weapon involved; and (4) the victim was safe due to the police presence. *Id.* at ¶ 41, 43-44.

Despite the fact that the majority in *Merritt* rejected that narrow focus under the ongoing emergency inquiry, the *Smith* majority used the same analysis, concluding that use at trial of the initial

questioning by the first responding police officer violated the Confrontation Clause because the victim's answers to those initial questions arguably revealed that (1) the dispute was only between two individuals; (2) the assailant was known to the victim; (3) nothing in the record demonstrated that the assailant posed a threat to anyone because police officers did not ask the victim about any weapons during the initial discussion; and (4) the victim was safe due to the arrival of the police and medical responders. *Smith*, at ¶ 91-92.

Thus, *Smith* tacitly treated the dissenting analysis as controlling over the analysis provided by the majority in *Merritt*. The fact that the *Smith* majority borrowed a dissenting judge's analysis demonstrates that *Merritt* and *Smith* cannot be harmonized. Future panels are required to choose which analysis to apply. Leaving both decisions to stand does nothing to promote the uniformity in the law of this district.

III. *Smith* and *Steele* conflict on the scope of the exclusionary principle: Smith held that all statements are inadmissible despite the differing analysis that must be considered when multiple statements are made to police officers and medical providers.

In addition to the conflict between *Smith* and *Merritt*, *Smith* also conflicts with *Steele*. The body camera footage introduced at trial in *Smith* demonstrated that an EMT asked questions of the victim in the course treating the victim's injuries. *Smith* at ¶ 145 (Sheehan, J., dissenting). According to the dissent, "[t]he trial court admitted the victim's

statements made on March 21, 2020, to the responding police officer [and] her statements made to emergency medical technicians as recorded on the police body camera * * *." The *Smith* majority nonetheless excluded the body camera evidence in its totality based on the conclusion that no ongoing emergency existed, despite the fact that the victim was being treated for her injuries at the time of the questioning by the officer and the EMT. But see *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 183 ("Statements to police officers responding to an emergency situation are generally considered nontestimonial precisely because the declarant is usually acting—under great emotional duress—to secure protection or medical care.").

The majority did not address the fact that the EMT's questioning falls under a different analysis, but by reversing the conviction, the majority declared that the EMT's questions were the equivalent to the police officer's, and therefore, the victim "was no longer 'acting * * * to secure protection or medical care" even though the victim was actively receiving medical treatment during the body camera footage. *Smith* at ¶ 91. This contradicts the black letter law applied in *Steele*, at ¶ 27, in which the panel concluded that "unlike statements to law enforcement officials, statements to medical personnel are typically made in pursuit of treatment, not investigation. Statements to medical personnel are not made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* Thus, *Steele* differentiated between questions asked by an EMT and those posed by police officers even though the officer may be

present during the EMT's questioning. *Smith* attributed the questions of the EMT to the police officer, but that analysis contradicts the necessary analysis under *Steele*.

IV. *Smith* and *Tomlinson/Harris* conflict.

And finally, the *Smith* majority directly conflicts with *Tomlinson*, 8th Dist. Cuyahoga No. 109614, 2021-Ohio1301, ¶ 37, 43, in which the unanimous panel overruled the argument that the Confrontation Clause precluded the admission of the body camera video that included statements made by non-testifying witnesses. See also *Harris*, 8th Dist. Cuyahoga No. 111940, 2023-Ohio-1892. Despite this unambiguous holding, *Smith* concludes that body cameras and their attendant audio recordings cannot be used to supplant the in-court testimony of witnesses through the Confrontation Clause. *Id.* at ¶ 94 (concluding that body camera video cannot be used "to supplant the in-court testimony of witnesses."); see also *Jones*, 2023-Ohio-380, 208 N.E.3d 321, ¶ 129 (8th Dist.) (under the Confrontation Clause analysis, the panel concluded that "statements recorded by police body cameras cannot be used either to supplement the testimony of a witness or as a substitute for the testimony of a witness."). There is no factual difference between the two lines of authority. In *Jones* and *Smith*, the majority concludes that under the Confrontation Clause analysis, the state is not permitted to introduce witness or victim statements recorded on police body cameras in situations in which that witness or victim does not testify at trial. *Tomlinson* concluded otherwise; a statement that panels have

always considered as a routine application of the law. *See*, *e.g.*, *Harris*.

V. Conclusion

In my opinion, *Smith* conflicts with *Merritt* because (1) *Smith* solely relies on the analysis provided by the dissent in *Merritt*; (2) *Smith* fails to apply the entirety of the primary purpose test as applied and discussed in *Merritt*; and (3) *Smith's* exclusion of statements made to the EMT based on the lack of an ongoing emergency contradicts *Steele*. No panel can apply *Smith* in conjunction with *Merritt* or *Steele*. It's an either-or situation. There are no factual differences to differentiate the cases.

Further, this Court sitting en banc should have rectified the conflict between *Smith* and *Tomlinson* and resolve the question of whether statements recorded in police body cameras are admissible under the Confrontation Clause for non-testifying witnesses.

MARY J. BOYLE, J.,

FRANK DANIEL CELEBREZZE, III, J.,

EILEEN T. GALLAGHER, J., and

MICHELLE J. SHEEHAN, J., CONCUR

APPENDIX C

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

COA NO. 111274
LOWER COURT NO. CR-20-651674-A
CR-20-655568-A
MOTION NO. 562769

[Filed April 4, 2023]

JOURNAL ENTRY

Motion by appellee for reconsideration is denied.

Judge Michelle J. Sheehan, Dissents
Judge Mary Eileen Kilbane, Concurs

/s/ Eileen A. Gallagher
Eileen A. Gallagher
Presiding Judge

APPENDIX D

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

No. 111274

[Filed March 2, 2023]

	)
STATE OF OHIO,	)
Plaintiff-Appellee,	)
	)
v.	)
GARRY SMITH	)
Defendant-Appellant	)

JOURNAL ENTRY AND OPINION

EILEEN A. GALLAGHER, P.J.:

[¶1] Defendant-appellant Garry Smith ("Smith") appeals his convictions for domestic violence in Cuyahoga C.P. No. CR-20-651674-A ("651674") and his convictions for felonious assault and domestic violence in Cuyahoga C.P. CR-20-655568-A ("655568")

following a bench trial. Smith contends that the trial court erred by admitting evidence of out-of-court statements made by the alleged victim, who did not testify at trial, in violation of his rights under the Sixth Amendment's Confrontation Clause and the rules of evidence. Smith also contends that (1) his guilty verdicts are against the manifest weight of the evidence, (2) he was denied a right to trial by jury because, due to COVID-related delays, he was forced to choose between "continued confinement in the county jail" and "his right to a jury of his peers" and (3) the trial court erred in sentencing him to an indefinite sentence in 655568 because the indefinite sentencing provisions of the Reagan Tokes Law are unconstitutional.

[¶2] For the reasons that follow, we (1) reverse the trial court's decision and vacate Smith's convictions in 651674 and (2) affirm the trial court's decision in 655568.

I. Factual Background and Procedural History

[¶3] In 651674, a Cuyahoga County Grand Jury indicted Smith on two counts of domestic violence in violation of R.C. 2919.25(A), a fourth-degree felony. Count 1 included a pregnant victim specification; both counts included a furthermore clause, alleging that Smith had previously pleaded guilty to or had been convicted of domestic violence in November 2012. The charges related to Smith's alleged assault of Barbara Bradley on March 21, 2020.

[¶4] Following the March 21, 2020 incident, Smith was arrested and released on bond. One of the conditions of his bond was that he was to have no contact with Bradley. Smith was arraigned on November 24, 2020, and his bond was continued with the condition that he have no contact with Bradley. Smith pled not guilty to all charges.

[¶5] In 655568, a Cuyahoga County Grand Jury indicted Smith on three counts: one count of felonious assault in violation of R.C. 2903.11(A)(1), a second-degree felony (Count 1); one count of felonious assault in violation of R.C. 2903.11(A)(2), a second-degree felony (Count 2) and one count of domestic violence in violation of R.C. 2919.25(A), a fourth-degree felony (Count 3). The felonious assault counts included one- and three-year firearm specifications. The domestic violence count included a one-year firearm specification and a furthermore clause, alleging that Smith had previously pleaded guilty to or been convicted of domestic violence in November 2012. The charges related to Smith's alleged assault of Bradley on December 26, 2020. Smith was arrested on December 26, 2020 for that alleged assault and released on bond two days later. Smith pled not guilty to all charges.

A. Motions in Limine and Other Pretrial Proceedings

[¶6] Following Smith's indictment in 655568, the state filed a motion to revoke his bond in 651674. In its motion, the state asserted that Smith had admitted to having been in contact with Bradley, although he

denied injuring her. A hearing was set on the motion. Smith failed to appear for the hearing. Smith's bond was revoked and a capias was issued. A few days later, Smith was again arrested, and a holder was placed on him due to the new charges in 655568. On February 18, 2021, Smith filed a motion to reinstate bond and remove holder in both cases. The trial court denied the motion. On March 11, 2021, Smith filed a motion to set and/or reinstate bond in both cases. The trial court denied the motion. On April 16, 2021, Smith filed a motion to be released from detention and to be placed in an ankle bracelet in both cases. The motion was denied. On August 17, 2021, Smith filed a motion to dismiss for failure to provide a speedy trial in both cases.

[¶7] On September 24, 2021, Smith filed a combined motion in limine in both cases, seeking to preclude the state from introducing evidence of (among other things) out-of-court statements by Bradley captured on police body camera recordings "without having the victim actually testify in court" on the grounds that it would violate the Confrontation Clause and the rules of evidence. Smith also sought to preclude the introduction of "any and all 'dispatcher calls'" due to "the unavailability to counsel[,] * * * the hearsay content of these calls and the inability to cross[-]examine the speaker of the calls." On September 27, 2021, Smith filed a second motion in limine in both cases, seeking to preclude the introduction of "[a]ny and all portions of the victim's medical records that contain the HISTORY of the alleged offense(s)." Smith argued that the admission of such medical records, "without having the victim testifying in court," would

"constitute hearsay and would totally prevent cross[-]examination of the victim" in violation of his rights and this court's decision in *State v. Simmons*, 8th Dist. Cuyahoga No. 98613, 2013-Ohio-1789.[1]

[¶8] In response, the state asserted that it had subpoenaed Bradley to testify in these cases and indicated that "[i]f the victim appears, the [s]tate will question her about these things." However, the state further asserted that if Bradley did not appear for

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[1] In *Simmons*, the trial court, over the defendant's objection, allowed a sexual assault nurse examiner who had treated the rape victim to read a "narrative" she had asked the victim to provide that described the rape "in [the victim's] own words" into evidence at trial. *Id.* at ¶ 23-24. On appeal, this court stated that although the information the victim provided "concerning [her] physical injuries and how she was raped" was "necessary for proper medical treatment and diagnosis," it could "find little evidence to suggest that [the victim's] narrative aided in any sort of diagnosis or medical treatment" and found that "the details provided by [the victim] in the narrative, such as how she met [the defendant], [the defendant's] statements and demeanor during the rape, and [the victim's] actions following the rape, were not for the purpose of medical treatment, but rather related primarily to the investigation of [the defendant]." *Id.* at ¶ 25. As such, the court determined that the narrative did not fall within the hearsay exception set forth in Evid.R. 803(4) and that the trial court had erred in admitting evidence of the narrative. *Id.* at ¶ 26. In that case, however, the victim "took the stand" at trial, "provided substantial testimony regarding the events of the night, including the information provided in the narrative" and defense counsel "conducted a substantial cross-examination" of the victim. Under those circumstances, the court held that the defendant's rights under the Confrontation Clause were not violated and that the trial court's error in admitting evidence of the narrative was harmless beyond a reasonable doubt. *Id.* at ¶ 26-29.

trial, evidence of her statements would nevertheless be admissible "pursuant to the primary purpose test" because "[t]he officers were at the house to meet an ongoing emergency." With respect the "history" reflected in Bradley's medical records, the state asserted that "[t]hese statements have long been deemed admissible pursuant to Ohio Evid.R. 803(4)."

