

Crawford and the Confrontation Clause:

Cutting through the chaos to define what is
testimonial for the Court.

Introduction

Target situations:

- Not *Bullcoming*
- Active incident scenes
- DV allegations
- Complex DV scenes
(many witnesses,
multiple locations)
- ***More nuanced*** situations

Target audience:

- Misdemeanor practice
with lots of person
allegations vs. vehicle
offenses
- New to felony practice

Confrontation Clause 101

The confrontation clause of the Sixth Amendment prohibits admission of *testimonial* statements unless:

The declarant is unavailable

The defendant has had a prior opportunity for cross-examination

Crawford v. Washington, 541 U.S. 36, 59 (2004)

When are statements testimonial?

What was the primary purpose?

Testimonial when the circumstances objectively indicate that the **primary purpose** of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006)

State v. Burke, 196 Wn.2d 712, 725-26 (2021)

Confrontation Clause 101

Was the interview seeking to determine what *is happening*, or *what happened*?

Address a present emergency or collect information to prove past events?

Effectively a weaker substitute for live trial testimony?

Many variations on this theme.

Confrontation Clause 101

Objective standard:

What purpose would reasonable participants have had in that situation?

Look to their statements, actions in the circumstances.

Not with the benefit of hindsight.

Michigan v. Bryant, 562 U.S. 344, 367-68 (2011)

State v. Scanlan, 193 Wn.2d 753 (2019)

Note:

Kozlowski factors are not controlling, this many years out from *Bryant*.

Be wary of pulling analysis from cases before *Scanlan* in 2019.

Confrontation Clause 101

Conversations may change from nontestimonial to testimonial—sometimes suddenly.

State bears the burden of proving statements are non-testimonial.

De novo review on appeal.

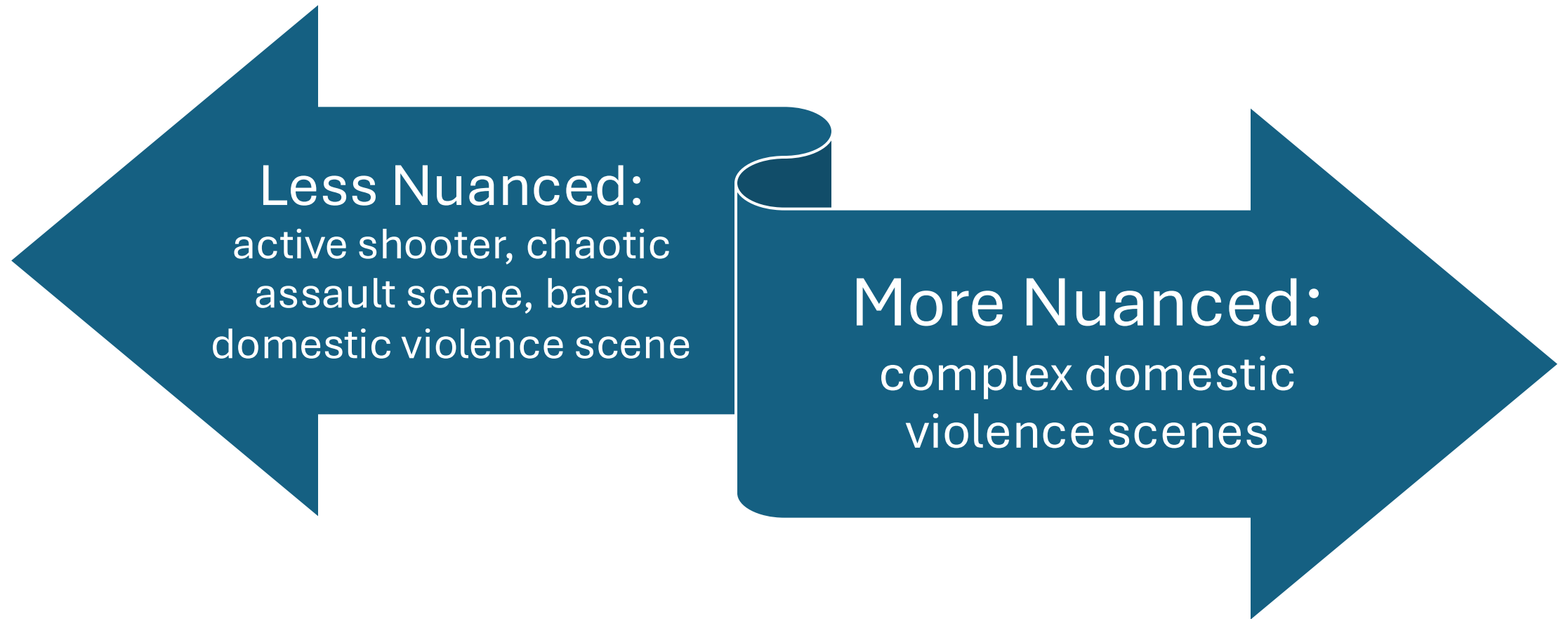
Constitutional harmless error analysis.

- Constitutional errors are presumed prejudicial.
- New trial if state cannot prove harmlessness.