[¶9] On November 30, 2021, the state filed a motion for joinder of the two cases. Smith opposed the motion and filed a motion for separate trials.

[¶10] On December 1, 2021, Smith waived his right to a jury trial. The trial court granted the state's motion for joinder, denied Smith's motion for separate trials and the cases proceeded to a bench trial.

[¶11] Before trial commenced, the trial court allowed the parties to present oral argument on Smith's motions in limine. Smith reiterated the arguments set forth in his motions, i.e., that the statements at issue were elicited "for investigative purposes" and that admission of body camera footage and other evidence of the absent witness' statements would violate his right of confrontation and the rules of evidence. Defense counsel further explained his concerns as follows:

> I've had cases where they hide the victim, they tell them, [w]e don't need you if you don't come down, when in fact they're available and want to come down, Judge. I don't know what's going on here. I mean, I have the right of cross-examination. * * * [S]ome other people that did that to me and I'm sensitive to that.

[¶12] The trial judge acknowledged defense counsel's concerns and indicated that she did not believe that was happening in this case:

> Well, I think you have the assurance of the prosecutors representing the State of Ohio that that is not the case. They have subpoenaed the victim, they are anticipating her presence.

[¶13] The state asserted that although it "intend[ed] to call the victim," Bradley had not appeared to testify.[2] The state argued that regardless of the appearance of Bradley, her statements were admissible under numerous hearsay exceptions as statements "made for medical diagnosis and treatment," statements "describ[ing] her physical condition" and statements made "under the stress and excitement of the event." With respect to Smith's Confrontation Clause concerns, the state asserted that admission of evidence of Bradley's statements related to the March 21, 2020 incident would not violate the Confrontation Clause because "[t]hey were taken in the back of an ambulance," "the victim [was] describing her injuries" and Smith had "shortly left" and officers were "concerned about his whereabouts." The state further asserted that

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[2] During its argument on the motions in limine, the state suggested that Smith may have had an active role in Bradley's failure to appear to testify. The state claimed that hundreds of calls had been made to various telephone numbers associated with Bradley using Smith's pin while he was in jail awaiting trial. No evidence was presented regarding these alleged calls or the content of these alleged calls, and the state did not file a motion for forfeiture for wrongdoing. Accordingly, we do not further consider the issue here.

evidence of Bradley's statements related to the December 26, 2020 incident "would be offer[ed] under the primary purpose test of an ongoing emergency" and that those statements, made while Bradley was "all bloodied," after Smith had left with a weapon and officers were "concerned about finding him," "were clearly not testimonial statements."

[¶14] After listening to the parties' arguments, the trial court stated:

> I have to consider whether * * * [t]he primary purpose of a conversation captured on body camera is made for the purpose of an out-of-court substitution of trial testimony or if it's made during an ongoing investigation. I haven't seen or heard the body camera. * * * The law allows for evidence-based prosecution in domestic violence cases where the victim is unavailable.

[¶15] After further consideration, the trial court denied Smith's motions in limine. Citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and *State v. Tomlinson*, 8th Dist. Cuyahoga No. 109614, 2021-Ohio-1301, the trial court stated that "[t]o determine whether a statement is testimonial or nontestimonial, we have to consider whether a reasonable person in the declarant's position would anticipate that his or her statement is being used against the accused in investigating and prosecuting the case." The trial court indicated that *Tomlinson* was "similar to the facts presented by counsel with regard to the evidence at issue here" and that, therefore, "the body camera or 911 calls or the evidence the State seeks to present is nontestimonial

in nature." The trial court further stated that it would determine the admissibility of the evidence, i.e., whether the statements "fall within a firmly rooted hearsay exception" such as the excited-utterance exception, "at such time as the evidence is presented."[3] The trial court also denied Smith's motion to dismiss for failure to provide a speedy trial.

B. Trial

[¶16] Bradley did not appear to testify at trial.[4]

[¶17] The state presented testimony from six witnesses at trial: Cleveland police officers Brandon Melbar ("Melbar"), Jared Germaine ("Germaine"), Colbert Stadden ("Stadden") and Brian Soucek ("Soucek"); 911 "call-taker"/dispatcher Jessica McDougler ("McDougler"); and Cleveland police detective William Cunningham ("Cunningham"). In addition to the witness testimony, the state introduced photographs of Bradley's injuries (state exhibit Nos. 3-

[3] It is not clear from the record whether the trial court reviewed the body camera footage or other evidence of Bradley's statements prior to determining that Bradley's statements were nontestimonial and denying Smith's motions in limine. When the parties argued the motions, the trial court stated that "it [hadn't] seen or heard the body camera," but it is not clear if the trial court reviewed the body camera footage or any other evidence during a recess, prior to ruling on the motions in limine.

[4] The record reflects that Bradley was served with a subpoena for the December 2021 trial. However, there is nothing in the record to indicate that a bench warrant was requested or issued to secure Bradley's appearance as a material witness at trial when she failed to appear in response to the subpoena. The state confirmed, during its appellate oral argument, that a bench warrant had not been requested or issued for Bradley.

7 and 9), the audio recording of Bradley's 911 call relating to the December 26, 2020 incident (state exhibit No. 8), excerpts of footage from the body cameras of Melbar and Soucek (state exhibit Nos. 2 and 12) and a certified copy of a docket listing that included a journal entry reflecting Smith's prior conviction for domestic violence on November 26, 2012 in Cleveland M.C. No. 2012-CRB-37229 (state exhibit No. 11). The parties also stipulated to the admission of Bradley's medical records from MetroHealth Medical Center dated March 21, 2020 related to the incident (state exhibit No. 10).

[¶18] Smith testified in his defense and also presented testimony from his nephew, Chance Smith ("Chance"). A summary of the relevant evidence follows.

1. Evidence Presented by the State Relating to the March 21, 2020 Incident

[¶19] Soucek and Cunningham testified for the state regarding the March 21, 2020 incident.

[¶20] Soucek testified that on the evening of March 21, 2020, he and his partner, Officer Piper ("Piper"), responded to a call regarding "a female assaulted" that had occurred on Connecticut Avenue in Cleveland. He stated that the incident had occurred "on the street somewhere." Soucek did not know exactly when the incident occurred but stated that the victim, later identified as Bradley, was "already being escorted into the EMS wagon" when they arrived. Soucek indicated that he had been wearing, and had activated, his body

camera that evening. Over Smith's objection, the state introduced footage from Soucek's body camera (state exhibit No. 12), which recorded the officers' interrogation of Bradley while she was in the back of the ambulance. The state played excerpts[5] of the body camera footage (video and audio recordings), which Soucek acknowledged was a "fair and accurate depiction of what [he] saw that night," for the trial court. Rather than having Soucek testify based on his own recollection of the events, the state asked Soucek to describe what he observed on the body camera footage and, at times, to repeat what Bradley had said as heard on the body camera footage while the trial court viewed the body camera footage:

> Q. I'm stopping at 2:03. What did we just hear on the body cam the victim say?
>
> [Defense Counsel]: Objection. Let it speak for itself.
>
> THE COURT: Overruled.
>
> A. She stated that her fiancé assaulted her and also ripped her hair.
>
> Q. Specifically, what else? That's all right, I'll just hit Play. Now, I'm stopping at 3 minutes 4 seconds, and just prior to this you could see

[5] Although state exhibit No. 2 contains approximately eight-and-one-half minutes of body camera footage, the record reflects that state played only six minutes and 42 seconds of that footage during Soucek's testimony.

something with the victim. Can you describe what you see?

[¶21] Soucek testified that, as seen in the body camera footage, the right side of Bradley's face was "very swollen," her "eye was swollen shut," "little spots of blood and glue" were visible where her hair had been ripped out and she appeared "very disheveled" with her shirt "ripped, dirty" like she "was in a fight."

[¶22] The body camera footage captured the following colloquy as the officers interviewed Bradley while she was in the back of the ambulance being treated by EMS:

Q. So what happened?

A. My fiancé beat me up 'cuz I had an argument with his niece. Me and his niece had an argument. This is what he did. He pulled my hair up on the roots.

Q. Do you live with him?

A. We do live together.

Q. Who's this? Was this your niece here? She said you're five months pregnant? Does that sound about right? Did you take any kicks or punches or anything to the stomach?

A. To my knee, to my chest, to my stomach. I no longer feel my baby moving.

Q. Where did this happen at?

A. Outside.

Q. Outside where? In front of this house here?

A. * * * We were down the street.

Q. * * * Do you live over here?

A. No. We were on our way to her house but it didn't happen in her house.

Q. But it happened down the street here?

A. We had an argument and, you know, we were all, we were drinking. I'm not even supposed to be drinking.

Q. So, it happened in the car?

A. Outside the car.

Q. So, is he still in the area, or did he drive away?

A. No. He drove away. He left.

[¶23] In response to further police inquiries, Bradley provided officers with her name and date of birth, Smith's name and date of birth and their address in East Cleveland. EMS personnel observed that Bradley's heart was "beating real fast" and placed a heart monitor on Bradley. When asked by EMS personnel whether she had taken any drugs, Bradley stated: "I snorted cocaine when he beat me up. I snorted a couple rounds of cocaine." Bradley further indicated that she was pregnant with her sixth child and that Smith was the baby's father. As officers continued to question Bradley, she provided additional details regarding the incident:

Q. Can you tell me exactly what he did at the car?

A. He punched me in my face and other people were trying to break it up and he pushed everybody away. He threatened to shoot me and said he would kill me. He was also intoxicated. Very intoxicated.

Q. And he ripped out your hair?

A. He ripped out my hair. This is what he did to me. He kneed me to the face, the chest, stomach. * * *

[¶24] Soucek testified that when the officers arrived on scene, Bradley's "aunt" was present, i.e., that Bradley had gone to her aunt's house to call for help and that her "aunt called it in."[6] Soucek stated that his partner, Piper, interviewed Bradley's aunt but that the aunt did not witness the incident.

[¶25] EMS transported Bradley to the hospital; the officers followed Bradley to the hospital. At the hospital, officers further questioned Bradley and a supervisor took photographs of her injuries for the police report. Soucek identified the photographs of

[6] The body camera footage contradicts this testimony slightly. The body camera footage reflects that police responded to the home of Bradley's niece and that it was Bradley's niece who called 911. At the end of the body camera footage (state exhibit No. 12), an unidentified person, presumably Bradley's niece, states: "She just got here about 20 minutes ago, and, when she got here, the first thing I did was call EMS because that's my aunt. I don't know who she was with. She stay all the way in East Cleveland but whoever she was with had to be on this side of town and dumped her off, and she knocked on my door."

Bradley's injuries (state exhibit No. 9) and confirmed that they fairly and accurately depicted Bradley's injuries as he had observed them the night of the incident.

[¶26] Soucek testified that although Bradley made no mention of a weapon when the officers were questioning her while she was in the ambulance. However, at the hospital, "[w]hile she was receiving treatment," Bradley told him that Smith had a gun on him that day and that he had assaulted her previous times but was "unsure if they were reported." The officers' interrogation of Bradley at the hospital was not captured on the body camera footage admitted into evidence at trial.

[¶27] Cunningham was the detective assigned to investigate the March 21, 2020 incident. He testified that, in investigating the March 21, 2020 incident, he reviewed the police report, researched Smith's criminal history, reviewed photographs of Bradley's injuries and obtained a search warrant to obtain Bradley's medical records relating to the incident. Cunningham identified the photographs, medical records and a journal entry reflecting Smith's prior conviction for domestic violence on November 26, 2012.

[¶28] Bradley's medical records include an "emergency department - visit note," dated March 21, 2020, which states, in relevant part, as follows:

The history is provided by the Patient.

> [Bradley] is a 38 year old female with a history of drug use per chart review presenting to the ED as a Cat 2 trauma after an assault.<[EM.1]> Pt states that her boyfriend was drunk and showing off, so hit and knocked her in the face and stomach. Denied LOC or AC. Had been drinking tonight herself. Says that she took some cocaine for the pain after. This is her 6th pregnancy. Is not feeling the baby move anymore — did before. No vaginal leakage or leakage for fluids. Thinks she is 5 months. Was lightheaded earlier, not currently. Has diffuse arm and abdominal pain. Also c<[JV.1]>omplaining [sic] of facial pain in the trauma bay.<[EM.1]> Denies tingling/numbness/weakness anywhere, incontinence, IVDA<[BG.1]>[.]

[¶29] The medical records also include a "Consult Note," which states, in relevant part:

> HPI: <[KB.1]> [Bradley] <[KB.2]> is a<[KB.1]> 38 year old<[KB.2]> G<[KB.1]>6<[KB.4]>P4105<[KB.1]> at <[KB.4]> 22w3d<[KB.4]> gestation<[KB.4]> who presents<[KB.1]> to the ED s/p assault by FOB/fiancé. Patient reports that they were both intoxicated (alcohol + cocaine). After a short verbal altercation, he punched her in the face multiple times, pulled her hair out, then kneed/kicked her in her chest and abdomen. Patient reports facial and abdominal pain. She denies and contractions. * * * Active fetal movement prior to altercation. Currently not feeling any in the ED.

[¶30] Cunningham testified that he had attempted to speak with Bradley to "find out her side" regarding the incident but was unable to do so. He indicated that, at that time, the department had "a standard" of attempting to contact a victim three times and "after that, then we have to take the facts to the prosecutor of what we have." He stated that, in his experience, it is "not uncommon" for victims of domestic violence "to not want to speak with law enforcement."[7]

2. Evidence Presented by the State Relating to the December 26, 2020 Incident

[¶31] Melbar, Germaine, Stadden, McDougler and Cunningham testified for the state regarding the December 26, 2020 incident.

[¶32] McDougler was working as a 911 "call-taker"on December 26, 2020, when she received a call from Bradley The state played an audio recording of the 911 call for the trial court (state exhibit No. 8), which McDougler confirmed was a fair and accurate recording of the 911 call she received from Bradley

[¶33] At the outset of the 911 call, Bradley told McDougler that she needed police at her home, gave her name and address and said, "He left. He's leaving. * * * He's leaving in the truck." McDougler asked, "What's going on?" Bradley replied: "He beat me. He beat me bad. He beat me with a gun." In response to

[7] Although Bradley had told the officers that others had witnessed the March 21, 2020 incident and had tried to break up the fight, there is no evidence that Cunningham or any of the other officers attempted to locate or interview any of those witnesses.

further inquiries, Bradley identified her assailant as Smith and provided his date of birth and a description of the vehicle in which he had left. Bradley stated that she did not know in which direction Smith went when he left. Bradley denied that she needed an ambulance and stated, "I think I'll be ok, but I do need them * * * to help me get my face together. Ok? I am beat real bad." When asked where the gun was, Bradley stated: "He might have got rid of it because he left. He left. He left. He left." McDougler indicated that they would "get someone out there" and ended the call.

[¶34] Melbar testified that at approximately 5:15 a.m. on December 26, 2020, he and his partner, Germaine, responded to a domestic violence call for "a female assaulted" at a residence on Parkhill Avenue in Cleveland. When the officers arrived at the residence, they knocked on the door and a female, later identified as Bradley, opened the door. Bradley was the only person in the residence at that time. Melbar stated that Bradley was bleeding, had "a large laceration to her head" and "severe swelling" that was "really bad." Germaine stated that when Bradley came to the door, "[s]he had a very serious-looking head trauma with a lot of blood."

[¶35] Melbar and Germaine entered the residence and began to speak with Bradley Germaine described Bradley as "distraught and a little bit out of it."Melbar described Bradley as "afraid," "really nervous," "shaking" and "crying." Melbar stated that, initially, "[s]he didn't really want to talk to us that much" but that, as she calmed down, Bradley told the officers what had happened.

[¶36] Melbar testified that Bradley told the officers she and her "husband," Smith, had gotten into an argument because one of his friends, "Shoulders,"[8] had disrespected her and Smith "didn't stick up for her." When the friend left, Smith "became aggressive," pulled out a firearm and cocked it. Melbar stated that Bradley told him she had asked Smith whether he was going to shoot her and that Smith said, "No," and he then pistol-whipped her multiple times.

[¶37] Germaine testified that Bradley told the officers that she had been in a physical altercation with Smith "over [an] incident that occurred prior with his daughter and another male that was on the scene [who was] disrespectful" and that, during the altercation, Smith had struck her twice in the head with a gun.

[¶38] The officers were aware of the prior incident involving Bradley's daughter. Melbar testified that sometime earlier that day, he and Germaine had responded to a call at the residence regarding a dispute between Bradley and her sister. Germaine testified that when the officers arrived at the residence, Bradley's daughter was outside. Melbar stated that the officers spoke with Bradley's daughter and that she informed them that there had been an altercation among family members in which she had been pushed by her stepfather. When the officers approached the home, Smith and Bradley answered

[8] In the trial transcript, this friend is referred to both as "Shoulders" and "Shoulder." For consistency, we refer to this individual as "Shoulders" throughout.

the door and identified themselves but did not allow the officers inside the home.

[¶39] Melbar testified that at the time of the first "call-out," Smith, Bradley, Bradley's daughter and three or four other people were at the residence. Melbar stated that Bradley later told the officers that Smith had "supposedly shoved" Bradley's daughter while attempting to break up the fight. Germaine testified that it was his understanding that Bradley's daughter had gotten "in between the argument" between Bradley and her sister and that Smith had "pushed [Bradley's daughter] out of the way so that he could separate the parties." Melbar testified that he had gotten "a good look" at Bradley during the first call-out and that she did not appear to be injured. Germaine likewise testified that he saw no visible injuries on Bradley at the time of the first call-out. Germaine identified Smith in court as the man who had answered the door on that first call-out.

[¶40] Melbar testified that Bradley told the officers that, after the second incident, Smith had left the house in a burgundy 2006 Ford Expedition with temporary tags. Melbar stated that he broadcast the vehicle description to other patrol officers so they could attempt to locate Smith. Germaine testified that the officers also requested that EMS respond because they wanted to get Bradley "to a safe location, to the hospital to get checked out, and make sure that she was all right." Melbar testified that it was "[p]robably the worst DV [he had] ever seen" and that "it was clear that she definitely needed medical attention." EMS later responded to the scene.

[¶41] Melbar and Germaine stated that they did not locate a firearm at the residence and believed that Smith may have taken the firearm with him when he left. Melbar indicated that he felt it was important to locate Smith because Bradley "didn't want to go with the ambulance" and he feared she would be "in danger" if Smith returned.

[¶42] During Melbar's direct examination, after he provided a brief overview of what had occurred, the state introduced footage from Melbar's body camera (state exhibit No. 2),[9] which recorded the officers' actions and observations at the scene, including their interview of Bradley, during the second call-out. The state then played excerpts[10] of the body camera footage (video and audio recordings) for the trial court.[11]

[¶43] As captured in the body camera footage, Bradley told the officers, in response to their inquiries, that she had been upset with Smith following the earlier altercation in which Smith had pushed

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[9] Although Melbar testified that he was wearing his body camera, no body camera footage was introduced into evidence from the first call-out on December 26, 2020.

[10] State exhibit No. 2 contains approximately 50 minutes of body camera footage. According to the state, it played "probably three or four minutes" of that footage during Melbar's testimony.

[11] Before the state played the body camera footage, the trial court noted Smith's "ongoing objection to the presentation of this evidence" as set forth in his motions in limine. The trial court overruled Smith's objection based on "the same explanation already given," i.e., that the evidence was "nontestimonial in nature and admissible under the hearsay exception."

Bradley's 14-year-old daughter. She said that she told Smith: "Don't put your hands on my daughter. You're a whole grown man. She's a little girl. She's 14 years old. Do not hit her like that." Later in the interview, Bradley told police that she did not believe Smith had intended to hurt her daughter and that she "would have been at [her] daughter's side if he did anything to [her] daughter."

[¶44] Bradley stated that, prior to the second incident, she had also been upset because Smith's friend, Shoulders, had been "coming at [her] disrespectfully," "going up in my face, talking crazy, telling about what he's going to do to me" and Smith had done nothing in response. She indicated that after Shoulders left, an argument ensued between her and Smith. Bradley told the officers that she asked Smith why he let Shoulders "disrespect" her. She stated that Smith responded, "F*** you, b****. I don't give a f*** about you," and grabbed his gun, a black handgun. Bradley stated that she asked Smith whether he was going to shoot her and that he replied, "No, b****." Bradley said that Smith cocked the gun, but did not shoot her. She indicated that Smith then "slapped" her "twice" with the gun. She told police that she believed Smith had pistol-whipped her because "I was talking about s*** that was going on * * * things that was going on earlier today and he didn't like what I was saying."

[¶45] Bradley told police that after Smith pistol-whipped Bradley, he left in her vehicle.[12] Bradley stated that she did not know whether Smith had taken the gun with him when he left but that she knew it was not in the house. She indicated that "he might have gotten rid of it."

[¶46] When officers asked Bradley whether Smith had "ever attacked her like this in the past," Bradley responded that they had a prior domestic violence case but that it "wasn't as serious." Bradley acknowledged that, this time, it was "pretty bad."

[¶47] Bradley told the officers that she did not want to go to the hospital because Smith had the only set of keys to the house and she could not lock up the house and get back in. She indicated that she did not want to give a written statement and did not want Smith to go to jail.

[¶48] Melbar testified that Bradley's face was "extremely bad" and that the body camera footage, which was "a little bit dark," did not fully capture her injuries. He stated that Bradley was bleeding with "severe swelling." During their testimony, the officers identified several photographs of Bradley's injuries that were taken by a supervisor (state exhibit Nos. 3-7). Melbar also pointed out blood splatter on the walls and the television, which he said could be seen in the body camera footage.

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[12] Bradley indicated that she had paid for the vehicle but that Smith had registered the vehicle in his name.

[¶49] Melbar testified that the officers eventually convinced Bradley to go to the hospital and drove her to the hospital, where she received stitches for the laceration on her head.

[¶50] Stadden testified that he and his partner had assisted in searching for the suspect, the victim's "live-in boyfriend," in connection with a report of "a female beaten with a gun, pistol-whipped," on December 26, 2020. He stated that officers had been given the suspect's name, Smith, along with his date of birth, social security number and a description of the vehicle in which Smith had fled the crime scene — a 2006 burgundy Ford Explorer — and had been told that Smith was "possibly armed." Based on the information provided, additional information, including a VIN and temporary tag number, were obtained for the vehicle. Stadden stated that he and his partner observed the vehicle as it turned from Kinsman Road. onto Martin Luther King Boulevard and conducted a traffic stop.