Confrontation Clause 201

Gun involved?	This will change the analysis. Considerably so, if this is not a domestic violence situation (see below) but instead an assault scene or an active shooter scenario. <i>Bryant</i>, 562 U.S. at 364.
Allegation of domestic violence?	Domestic violence is different under confrontation clause analysis. There is a narrow scope of potential victims, much less danger to the public at large. For example, compare DV cases with <i>State v. Perez</i>, 184 Wn.App. 321 (2014). Unknown location of suspect is not dispositive in these cases. Generally, when a domestic violence suspect is at large, the ongoing emergency ends while the alleged victim is under police protection. <i>State v. Reed</i>, 168 Wn.App. 553, 570 (2012).

Confrontation Clause 201



Confrontation Clause 201

Basic

- 911 call
- call +interview
- one witness

Complex

- many witnesses
- client taken into custody during interviews
- timing issues

What are we dealing with?

Often, **complex** cases involve:

- 911 call(s);

- Multiple statements from alleged victim;

- Statements from witnesses;

- Possibly, seizure of your client;

- Follow-up investigation (*could be shortly after initial contact*);

- Text messages & social media evidence; and, possibly:

- Statements made to **non-state actors** (*clause applies*).

Ohio v. Clark, 576 U.S. 237 (2015); *State v. Scanlan*, 193 Wn.2d 753 (2019)

More nuance? More opportunities.

You have the power to shape the narrative for the court.

- With your briefing.
- With your oral arguments.
- With your questions at a pre-trial hearing.

What is this guy talking about, “narrative?”

- The power comes from you drawing the lines.
- You tell the court what is ***testimonial and nontestimonial***.

Deciding where to draw the line.

Here, there ***will be*** grey:

- 911 call(s);

- Multiple statements from alleged victim;

- Statements from witnesses;

- Possibly, seizure of your client;

- Follow-up investigation;

- Text messages & social media evidence;

- Statements made to nongovernmental actors.

Identify obvious testimonial and nontestimonial statements, and decide where in the grey area you want argue for exclusion.

This often starts with police questioning of reluctant witnesses.

- Police often try to convince people to talk by encouraging them with language of accountability.

Navigating the Grey Area.

What type of questioning did police engage in?

It is possible that a responding officer's obvious focus on eliciting testimonial statements—even during an emergency—will render the declarant's responses testimonial.

Reed, 168 Wn.App. at 568.

But!

The primary focus is on the purpose of the challenged statement, not the question that prompted it.

State v. Ta'afulisia, 21 Wn.App.2d 914, 932 (2022).

Navigating the Grey Area.

But, again!

Even if the situation is chaotic and seems like an emergency, the primary purpose of any interview at the scene must be responding to the emergency, not gathering information for prosecution. There is a difference.

- *Bryant*, 562 U.S. at 367-68.

These are clearly not the same:

What happened?

&

Tell us who did this to you so we can arrest them.

Navigating the Grey Area.

If you need to make these arguments, the declarant's statements will be evaluated on a cold record. The court of appeals understands *Bryant* this way:

Assessing the primary purpose of statements requires a combined inquiry that accounts for both the declarant and the interrogator.

State's focus

The State frequently argues that excited utterances almost always means nontestimonial.

The State, with police testifying at a pretrial hearing, often argues that cajoling statements were meant to get a reluctant witness to provide information to assess an ongoing emergency.

The closer the State gets to making a categorical argument, the more contrary to caselaw it becomes.

- *State v. Ohlson*, 162 Wn.2d 1, 16-17 (2007)(rejecting *per se* rule; affirmatively stating excited utterances may contain testimonial statements)

Flip the “*combined inquiry*” on the State.

- Did the declarant see it that way?
- Evaluating this on a cold record, leaving more room for interpretation.

In practice ...

State v. Green, 32 Wn.App.2d 1025 (2024)

Important cases to review.

State v. Scanlan, 193 Wn.2d 753 (2019)

Great historical overview, examining the struggle of fashioning a test for examining statements made to non-state actors.

No test inconsistent with primary purpose analysis survives this case.

State has considerable leeway introducing statements from mandatory reporters and medical personnel.

Important cases to review.

State v. Ta'afulisia, 21 Wn.App.2d 914 (2022)

Undercover recording case, no question the recording party was acting as an agent of law enforcement.

Statements made to a family member. Classic “mixed-motives” case.

Especially post-*Clark*, the interrogator’s questions are only part of the analysis.

Court leaned on fact that declarant never made aware of the law enforcement purpose of the conversation.

Important cases to review.

State v. Burke, 196 Wn.2d 712, 725-26 (2021).

Rape case.

At issue: Statements to a sexual assault nurse.

Some statements held testimonial, others not.

Statement providing detailed description of alleged assailant
was testimonial.

Example of interview starting off nontestimonial and
becoming testimonial.

Unpublished cases to mine for examples.

State v. Brower, 31 Wn.App.2d 1072 (2024)

Police interview at issue;
Deputy specifically asking about past events;
No threat of ongoing emergency because suspect already apprehended;
Statement was testimonial, despite state's argument that police were trying to determine whether there were others nearby who could pose a threat.

State v. Eldridge, 9 Wn.App.2d 1009 (2019)

Example of conversation between deputy and alleged victim that quickly went from nontestimonial to testimonial.

Unpublished cases to mine for examples.

State v. Green, 32 Wn.App.2d 1025 (2024)

Example of complex scene with several interviews and witnesses;

Multiple interviews of alleged victim;

Gun case and suspect initially at large;

Case overturned on appeal.

State v. Landes, 20 Wn.App.2d 1016 (2021)

911 call case;

911 call deemed testimonial.

State v. Mylan, 27 Wn.App.2d 1010 (2023)

911 call case;

911 call deemed nontestimonial.