[¶51] Stadden testified that, as he approached the driver's side of the vehicle, he told the driver to show his hands because "of the seriousness of the crime" and because he "wasn't sure if he had a weapon on him." Stadden stated that the driver complied, identified himself as Smith and, at Stadden's request, stepped out of the vehicle. After patting Smith down, officers placed Smith in the back seat of their zone car, "Mirandized him" and took him to the Cuyahoga County Jail. Stadden stated that Smith asked, "What's going on? What's this about?" when they stopped him and told police that he was on his way back home. Stadden identified Smith in court as the man they had arrested. Melbar and Germaine were

still with Bradley at her home when officers stopped and detained Smith.

[¶52] Stadden testified that Smith did not resist arrest, that he did not find any weapons on Smith and that he did not observe any blood on Smith's hands or clothes. After arresting Smith, officers inventoried the vehicle; no weapons or ammunition was discovered in the inventory search.

[¶53] Cunningham was the detective assigned to investigate the December 26, 2020 incident. He testified that he spoke with Bradley on December 26 or 27, 2020 by telephone for approximately eight to eight-and-one-half minutes and recorded the call on his body camera.[13] He stated that, at that time, Bradley was "a little relaxed," "kind of still upset, but not frantic or anything," and that she was able to provide "a clear story of what had happened." Cunningham indicated that he took the information Bradley had given him and "presented the facts" along with the police report and photographs of Bradley's injuries to the prosecutor.

[¶54] On cross-examination, Cunningham testified that Bradley had told him Smith had "assaulted her by punching her" once on December 26, 2020 and made "[n]o mention of a gun." On redirect examination, however, he stated that due to the "severity of the laceration" as depicted in the

[13] No body camera footage from this interview was introduced at trial.

photographs of Bradley's injuries, he believed her injuries were caused by "more than a punch."

3. Testimony of Defense Witnesses

[¶55] Chance, Smith's nephew, testified that Bradley dated his uncle and that the couple had been together for "many years." He stated that on December 25-26, 2020, he had been at Bradley and Smith's home from sometime in the afternoon until 1:00 or 2:00 a.m. He indicated that when he was at the house, Smith, Bradley, Bradley's sister and her boyfriend, Bradley's niece, two of Bradley's sons and Bradley's daughter were also there. He stated that everyone was having "a good time," "partying, listening to music" and that all the adults, including both Smith and Bradley, were drinking alcohol.

[¶56] Chance testified that, at some point that evening, Bradley and her sister began arguing and "were trying to fist fight in the kitchen." He stated that they "got close enough to each other that nobody did too much damage" but that the argument ended with "cooking grease all over the floor," so that everyone was "slipping and falling." Chance indicated that when the fight started, Smith was sleeping on the couch. Chance stated that Smith "woke up from the commotion" and "did what everybody else did * * * try to stop the argument." Eventually the two women were separated, and Bradley's sister left.

[¶57] Chance testified that after her sister left, Bradley was still "yelling and belligerent" and got into an argument with her son and daughter. Chance indicated that by the time he left the home, only

Smith, Bradley and Bradley's daughter remained. He stated that, at that time, Bradley was drunk and "mad" due to the argument with her sister, but "looked fine" and did not have any marks on her.

[¶58] Chance testified that he did not hear Smith and Bradley arguing that evening, did not see Smith punch or strike Bradley that evening and had never seen Smith with a gun. Chance testified that he had not seen Smith since that night and that he did not know what happened after he left.

[¶59] Smith testified that he and Bradley had been together since 2002 and that "[w]e say were married because we been together so long." He stated that the couple had eight children in total and that their youngest child had just turned one. He indicated that on the night of December 25, 2020, various family and friends were at their home to celebrate Christmas.

[¶60] Smith testified that, at some point that he evening, he woke up to "a whole lot of noise" and "a whole lot of debris" as Bradley and her sister were in the dining room fighting. He stated that, while fighting, the two women knocked over food and cooking grease, broke the fish tank and "tore the house up." Smith indicated that he "got in the middle of it trying to break 'em up."

[¶61] Smith stated that, after the fight, he told everyone to get out of the home and that "when everybody started to get their stuff to leave," he left too. He indicated that, at that time, Bradley had no injuries to her face.

[¶62] Smith testified that after he left, he and his friend Shoulders went down to "the projects" and that he then got "pulled over" and arrested. He stated that after he "bonded out" two days later, he came home and observed that Bradley had "a little scratch on her head." He indicated that he asked Bradley how she got the scratch but that Bradley said that it was "nothing but a little scratch," "a superficial scratch." Smith stated that he did not know how Bradley got the scratch on her head.

[¶63] Smith testified that Bradley calls the police on him "when she['s] mad" because she assumes he is cheating on her and that "she always get mad when me and [Shoulders] go somewhere together, because she think I'm cheating on her every time I go out the door: "That's all she say every time she drink, 'You're going out to cheat.'" Smith claimed that he knew nothing about Bradley's December 26, 2020 injuries until trial when he saw the photographs of the injuries. Smith denied that he struck Bradley at any time and denied that he had a gun.

[¶64] Smith also denied that he had caused Bradley's injuries on March 21, 2020. Smith testified that, on March 21, 2020, he and Bradley went to a friend's house on Warner Road. He stated that Bradley got into a fight with a girl with whom Bradley had accused Smith of cheating, resulting in a swollen eye. He testified that Bradley had told him, "I'm gonna do everything I can every time you cheat on me, I'm gonna make you miserable." Smith denied striking Bradley and stated that when he left, Bradley was "fine" and "[e]verybody was down in the basement getting drunk." Smith testified that Bradley called

him the following day and asked him to bring her home from the hospital and that he did so.

[¶65] Smith admitted that he had been talking to Bradley while he was in jail and stated that all of their calls had been recorded. He indicated that he had never admitted injuring Bradley and that Bradley had never said to him, "You did this to me." He claimed that he had asked Bradley to come to court and testify but that Bradley told him she was not coming to court because "I already told you[,] you ain't did nothing."

[¶66] Following the presentation of the evidence, Smith moved for acquittal, pursuant to Crim.R. 29. After hearing argument, the trial court denied the motion.

D. Verdicts

[¶67] On December 3, 2021, the trial court found Smith guilty on all counts, in both cases, as charged. The trial court referred Smith for a presentence investigation and report and scheduled a sentencing hearing for the following month.

E. Sentencing

[¶68] On January 19, 2022, the trial court conducted a sentencing hearing. Although Bradley did not testify at trial, she sent a text message to be read at sentencing, requesting leniency, which the victim advocate read into the record. The trial court also heard from the state, defense counsel and Smith.

[¶69] In 655568, the trial court found that the three counts were allied offenses of similar import

that merged for sentencing. The state elected to have Smith sentenced on Count 2. The trial court ordered that the sentences on the one and three-year firearm specifications be served concurrently and that the three-year sentence on the firearm specifications be served prior to and consecutive to an indefinite sentence (under the Reagan Tokes Law) of six to nine years on the underlying offense, resulting in an aggregate sentence of nine to 12 years. The trial court also imposed mandatory postrelease control of 18 months to three years. Smith objected to the constitutionality of the Reagan Tokes Law's indefinite sentencing provisions.

[¶70] In 651674, the trial court sentenced Smith to 12 months on each count, to be served concurrently to one another but consecutively to the sentence in 655568.

[¶71] Smith appealed, raising the following five assignments of error for review:

ASSIGNMENT OF ERROR I: Mr. Smith's right to confront his accuser, under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution, was violated when the trial court admitted testimonial statements made by the accuser, who did not testify, via police body camera recordings.

ASSIGNMENT OF ERROR II: The statements in the March 2020 body camera recording also violate the rules of evidence and [are] inadmissible on that basis as well.

ASSIGNMENT OF ERROR III: Mr. Smith's conviction is against the manifest weight of evidence in violation of his rights to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the State of Ohio Constitution.

ASSIGNMENT OF ERROR IV: As amended by S.B. 201, the revised code's sentences for first- and second-degree qualifying felonies violated the constitutions of the United States and the State of Ohio; accordingly, the trial court plainly erred in imposing a S.B. 201 indefinite sentence.

ASSIGNMENT OF ERROR V: Mr. Smith's Sixth Amendment right to a trial by jury was violated.

II. Law and Analysis

A. Admissibility of Bradley's Statements to Police as Captured in the March 21, 2020 Body Camera Footage

[¶72] In his first assignment of error, Smith asserts that his right of confrontation under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution was violated "when the trial court admitted testimonial statements made by the accuser, who did not testify, via police body camera recordings."[14]

[14] Although body camera footage of statements by Bradley relating to both the March 21, 2020 and December 26, 2020 incidents were admitted into evidence at trial, on appeal, Smith

[¶73] Smith contends that Bradley's statements regarding the March 21, 2020 incident are testimonial based on various factors identified in *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and the "objective witness test" adopted by the Ohio Supreme Court in *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, ¶ 36.[15]

[¶74] The state responds that Bradley's statements regarding the March 21, 2020 incident were nontestimonial because they were made "in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency." (Appellee's Br. at 4.)

1. The Confrontation Clause

[¶75] Under both the United States and Ohio Constitutions, a criminal defendant has a right to confront witnesses. The Sixth Amendment's Confrontation Clause, which is binding on the states through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against

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challenges only the admission of the body camera footage of Bradley's statements related to the March 21, 2020 incident.

[15] As discussed in greater detail below, because this case involves the admissibility of statements made in the course of a police interrogation, we apply the "primary purpose test," not the "objective witness test," in determining whether Bradley's statements are testimonial.

him." Article I, Section 10 of the Ohio Constitution states that "[i]n any trial, in any court, the party accused shall be allowed * * * to meet the witnesses face to face."[16] The ""central concern"" of the Confrontation Clause is ""to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. "" *State v. Smith*, 2019-Ohio-3257, 141 N.E.3d 590, ¶ 10 (1st Dist.), quoting *State v. Madrigal*, 87 Ohio St.3d 378, 384, 2000 Ohio 448, 721 N.E.2d 52 (2000), quoting *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990); *see also Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011) ("Even where * * * an interrogation is conducted with all good faith, introduction of the resulting statements at trial can be unfair to the accused if they are untested by cross-examination. Whether formal or informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being

[16] We note that it has been held that "[w]hile these constitutional provisions are not identical, the Ohio Constitution provides no greater right of confrontation than the Sixth Amendment." *In re H.P.P.*, 8th Dist. Cuyahoga Nos. 108860 and 108861, 2020-Ohio-3974, ¶ 20, citing *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 12. Although Smith claims a violation of his confrontation rights under both Article I, Section 10 of the Ohio Constitution the Sixth and Fourteenth Amendments to the United States Constitution, he does not claim that he was entitled to greater or different rights or protection under the Ohio Constitution than the United States Constitution.

deprived of the opportunity to cross-examine the declarant about statements taken for use at trial.").

[¶76] The admission of a testimonial, out-of-court statement by a declarant who does not testify at trial violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68, 124 S.Ct. 1354, 158 L.Ed.2d 177; *see also Garfield Hts. v. Winbush*, 187 Ohio App.3d 302, 2010-Ohio-1658, 931 N.E.2d 1148, ¶ 17 (8th Dist.) ("If a statement is testimonial, then the Confrontation Clause requires a showing of both the declarant's unavailability and the defendant's opportunity to have previously cross-examined the declarant. * * * If the statement is nontestimonial, it is merely subject to the regular admissibility requirements of the hearsay rules."), citing *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, ¶ 21.

[¶77] Regardless of whether Bradley was "available" to testify at trial, there is no dispute that Smith did not have a prior opportunity to cross-examine her regarding the statements at issue. Accordingly, if the statements Bradley made were testimonial, Smith was denied his right of confrontation.

2. "Testimonial" Statements and the Primary Purpose Test

[¶78] In *Crawford*, the Court held that statements made by the defendant's wife during a police interrogation while in police custody were testimonial and could not be admitted under the Confrontation Clause when the wife did not testify at trial. *Crawford*,

541 U.S. at 38-41, 65-66, 68-69, 124 S.Ct. 1354, 158 L.Ed.2d 177. *Crawford* did not offer an "exhaustive definition" of what constitutes a "testimonial" statement. *Ohio v. Clark*, 576 U.S. 237, 243, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015); *Crawford* at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"). However, the Court stated that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. Following *Crawford*, courts have "labored to flesh out what it means for a statement to be 'testimonial.'" *Clark* at 244.

[¶79] The United States Supreme Court announced the "primary purpose test" in *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Where a statement is made "in the course of police interrogation" whether a statement is testimonial depends on the "primary purpose" of the statement. *Davis* at 822; *Bryant* at 370. The Court explained 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." *Davis* 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.*[17]

[¶80] *Davis* identified four characteristics that distinguish nontestimonial statements from testimonial statements: (1) the declarant describes contemporaneous events as they are actually occurring rather than describing past events, (2) an objective ongoing emergency exists, (3) the nature of what is asked and answered, viewed objectively, is necessary to be able to resolve the emergency and (4) the interview is of an informal nature. *Davis* at 826-828; *see also Cleveland v. Johnson*, 8th Dist. Cuyahoga No. 107930, 2019-Ohio-3286, ¶ 18.

[¶81] In *Davis*, the victim did not testify at Davis' trial; instead, the state introduced a recording of portions of her conversation with the 911 operator. The issue in that case was whether the portion of the victim's 911 call identifying Davis as her assailant was testimonial. *Id.* at 829. At the beginning of the call, the victim told the 911 operator that "[h]e's here jumpin' on me again," that "[h]e's usin' his fists" and that her assailant had not been drinking. The 911 operator then asked the victim the name of her assailant. After she identified her assailant as Davis, the victim told the operator, "He's runnin' now." The victim informed the 911 operator that Davis had "just r[un] out the door" and that he was leaving in a car with someone

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[17] The fact that statements may be "volunteered" during an interaction with police does not preclude them from being testimonial. *Davis* at 822-823, 827, fn. 1 (noting that "volunteered testimony" is still testimony and remains subject to the requirements of the Confrontation Clause).

else. *Id.* at 817-818. The Court held that the portion of the 911 call that included the identification of Davis as the assailant was non-testimonial because (1) the victim was "speaking about events as they were actually happening" rather than describing past events, (2) the victim's call was "plainly a call for help against a bona fide physical threat," (3) the victim's "frantic answers were provided over the phone, in an environment that was not tranquil, or even * * * safe" and (4) the "nature of what was asked and answered * * * viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency" rather than simply learn what had happened in the past. (Emphasis deleted.) *Id.* at 827.

[¶82] However, the Court cautioned that other portions of the 911 call — i.e., the victim's statements to the 911 operator after Davis had left the premises — could be testimonial:

> In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told [the victim] to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, [the victim's] statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*, 541 U.S. at 53, fn. 4, 124 S.Ct. 1354, 158 L.Ed.2d 177.

Davis at 828-829. The Court noted that the Washington Supreme Court had concluded that even

if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Because Davis did not challenge that holding, the court simply "assume[d] it to be correct" and did not further address the issue. *Id.* at 829; *see also Bryant*, 562 U.S. at 363, 131 S.Ct. 1143, 179 L.Ed.2d 93.

[¶83] In *Bryant*, the United States Supreme Court clarified "what *Davis* meant" by "an ongoing emergency" and its role in determining the "primary purpose" of an interrogation. *Bryant*, 562 U.S. at 359, 131 S.Ct. 1143, 179 L.Ed.2d 93. In that case, the Court held that statements a mortally wounded shooting victim made to police officers about his assailant (i.e., the identity and description of the shooter and the location of the shooting) in a gas station parking lot (after he had been shot by the assailant outside the assailant's house and had driven himself to the parking lot) were not testimonial because the circumstances objectively indicated that the primary purpose of the interrogation was to enable police assistance to address an ongoing emergency, rather than to establish evidence for prosecution. The victim was unavailable to testify at trial because he died shortly after the shooting, so police officers testified at trial about what the victim had told them. *Id.* at 348-350.

[¶84] In *Bryant*, the Court indicated that "*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator" and that "[i]n many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers." *Bryant* at 367-368. The Court held that, in applying

the primary purpose test, courts must objectively evaluate "all of the relevant circumstances" and determine "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred":

> An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the "primary purpose of the interrogation." The circumstances in which an encounter occurs — e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards — are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred. * * * When a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs.

Id. at 359-360, 369, 370-371.

[¶85] Addressing the significance of an "ongoing emergency" in determining whether a declarant's

statements are testimonial, the Court stated that although "the existence vel non of an ongoing emergency" is not "dispositive of the testimonial inquiry," it is "among the most important circumstances" that "informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Bryant*, 562 U.S. at 361, 367, 374, 131 S.Ct. 1143, 179 L.Ed.2d 93.[18] The Court explained:

> The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than "prov[ing] past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822, 126 S.Ct. 2266, 165 L.Ed.2d 224. Rather, it focuses them on "end[ing] a threatening situation." *Id.* at 832. Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.

Bryant at 361. In other words:

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[18] Although the United States Supreme Court has recognized that "there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony," *see Bryant* at 358; *Clark*, 576 U.S. at 244-245, 135 S.Ct. 2173, 192 L.Ed.2d 306, no one has claimed that any such "other circumstance" existed in this case. Accordingly, we do not further address that issue here.

> The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. * * * [T]he existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.

Id. at 370-371. "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." *Id.* at 363.[19]

[¶86] Once Smith objected to the admissibility of Bradley's out-of-court statements, the state, as the proponent of the evidence, bore the burden of establishing the admissibility of the statements. *See, e.g., State v. Hill*, 12th Dist. Butler No. CA80-05-0053, 1981 Ohio App. LEXIS 14266, 4 (Mar. 1, 1981) ("The burden of proving facts which must be established to make evidence admissible is upon the party seeking to

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[19] Factors the Court identified as relevant to determining whether an ongoing emergency exists include: whether physical violence is presently occurring; whether the dispute is a private or public dispute; whether there is an ongoing threat to police or the public; whether the perpetrator's location is known or unknown; whether the perpetrator and victim are separated; the motive(s) of the perpetrator (if known); whether the perpetrator is armed and, if so, the type of weapon(s) the perpetrator has; the victim's medical condition and whether medical assistance is required and whether the scene is secured. *See generally Bryant*.

introduce the evidence."); *cf. State v. Stover*, 9th Dist. Wayne No. 13CA0035, 2014-Ohio-2572, ¶ 12 (the state, as the party seeking to admit statement under excited-utterance exception to the hearsay rules, had the burden to prove that the statement was made while the declarant was still under the stress of the event); *see also United States v. Duron-Caldera*, 737 F.3d 988, 993 (5th Cir.2013) ("'[T]he government bears the burden of defeating [a] properly raised Confrontation Clause objection by establishing that its evidence is nontestimonial.'"), quoting *United States v. Jackson*, 636 F.3d 687, 695, fn. 4 (5th Cir.2011); *United States v. Arnold*, 486 F.3d 177, 192 (6th Cir.2007) (noting that "the government ha[d] met its burden of proving that [declarant's] statements to the 911 operator and at the scene were nontestimonial"). We review evidentiary rulings that implicate the Confrontation Clause de novo. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 97.

[¶87] The state contends that this case is akin to *State v. Tomlinson*, 8th Dist. Cuyahoga No. 109614, 2021-Ohio-1301. In *Tomlinson*, this court held that statements by two witness to a drive-by shooting, which were recorded by police body cameras, were not testimonial where they were "made to law enforcement in the course of responding to an emergency situation" and "[t]he victims had just been shot at and called the police to seek protection and medical treatment." *Id.* at ¶ 43. *Tomlinson* contains limited information regarding the circumstances surrounding the witness statements in that case and the specific inquiries made by police in eliciting those

statements. Nevertheless, we believe that *Tomlinson* is readily distinguishable from the facts here.

[¶88] In *Tomlinson*, the defendant had allegedly shot at three individuals while they were in a vehicle then left the scene. *Id.* at ¶ 14. Prior to the shooting, Cleveland police detectives had been monitoring the defendant's social media accounts due to concerns related to "feuds among different neighborhood groups." *Id.* at ¶ 10, 15. After the shooting, two of the victims called police "to seek protection and medical treatment" and remained at the scene. *Id.* at ¶ 14. When police arrived at the scene, approximately 40 minutes after the shooting, and began questioning the victims, the victims were "very excited and emotional about what had just happened to them." *Id.* At the time the police were questioning the victims, their assailant, armed with a gun, was still at large, location unknown, presenting an immediate continuing threat to the victims who remained at the scene, the police and the public, and the victims were apparently still in need of medical treatment. *Id.* at ¶ 14, 43. In *Tomlinson*, the totality of the circumstances objectively indicated that the emergency for which the victims sought police assistance was still ongoing at the time of the interrogation and that the primary purpose of both the police in questioning the victims and the victims in responding to those inquiries was to resolve an ongoing emergency. This case is different.

[¶89] We recognize that an ongoing emergency can exist after the original threat to the victim has ceased to exist if there is a continuing threat to police or the public or the victim is in need of emergency medical

services. However, this does not mean that an alleged victim's responses to "initial inquiries" by police officers are always testimonial. *See Davis*, 547 U.S. at 832, 126 S.Ct. 2266, 165 L.Ed.2d 224 (rejecting the "implication that virtually any 'initial inquiries' at the crime scene" will be non-testimonial). *Bryant* instructs that a court must consider "all of the relevant circumstances," including whether an ongoing emergency exists and the perspectives of both the declarant and the interrogator in determining the primary purpose of an interrogation and whether a declarant's statements are testimonial. *Bryant*, 562 U.S. at 369, 131 S.Ct. 1143, 179 L.Ed.2d 93. Furthermore, "'a conversation which begins as an interrogation to determine the need for emergency assistance' can 'evolve into testimonial statements once the initial purpose has been achieved.'" *Bryant*, 562 U.S. at 365, 131 S.Ct. 1143, 179 L.Ed.2d 93, quoting *Davis*, 547 U.S. at 828, 126 S.Ct. 2266, 165 L.Ed.2d 224 (internal quotation marks omitted). Such an "evolution" may occur if "a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute" or "if a perpetrator is disarmed, surrenders, is apprehended, or * * * flees with little prospect of posing a threat to the public." *Bryant* at 365.

[¶90] In this case, the incident allegedly occurred somewhere in the street on the other side of town, away from Bradley's home. Before police arrived, Bradley had left the scene of the incident and had walked to the home of a family member. It is unclear

from the record how far the relative lived from the scene of the incident. Smith had allegedly left the scene shortly after the incident and there is nothing in the record to suggest Smith knew where Bradley was or that he otherwise posed an immediate, continuing threat to Bradley once she arrived at the home of her family member.

[¶91] It is unknown exactly how much time elapsed between the incident and the officers' interrogation of Bradley, but it is clear that the interrogation was not conducted immediately after the incident. According to Bradley, after the incident, she snorted cocaine and then walked to the home of the family member, who called 911. By the time police arrived and began questioning Bradley, she was already in an ambulance, in the custody of EMS personnel, receiving medical care and preparing to be transported to the hospital. Thus, by the time police questioned Bradley, she was no longer "acting * * * to secure protection or medical care." *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 183. Although Bradley had not yet been transported to the hospital, from her perspective, the "emergency" for which she needed police assistance had effectively ended before police began questioning her. *Cf. State v. Steele*, 8th Dist. Cuyahoga No. 91571, 2009-Ohio-4704, ¶ 39 (statements victim made to police officer while in the ambulance and at the emergency room were testimonial because emergency no longer existed).

[¶92] Here, the dispute that allegedly led to the assault was a private dispute, the alleged assailant was known to Bradley and there is nothing in the

record to indicate that he presented an immediate physical threat to Bradley, police or the public at the time of the officers' interrogation of Bradley. Police did not ask Bradley, during their initial interview, whether Smith had a weapon or otherwise focus on any exigent threat or safety concern in their questioning. The questions police posed to Bradley were directed to investigating and documenting what had happened — i.e., determining the identity of Bradley's alleged assailant and what had occurred. These elicited statements were not "'necessary to be able to resolve [a] present emergency,'" but rather "'to learn * * * what had happened in the past.'" (Emphasis deleted.) *Bryant*, 562 U.S. at 367, 131 S.Ct. 1143, 179 L.Ed.2d 93, quoting *Davis*, 547 U.S. at 827, 126 S.Ct. 2266, 165 L.Ed.2d 224.

[¶93] Viewed objectively, the totality of the circumstances surrounding the March 21, 2020 police interview of Bradley demonstrates that the "primary purpose" of Bradley's statements to police, in which Bradley identified Smith as her assailant and described what he had done, was to provide an account of the assault that had allegedly occurred — i.e., to document past events for purposes of a later criminal investigation or prosecution — and that the statements were, therefore, testimonial. Bradley's statements to police were simply "'a weaker substitute for live testimony' at trial." *Davis* at 828, quoting *United States v. Inadi*, 475 U.S. 387, 394, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986); *cf. Smith*, 2019-Ohio-3257, 141 N.E.3d 590, at ¶ 13 (declarant's statements were testimonial where police did not "focus on any exigent threat or safety concern in their questioning"

but rather "asked about what had happened, rather than what was happening, procuring information about the past course of events, which then led to the charges against [defendant]"); *Toledo v. Green*, 2015-Ohio-1864, 33 N.E.3d 581, ¶ 21-25 (6th Dist.) (where victim and alleged perpetrator were in separate rooms, the victim "seemed a little upset" and "was a little bit loud" when police arrived and there was no bona fide physical threat to the victim at the time of her statements to police, no ongoing emergency existed and victim's statements to police were testimonial); *Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, at ¶ 156-159 (witness' statements to police were testimonial where witness called police to report that her husband had confessed to killing a woman, witness was not at an active crime scene, no gun was involved in the murder and although police were still trying to identify and apprehend an at-large perpetrator, who "initially * * * appeared to pose a continuing threat to [witness] and maybe others," police contact with witness was "did not occur in the midst of an ongoing emergency").

[¶94] The fact that Bradley's statements to police were presented through the playing of Soucek's body camera footage does not alter our analysis. The purpose of body cameras is to record events in which law enforcement officers are involved to improve officer safety, increase evidence quality, reduce civilian complaints and reduce agency liability, *see* Hyland, Bureau of Justice Statistics, *Body-Worn Cameras in Law Enforcement Agencies, 2016* (Nov. 2018) — not to supplant the in-court testimony of witnesses. Out-of-court statements that would

otherwise be inadmissible do not become admissible simply because they were captured on a police body camera.

[¶95] This is yet another case in which the state of Ohio proceeded to trial without the alleged "victim"/witness. This case is part of a disturbing trend favoring "victimless" prosecutions. *See* the state's oral argument in *State v. Johnson*, 8th Dist. Cuyahoga No. 110942 ("There are attempts frequently to do victimless prosecutions * * *[.] There is a thought, at least among some prosecutors, that it favors community and favors victims to be able to put on a case.").[20] Professors Richard Friedman and Bridget McCormack described this practice in their law review article, *Dial-In Testimony*:

> Often * * * prosecutors do not bother with an unwilling or recanting complainant. Rather, they simply go forward without her, and instead of her live testimony, submit as evidence of the incident the statements carefully taken from her by the 911 operator and the police. In some cases, the prosecutor's decision to pursue a "victimless" prosecution is based on a well-founded belief that the defendant's misconduct has inhibited the complainant from testifying. But often the prosecutor evidently concludes that it is easier to go forward with unsworn, untested statements provided on the 911 tapes than to expose a witness to the risks of testifying at trial.

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[20] Pursuant to App.R. 21(J), recordings of these oral arguments are available for review upon request.

Richard D. Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U.Pa.L. Rev. 1171, 1189-1190 (2002).

[¶96] During oral argument, the state indicated that it had not requested a bench warrant to compel Bradley's appearance as a material witness at trial and acknowledged that it can be "easier to go without the victim in these cases." Here, it may have very well been "easier" for the state to attempt to make a case against Smith without Bradley testifying and being subject to cross-examination. Based on the limited information in the record, Bradley may not been the strongest witness had she testified at trial. Bradley, who was five months pregnant at the time of the March 21, 2020 incident, admitted that she had been drinking prior to the incident and that she had snorted cocaine — prior to her interactions with police and medical providers — after the incident. It is unknown the extent to which Bradley's substance abuse may have affected her perception, recollection or ability to accurately relate what had occurred.[21] As such,

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[21] It is well-recognized that a witness' alcohol or drug use at the time of an incident can affect the witness' perception of, recollection of and ability to describe what occurred, impacting his or her credibility. *See, e.g., State v. Fast*, 2021-Ohio-2548, 176 N.E.3d 361, ¶ 80-81 (11th Dist.) ("Evidence of a witness's drug use may be probative of his or her capacity or ability to observe, remember, or relate[.] * * * '[T]he credibility of testimony can be attacked through evidence of a witness's intoxication at the time of the matter about which the witness seeks to testify. * * * Such evidence is relevant to the issue of credibility, since it questions the ability of the witness to correctly perceive the events which allegedly occurred.'"), quoting *Kenney v. Fealko*, 75 Ohio App.3d

presenting Bradley's testimony live (rather than through body camera footage) and subjecting her to cross-examination may very well have weakened the state's case. However, the exceptions to live witness testimony authorized in *Davis, Bryant* and their progeny were not intended to enable prosecutors to make tactical decisions not to bring in a victim (or alleged victim) to testify at trial to avoid subjecting his or her testimony to scrutiny under cross-examination.

[¶97] As the United States Supreme Court has cautioned:

> Domestic violence is an intolerable offense that legislatures may choose to combat through many means — from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the [s]tate's arsenal.

Giles v. California, 554 U.S. 353, 376, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008).

47, 51, 598 N.E.2d 861 (11th Dist.1991). Where a witness testifies, the impact of a witness' alcohol or drug use on his or her observation, perception, recollection and accurate relation of what occurred can be explored and tested through effective cross-examination. *See, e.g., State v. Smith*, 6th Dist. Lucas Nos. L-16-1306, L-16-1307 and L-16-1308, 2018-Ohio-3983, ¶ 16 ("Where a witness has been examined about his or her drug use, the trier of fact can properly weigh the credibility of the witness' testimony."). Here, however, because Bradley did not testify, Smith had no such opportunity.

[¶98] Smith testified that Barbara Bradley had stated to him in the past that she would take revenge on him when she thought he was "cheating" on her and that, during a telephonic conversation between them while he was incarcerated in the Cuyahoga County Jail she informed him that she was not going to present herself at the court to testify as "I already told you. You ain't did nothing."

[¶99] Trial courts need to hold the prosecution and the "victims" accountable in these matters. If the "victim" chooses not to appear to testify, there are options available to the state. When service of a subpoena has been perfected, a bench warrant can be issued. If the state cannot proceed to trial, a case can be dismissed without prejudice and refiled at a time when the "victim" sees the folly of their way.

[¶100] We recognize that some prosecutions can go forward without a "victim" but that should be the exception and not the rule.

[¶101] Because Bradley's statements relating to the March 21, 2020 incident were testimonial and Smith did not have an opportunity to cross-examine Bradley regarding those statements, the trial court's admission of those statements violated the Confrontation Clause.

3. Harmless Error

[¶102] Having determined that the trial court erred in admitting the body camera footage of Bradley's statements relating to the March 21, 2020 incident, we must now consider whether that error was reversible

error or harmless error. *Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, at ¶ 178 ("Confrontation Clause claims are * * * subject to harmless-error analysis."), citing *McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, at ¶ 192.

[¶103] Crim.R. 52(A) addresses harmless error in the context of criminal cases. It provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." *See also* R.C. 2945.83(C) ("No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of * * * [t]he admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby."). Under the harmless-error standard of review, the state bears the burden of demonstrating that the error did not affect the substantial rights of the defendant. *State v. Graham*, 164 Ohio St.3d 187, 2020-Ohio-6700, 172 N.E.3d 841, ¶ 55; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 15. Smith asserts that "without the March body camera recording, a conviction on the March incident would be impossible under the circumstances." The state did not address the issue. It addressed only the issue of admissibility in its appellate brief.

[¶104] In *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, the Ohio Supreme Court set forth a three-part analysis "to guide appellate courts" in determining whether an error in the admission of evidence has affected the substantial rights of a defendant, thereby requiring a new trial, or

whether admission of that evidence was harmless error:

> First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. [*Morris*] at ¶ 25, 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. *Id.* at ¶ 28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt. *Id.* at ¶ 29, 33.

State v. Harris, 142 Ohio St.3d 211, 2015-Ohio-166, 28 N.E.3d 1256, ¶ 37; *see also State v. Boaston*, 160 Ohio St.3d 46, 2020-Ohio-1061, 153 N.E.3d 44, ¶ 63.

[¶105] Applying this analysis to the evidence in this case, we find that the erroneous admission of Bradley's statements to police regarding the March 21, 2020 incident was not harmless error and affected Smith's substantial rights.

[¶106] "[W]hile courts may determine prejudice in a number of ways and use language that may differ, * * * both the nature of the error and the prejudice to defendant (the measure of how the error affected the verdict) are important." *Morris* at ¶ 25, 33. As such, when determining whether a new trial is required or error is harmless beyond a reasonable doubt, "an appellate court must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence." *Id.* at ¶ 33. Error in the admission of evidence is harmless beyond a reasonable

doubt when "'there is [no] reasonable possibility that the improperly admitted evidence contributed to the conviction.'" *McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, at ¶ 192, quoting *Schneble v. Florida*, 405 U.S. 427, 432, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). As a general matter, "'"the cases where imposition of harmless error is appropriate must involve either overwhelming evidence of guilt or some other indicia that the error did not contribute to the conviction."'" *Morris* at ¶ 29, quoting *State v. Rahman*, 23 Ohio St.3d 146, 151, 23 Ohio B. 315, 492 N.E.2d 401 (1986), quoting *State v. Ferguson*, 5 Ohio St.3d 160, 166, 5 Ohio B. 380, 450 N.E.2d 265 (1983), fn. 5.

[¶107] In this case, the improperly admitted evidence was clearly prejudicial, linking Smith to the crimes for which he was ultimately convicted. Further, this is not a case in which the state's evidence was so overwhelming that it is clear that the improperly admitted evidence did not affect the outcome. To the contrary, the state's case against Smith relating to the March 21, 2020 incident was based almost exclusively on the statements Bradley made to police as captured on the body camera footage. The evidence relating to the March 21, 2020 incident that remains once the improperly admitted evidence of Bradley's statements to police is removed from consideration is video footage and photographs showing Bradley's injuries and Smith's testimony about what allegedly occurred.[22]

[22] In considering whether the trial court's admission of Bradley's statements was harmless error, we are mindful that Smith stipulated to the admissibility of Bradley's medical records, which includes an "emergency department - visit note"

That evidence was insufficient to support Smith's convictions relating to the March 21, 2020 incident.

[¶108] Following a thorough review of the record before us, considering both the potential impact of the improperly admitted evidence on the verdict and the strength (or weakness) of the remaining evidence after the improperly admitted evidence is removed from consideration, we cannot say that the trial court's erroneous admission of the body camera footage containing Bradley's statements to police regarding the March 21, 2020 incident was harmless beyond a reasonable doubt. We find that the trial court's admission of this improper evidence contributed to Smith's convictions in 651674, was not harmless error and affected Smith's substantial rights.

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recording a "history * * * provided by the Patient" that includes a description of the incident purportedly provided by Bradley It is unclear from the record when or under what circumstances the "history" information identified as having been "provided by the Patient" was provided, i.e., whether it was provided in response to the officers' questioning of Bradley in the presence of EMS personnel while she was receiving medical care in the ambulance, whether it was provided in response to officers' questions at the hospital or whether it was provided in response to inquiries by medical providers at some other time. Because it appears from the record that that stipulation was made only after the trial court denied Smith's motion in limine relating to those records and admitted, over Smith's objections, the body camera footage containing the statements Bradley had made to police in the ambulance regarding the March 21, 2020 incident, we do not believe Smith's stipulation to the admissibility of the medical records compels a different result on the issue of harmless error here.

[¶109] We sustain Smith's first assignment of error. Accordingly, in 651674 only, we reverse the judgment of the trial court, vacate Smith's convictions and remand for a new trial.

[¶110] Smith contends that, based on the erroneous admission of Bradley's testimonial statements relating to the March 21, 2020 incident, we should not only overturn Smith's convictions in 651674 relating to the March 21, 2020 incident, but also his convictions in 655568 relating to the December 26, 2020 incident, asserting that because the accuser is the same in both cases and the "accusations * * * are similar," "there is no way to remove the impact that this evidence would have had on the trial as a whole." We disagree.

[¶111] This was a bench trial. The trial court was fully capable of separating the evidence relating to the March 21, 2020 incident from the evidence relating to the December 26, 2020 incident in rendering its verdicts. Smith has not assigned as error on appeal the joinder of the two cases for trial. There is nothing in the record to suggest that the trial court considered improperly admitted evidence related to the March 21, 2020 incident in 651674 when rendering its verdicts against Smith related to the December 26, 2020 incident in 655568.

[¶112] Based on our resolution of Smith's first assignment of error, his second assignment of error is moot. Likewise, his third, fourth and fifth assignments of error are moot to the extent they relate to 651674.

Manifest Weight of the Evidence

[¶113] In his third assignment of error, Smith contends that his convictions in 655568 for felonious assault in violation of R.C. 2903.11(A)(1) (Count 1), felonious assault in violation of R.C. 2903.11(A)(2) (Count 2) and domestic violence in violation of R.C. 2919.25(A) are against the manifest weight of the evidence.

[¶114] A manifest weight challenge questions whether the state met its burden of persuasion. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. "'[W]eight of the evidence involves the inclination of the greater amount of credible evidence.'" *State v. Harris*, 8th Dist. Cuyahoga No. 109060, 2021-Ohio-856, ¶ 32, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997- Ohio 52, 678 N.E.2d 541 (1997). On a manifest weight challenge, "a reviewing court asks whose evidence is more persuasive — the state's or the defendant's?" *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25.

[¶115] When considering an appellant's claim that a conviction is against the manifest weight of the evidence, the appellate court examines the entire record, weighs the evidence and all reasonable inferences that may be drawn therefrom, considers the witnesses' credibility and determines whether, in resolving conflicts in the evidence, the trier of fact "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387,

quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717 (1st Dist.1983). Reversal on manifest weight grounds is reserved for the "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins* at 387, quoting *Martin* at 175.

[¶116] Smith contends that his convictions in 655568 are against the manifest weight of the evidence because (1) "[t]here are discrepancies in Bradley's description of events and the injuries she sustained," (2) "[t]here are conflicts in Bradley's different versions as they were entered into evidence as recorded out-of-court statements," (3) "[t]here are serious conflicts in the evidence that should call Bradley's credibility into question when she says that [Smith] is the one who injured her" and (4) "[w]e cannot know what Bradley would have said about these things in her testimony because the [s]tate tried the case without her." Smith further argues that his convictions are against the against the manifest weight of the evidence because (1) as Bradley spoke with law enforcement, "the firearm took on greater and greater significance with every retelling," (2) Bradley's injuries, as depicted in the police photographs, are not consistent with Bradley having been pistol-whipped and (3) "there is no mention of [a] gun in the investigating detective's report."

[¶117] The state responds that there was a "wealth of evidence" supporting Smith's convictions, including the 911 call, the body camera footage and photographs of Bradley's injuries, and disputes Smith's claim that Bradley's statements were inconsistent.

[¶118] To convict Smith of felonious assault as charged in Count 1, the state needed to prove beyond a reasonable doubt that Smith "knowingly * * * [c]ause[d] serious physical harm to another." R.C. 2903.11(A)(1). To convict Smith of felonious assault as charged in Count 2, the state needed to prove beyond a reasonable doubt that Smith "knowingly * * * [c]ause[d] or attempt[ed] to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." R.C. 2903.11(A)(2). To convict Smith of domestic violence as charged in Count 3, the state needed to prove beyond a reasonable doubt that Smith "knowingly cause[d] or attempt to cause physical harm to a family or household member" and that he had been previously convicted of a domestic violence offense. R.C. 2919.25(A), (D)(3). To support guilty verdicts on the one-year and three-year firearm specifications included in these counts, the state needed to prove beyond a reasonable doubt that Smith had a firearm on or about his person or under his control while committing the offense and displayed the firearm, brandished the firearm, indicated that he possessed the firearm or used it to facilitate the offense. R.C. 2941.141(A), 2941.145(A).

[¶119] "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

[¶120] "Physical harm" means "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3). "Serious physical harm" includes "[a]ny physical harm that involves some permanent disfigurement or that

involves some temporary, serious disfigurement." R.C. 2901.01(A)(5)(d). Facial swelling and lacerations that require stitches have frequently been held to constitute "serious physical harm." *See, e.g., State v. Finley*, 8th Dist. Cuyahoga No. 108062, 2019-Ohio-3891, ¶ 28 (""This court has consistently held that the need for stitches constitutes serious physical harm for purposes of a felonious assault conviction.'"), quoting *State v. Studgions*, 8th Dist. Cuyahoga No. 94153, 2010-Ohio-5480, ¶ 10; *State v. Williams*, 8th Dist. Cuyahoga No. 98210, 2013-Ohio-573, ¶ 19 ("This court has repeatedly held that the element of serious physical harm is satisfied when the evidence shows that the victim sustained injuries requiring medical treatment, including stitches."). Serious physical harm has also been found where a victim sustains a bloody cut and/or significant swelling to the face, even where there is no evidence stitches were required. *See, e.g., State v. Payne*, 8th Dist. Cuyahoga No. 76539, 2000 Ohio App. LEXIS 3274, 9-10 (July 20, 2000) (bloody, cut and swollen right eye was sufficient to establish serious physical harm because the injury was a temporary, serious disfigurement); *see also State v. Scott*, 1st Dist. Hamilton Nos. C-200385 and C-200403, 2021-Ohio-3427, ¶ 26, citing *State v. Crossty*, 2017-Ohio-8382, 99 N.E.3d 1048, ¶ 22 (1st Dist.).

[¶121] As detailed above, the state presented ample, credible evidence from which the trial court could have reasonably found beyond a reasonable doubt that Smith had pistol-whipped Bradley, a family or household member, had caused her serious physical harm or physical harm by means of a deadly weapon

or dangerous ordnance and used a firearm to commit the offense.

[¶122] A conviction may rest solely on the testimony of a single witness, if believed, and there is no requirement that a witness' testimony be corroborated to be believed. *See, e.g., State v. Nicholson*, 8th Dist. Cuyahoga No. 110595, 2022-Ohio-2037, ¶ 180; *State v. Flores-Santiago*, 8th Dist. Cuyahoga No. 108458, 2020-Ohio-1274, ¶ 38; *State v. Black*, 2019-Ohio-4977, 149 N.E.3d 1132, ¶ 43 (8th Dist.); *State v. Schroeder*, 2019-Ohio-4136, 147 N.E.3d 1, ¶ 84 (4th Dist.). Likewise, a conviction is not against the manifest weight of the evidence "solely because the [factfinder] heard inconsistent or contradictory testimony." *State v. Rudd*, 8th Dist. Cuyahoga No. 102754, 2016-Ohio-106, ¶ 72, citing *State v. Wade*, 8th Dist. Cuyahoga No. 90029, 2008-Ohio-4574, ¶ 38; *State v. Nitsche*, 2016-Ohio-3170, 66 N.E.3d 135, ¶ 45 (8th Dist.) ("A defendant is not entitled to reversal on manifest weight grounds merely because certain aspects of a witness's testimony are not credible or were inconsistent or contradictory."); *see also State v. Mann*, 10th Dist. Franklin No. 10AP-1131, 2011-Ohio-5286, ¶ 37 ("'While the [factfinder] may take note of the inconsistencies and resolve or discount them accordingly, * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence.'"), quoting *State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 Ohio App. LEXIS 2245, 7 (May 28, 1996).

[¶123] Although Bradley made no mention of a gun to Cunningham when he interviewed her by telephone after the incident, Bradley told McDougler in the 911

call that Smith had "beat [her] with a gun." Bradley likewise told Melbar and Germaine that Smith had struck her twice in the head with a gun, causing her injuries. Smith has not shown that these statements by Bradley were so inherently incredible or unreliable as to preclude a reasonable fact finder from believing them. Bradley's statements to McDougler were made as Smith was leaving the couple's home immediately following the incident. Her statements to Melbar and Germaine were made while she was sitting in her home, still bleeding, in pain and in need of medical care, shortly after the incident. In both instances, it appears that Bradley was under the stress and excitement of the incident that had just occurred.

[¶124] Cunningham interviewed Bradley later, when she was, as he described it, "a little relaxed," "kind of still upset, but not frantic or anything" and had an opportunity for reflection. The trial court could have reasonably determined that Bradley's statements immediately following the incident were more credible than those made after reflection, i.e., after Bradley realized Smith had been arrested and could be sent to prison for what he had done. The injuries Bradley sustained, as depicted on the body camera footage and in the police photographs, were consistent with Bradley having been pistol-whipped on the head. Smith's convictions were not against the manifest weight of the evidence merely because the trial court believed the testimony of the state's witnesses and Bradley's statements that Smith had caused her injuries over the testimony of Smith, where, as here, the trial court could reasonably make that choice. *See, e.g., State v. Nash*, 1st Dist. Hamilton Nos. C-210435

and C-210436, 2022-Ohio-1516, ¶ 13 ("[A] conviction is not against the weight of the evidence merely because the trial court did not believe the defense testimony."). "A trier of fact is free to believe all, some, or none of the testimony of each witness appearing before it." *State v. Williams*, 2019-Ohio-794, 132 N.E.3d 1233, ¶ 28 (8th Dist.).

[¶125] The parties stipulated to evidence establishing that Smith had a prior conviction for domestic violence in 2012. Smith admitted that at the time of the December 26, 2020 incident, he was living with Bradley and that the couple was in a long-term relationship. Smith testified that he and Bradley had children together and that, due to the length of their relationship, he referred to Bradley as his wife. The responding officers testified regarding the severity of Bradley's injuries. Melbar testified that, when he saw Bradley after the incident, she was bleeding and was "really bad," with "severe swelling" and "a large laceration to her head" that required stitches. Germaine similarly testified that Bradley had "a very serious-looking head trauma with a lot of blood." Photographic evidence in the form of Melbar's body camera footage and photographs taken while Bradley received medical care at the hospital confirm the severity of Bradley's injuries. The trial court was entitled to give greater weight to this evidence than to Smith's testimony that Bradley had sustained "nothing but a little scratch," "a superficial scratch."

[¶126] Following a thorough review of the record, weighing the strength and credibility of the evidence presented and the reasonable inferences to be drawn therefrom, we cannot say that this is one of those

"'exceptional cases'" in which the trier of fact clearly lost its way and created a manifest miscarriage of justice that the defendant's convictions must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717, 20 Ohio B. 215. Accordingly, Smith's third assignment of error is overruled.

Sentencing under the Reagan Tokes Law

[¶127] In his fourth assignment of error, Smith contends that the trial court erred in 655568 in sentencing him to an indefinite sentence on Count 2 (felonious assault in violation of R.C. 2903.11(A)(2)) under the Reagan Tokes Law. Under the Reagan Tokes Law, qualifying first- and second-degree felonies committed on or after March 22, 2019 are subject to the imposition of indefinite sentences. Smith argues that the Reagan Tokes Law is unconstitutional because it violates his constitutional rights to trial by a jury, the separation-of-powers doctrine and his right to due process.

[¶128] The arguments presented in this case do not present novel issues or any new theory challenging the constitutional validity of any aspect of the Reagan Tokes Law left unaddressed by this court's en banc decision in *State v. Delvallie*, 2022-Ohio-470, 185

N.E.3d 536 (8th Dist.).[23] Accordingly, we overrule Smith's fourth assignment of error.

Waiver of Jury Trial

[¶129] In his fifth and final assignment of error, Smith claims that he was effectively denied his right to a jury trial in violation of the Sixth Amendment to the United States Constitution because, due to difficulties in scheduling jury trials as a result of COVID, he was faced with a "Hobson's Choice," i.e., "stay in jail waiting for a jury or have a bench trial."

[¶130] On December 1, 2021, Smith executed a written waiver of his right to a jury trial in both cases. Before proceeding with the trial, the trial court read the written waiver into the record and then questioned Smith regarding his waiver of his right to a jury trial. The written waiver stated:

> I, GARY SMITH, the Defendant in this cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a judge of this Court of Common Pleas. I understand that I have a right, under the Constitutions and laws of both the United States and the State of Ohio, to a trial by a jury of twelve, and that no verdict could be made by a jury, except by agreement of all twelve members of that jury. I further state that

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[23] In his appellate brief, Smith acknowledges that "[t]he arguments challenging the constitutionality of S.B. 201's indeterminate sentencing provisions [raised in this appeal] were rejected by the *en banc* Court in *Delvallie*." (Appellant's Br. at 16.)

> no threats or promises have been made to induce me to waive this right, and that I am not under the influence of any drugs, alcohol, or medication that would affect my decision.

[¶131] On the record, the trial court confirmed with Smith and defense counsel that they had signed the jury waiver in both cases. The trial court advised Smith that the right to a jury trial is a constitutional right and confirmed that (1) defense counsel had explained Smith's right to a jury trial to him, (2) Smith understood the difference between a jury trial and a bench trial and (3) Smith was not under the influence of any drugs, alcohol or medication that could affect his decision to waive a jury trial.

[¶132] The trial court also specifically addressed the delays in scheduling jury trials due to COVID-19 and the potential impact of those delays on Smith's decision to waive his right to a jury trial:

> THE COURT: * * * I'm sure you also appreciate that it may be some time before we get a jury trial, but I don't want that to be the motivating factor, because there is a difference between one person being the trier of fact and 12 people having to reach a unanimous decision, so I just want to make sure that you appreciate that difference. And are you confident that you want to proceed by bench trial today?
>
> THE DEFENDANT: Yes.

[¶133] Following a colloquy with Smith and defense counsel, the trial court found that defense counsel had

explained to Smith his rights to a trial by jury, that no threats or promises had been made to induce Smith to waive that right and that his jury waivers had been knowingly, intelligently and voluntarily executed. Accordingly, the trial court accepted Smith's jury waivers, and they were filed with the trial court.

[¶134] After accepting Smith's jury waivers, the trial court then proceeded to rule on Smith's motion to dismiss for lack of a speedy trial. In denying the motion to dismiss for lack of a speedy trial — a ruling Smith has not appealed — the trial court further noted:

> [D]ue to the Court's efforts to reduce the spread of the COVID-19 virus, and I don't have the specific dates, but for many months in the last year and a half we have not had access to jury panels and we were not calling in jury trials. When a determination was made between you and your counsel that we would go forward on a bench trial, this is the soonest that this Court could get your case called for trial. I've been in nonstop trials, your attorney has been in nonstop trials, the prosecutors have been in nonstop trials since we've resumed trials. * * * The delays have not been at the State's request. They've been in most part, and I haven't looked at the Court's docket, at the Court's request.

[¶135] In response to Smith's question regarding why his trial did not occur on May 3, 2021, which he claimed was his "first original trial date" after trials were allowed to resume, the trial court further stated:

> I'll explain to you what happened with that. I lost all discretion over which of my cases could go to trial. My cases, I had to submit to our administrative judge, and the administrative judge through an administrative order decided which cases go. So does it pain me that you've been sitting in jail for pretrial purposes? Yes. I don't take any pleasure in that. But my jurisdiction and my discretion, a lot of it were removed due to the Court's administrative order. And as of November 1st, just one month ago, they've changed that process. But it was all the way through until November 1st I couldn't set my own trial dates. I couldn't. So we're trying to work through that, we're muddling through it. If it's an issue on appeal, then I would encourage you to raise it with the court of appeals.

[¶136] The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees an accused the right to trial by jury. *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, 872 N.E.2d 279, ¶ 6, citing *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). A defendant may, however, waive that right. Crim.R. 23(A) states, in relevant part:

> In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney.

[¶137] R.C. 2945.05 states:

> In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."
>
> Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.

See also Lomax at ¶ 9 ("[T]o be valid, a [jury] waiver must meet five conditions. It must be (1) in writing, (2) signed by the defendant, (3) filed, (4) made part of the record, and (5) made in open court.").

[¶138] Smith does not dispute that his jury waivers complied with all applicable statutory and common law requirements. He, nevertheless, argues that the voluntariness of his jury waivers was undermined by administrative orders that suspended and/or limited the scheduling of jury trials, requiring him to "choose between continued confinement in the county jail and his right to a jury of his peers." Smith cites no authority in support of his claim that the temporary suspension of jury trials or other limits on the

scheduling of jury trials due to COVID-19 violated the Sixth Amendment or invalidated his waiver of his right to a jury trial.

[¶139] The First District considered — and rejected — a similar argument in *State v. Fisher*, 2021-Ohio-3919, 180 N.E.3d 672 (1st Dist.), as follows:

> This is an unusual case where Mr. Fisher concedes that he waived his right to a jury trial and that this waiver satisfied all of the statutory and caselaw requirements. Mr. Fisher nevertheless maintains that an administrative order suspending jury trials in Hamilton County because of the COVID-19 pandemic essentially undermined the voluntariness of his waiver. In other words, he insists that this administrative order posed an unconstitutional Hobson's choice—wait indefinitely for the resumption of jury trials or forego that cherished right.
>
> Mr. Fisher cites no authority for the proposition that a temporary suspension of jury trials violated the Sixth Amendment, nor any cases invalidating waivers of the right to a jury trial made during such a suspension. While we realize that the suspension of jury trials placed Mr. Fisher (along with countless others) in a predicament, we see no reason to disturb an otherwise valid waiver on this record.

Id. at ¶ 17-18. We agree with the reasoning of *Fisher*.

[¶140] Further, in this case, the record reflects that Smith's decision to waive a jury trial was not due

solely to COVID-19-related difficulties in scheduling a jury trial. Before trial commenced, defense counsel informed the trial court that it was not only the delay in scheduling a jury trial but concerns regarding how a jury might perceive some of the evidence against Smith relating to the December 26, 2020 incident — the admissibility of which Smith does not challenge on appeal — that led Smith to choose a bench trial rather than wait for a jury trial. (Tr. 11) ("That's one of the reasons that we waived a jury, because the jury gets hold of that, they don't ignore it, and it hurts me and it hurts my defense.").

[¶141] In addition, it was only after Smith violated the terms of his bond in 651674, i.e., by admittedly having contact with Bradley, and then failed to appear for a hearing on the state's motion to revoke bond, that his bond was revoked, and Smith was required to await trial in jail rather than remaining free on bond.

[¶142] On the record before us, we see no reason to disturb Smith's valid jury waivers. Smith's fifth assignment of error is overruled.

[¶143] Judgment in 655568 affirmed; judgment in 651674 reversed; convictions in 651674 only vacated; 651674 only remanded for a new trial.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., CONCURS;

MICHELLE J. SHEEHAN, J., CONCURS IN JUDGMENT ONLY AND DISSENTS IN PART (WITH SEPARATE OPINON)

N.B. Judge Mary Eileen Kilbane joined the dissenting opinion by Judge Lisa B. Forbes and the concurring in part and dissenting in part opinion by Judge Anita Laster Mays in *Delvallie* and would have found the Reagan Tokes Law unconstitutional.

MICHELLE J. SHEEHAN, J., CONCURRING IN JUDGMENT ONLY IN PART AND DISSENTING IN PART:

[¶144] Respectfully, I concur in judgment only with the majority opinion affirming Garry Smith's convictions in Cuyahoga C.P No. 655568 and the resolution of Smith's fourth and fifth assignments of error. However, I dissent from the majority opinion and would overrule Smith's first, second, and third assignments of error as they pertain to his convictions in Cuyahoga C.P. No. 651674.

[¶145] In Cuyahoga C.P. No. 651674, Smith was convicted of felony domestic violence. The trial court admitted the victim's statements made on March 21, 2020, to the responding police officer, her statements made to emergency medical technicians as recorded on the police body camera, the victim's medical records, and evidence of Smith's prior conviction for domestic violence.

[¶146] The majority opinion found that all the victim's statements made to police while she was in the ambulance were testimonial and thus inadmissible. Majority Opinion, ¶ 93. I disagree and would not find the victim's answers to the initial questioning by police to be testimonial under the primary purpose test announced by the United States Supreme Court in *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Police responded to an emergency call, the victim was being treated by emergency medical technicians, and the initial questions asked of the victim and her responses where for the police to assess the nature and circumstances of the call. *Id.* at 822 (Statements are not 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."). I would further find that as the police learned the details as to what occurred, where it occurred, what occurred, and who was involved, the purpose of the questioning changed. The police sought to ascertain information as to specific details of the assault and information to later locate both the victim and Smith. Such questioning marked a change to the

purpose of the interview because those questions were in made "to establish or prove past events potentially relevant to later criminal prosecution." *Id.*

[¶147] Having found the entirety of the victim's statements made to the police to be testimonial, the majority finds that the admission of those statements was prejudicial and such error was not harmless. Majority Opinion, ¶ 105. I disagree. The trial court had admissible evidence in the form of the victim's initial statements to police, visual evidence of the injuries sustained, details of the assault in the victim's statements to the emergency medical technicians, and the victim's statements contained within her medical records. As such, I would find that the admission of the victim's statements once the purpose of the police questioning changed to be duplicative of, or cumulative to, the admissible evidence before the trial court and that the errant admission of the victim's statements constituted harmless error.