

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 91571**

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**STATE OF OHIO**

PLAINTIFF-APPELLANT

VS.

**KATHLEEN STEELE AND  
ANTHONY PRATT**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
AFFIRMED IN PART, REVERSED  
IN PART, AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-470846

**BEFORE:** Stewart, J., Gallagher, P.J., and Rocco, J.

**RELEASED:** September 10, 2009

**JOURNALIZED:  
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} The state of Ohio appeals from a ruling in limine that found various statements it wished to offer into evidence against defendants-appellees, Kathleen Steele and Anthony Pratt, were testimonial in nature and barred by the Confrontation Clause of the Sixth Amendment to the United States Constitution. We conclude that the court erred by finding two of the statements to be testimonial, so we reverse the court's decision to bar those particular statements. We affirm as to the remaining statements.

## I

{¶ 2} The defendants are currently facing counts of aggravated murder with felony murder specifications, aggravated burglary, aggravated robbery, and felonious assault.

{¶ 3} The facts show that the police responded to a 911 call at the apartment of the victim, Virginia Austin. They found the 80-year-old Austin lying on the hallway floor with her dress pulled up to her neck, and her breasts exposed. She was shaking and had tears in her eyes. Although not obvious to the officers at the time, Austin had been struck in the head and

extremities. Dresser drawers in the bedroom were open as were a number of boxes from her closet, and her possessions were strewn about the room. One of the doors to the apartment showed signs of forced entry. Both defendants were present inside the apartment when the police arrived.

{¶ 4} The defendants had formerly lived with Steele's mother in an apartment in the same building. They told the police that they were driving by the building and noticed a light on in Austin's apartment, so they entered her apartment in order to check on her. They said they found her and contents of the apartment in the condition noted by the police. When Austin's relatives arrived on the scene, they told the police that the defendants had recently been evicted from the building.

{¶ 5} Austin spoke to a police officer three times: (1) while inside the apartment; (2) while inside an Emergency Medical Services ("EMS") ambulance; and (3) while at the hospital. She also spoke with an Emergency Medical Technician ("EMT") while inside the ambulance.

{¶ 6} The officer testified that as Austin lay on the floor of her apartment, she asked Austin "if someone had broken into the house." Austin replied, "yes." The officer then asked Austin "if she had been sexually assaulted." Austin replied, "no." The officer asked Austin "if someone had hurt her." Austin replied, "yes." The officer tried to ask Austin additional questions, but Austin was unresponsive.

{¶ 7} EMS then arrived and after assessing her on scene, placed Austin inside the ambulance. An EMT asked her “what happened inside, was there anybody inside the apartment who did that to her.” Austin said “that two people inside the apartment caused the injuries to her.”

{¶ 8} The EMT alerted the police officer to Austin’s statement. The officer went into the ambulance and asked Austin “if she knew who had done this to her.” Austin nodded her head and said “yes.” The officer then asked “if it was a man that had done that to her.” Austin answered, “yes.” The officer then asked “if the man who had been standing in the apartment when we arrived had done this.” Austin seemed to become frightened and, with tears welling in her eyes, said “yes.”

{¶ 9} EMS took Austin to the hospital. The officer stayed at the apartment for about 15 minutes before driving to the hospital. She saw Austin in the emergency room and asked her if she “knew who had done this to her and who broke in her house.” Austin replied, “yes” and became upset. The officer asked “if the people from apartment number four had been the ones who had done this to her.” Austin answered, “yes.” The officer then asked “if it was Anthony Pratt who had done that.” Austin answered, “yes.” The officer then asked “if his girlfriend, Kathleen Steele, did this, too.” Austin answered, “yes.” The officer asked “if Kathleen’s mom knew that they had done that.” Austin said, “I think she knew.” Austin made no further statements and died 36 hours after the assault.

{¶ 10} The state sought to have the police officer and EMT testify at trial to the statements made by Austin. The defendants filed motions in limine to bar the state's use of the statements, asserting that admission of the statements would violate their confrontation rights because the victim's out-of-court statements were testimonial in nature under *Crawford v. Washington* (2004), 541 U.S. 36, and unable to be tested by cross-examination. The defendants also argued that even if the statements were nontestimonial, they did not fall within any recognized hearsay exception. The state argued that Austin's statements were nontestimonial and were admissible as excited utterances.

{¶ 11} The court conducted a hearing on the matter and, in the midst of the hearing denied the motion in limine. One week later, the court reversed its initial decision, finding that the contested statements "do not fall within the hearsay exception of excited utterance [sic]." The state asked the court for clarification on that ruling, but the court simply stated that it again reviewed the relevant law and remained convinced that none of the statements qualified as excited utterances.

{¶ 12} On appeal, a panel of this court concluded that the court had failed to state its "essential findings as required by Crim.R. 12(F)." See *State v. Steele*, Cuyahoga App. Nos. 87893 and 87898, 2007-Ohio-395, ¶4. Apart from the court's deficient factual findings, we noted that the court had terminated the hearing before the state could offer testimony to substantiate

its assertion that a startling event had occurred just prior to Austin's statements. We stated:

{¶ 13} “[W]e find that the trial court abused its discretion in the case sub judice because it reversed its prior ruling without allowing the State to proceed with its evidence. The State had the burden to show that Austin's statements were excited utterances. When the trial court reversed its ruling one week later, it should have allowed the State to fully present its evidence to rebut the motion. The court's abrupt ruling, coupled with the court's failure to state its essential findings on the record, leaves this court without the ability to properly review the trial court's decision.” Id. at ¶13.

{¶ 14} After remand, the court conducted a new hearing. In findings of fact issued after the hearing concluded, the court determined that the undisputed testimony showed that the police officer questioned Austin “to see if a crime had happened” and “to develop information to investigate a crime \* \* \* [and] to develop information that [the police officer] would later use \* \* \* in a criminal prosecution.” The court found that regardless of whether Austin's statements were admissible hearsay, Austin's unavailability for trial and the defendants' inability to cross-examine her on her statements made prior to death would lead to a Confrontation Clause violation if the state were permitted to introduce the statements. The court again granted the motion in limine and the state appealed pursuant to Crim.R. 12(K).

{¶ 15} The Sixth Amendment to the United States Constitution guarantees that a person accused of committing a crime has the right to confront and cross-examine witnesses testifying against him. *Pointer v. Texas* (1965), 380 U.S. 400, 406.<sup>1</sup> In *Crawford*, the United States Supreme Court held that “[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” 541 U.S. at 68. Rejecting its former hearsay formulations, the supreme court held that the Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.” *Id.* The supreme court declined to provide a comprehensive definition of “testimonial,” but indicated the term includes, at a minimum, prior testimony at a preliminary hearing, before a grand jury, at a former trial, and statements made during police interrogations. *Id.*

{¶ 16} In *Davis v. Washington* (2006), 547 U.S. 813, the supreme court held that statements are “nontestimonial” when made in the course of police

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<sup>1</sup>Section 10, Article I, of the Ohio Constitution, contains a similar guarantee of confrontation, and Ohio construes its confrontation clause as providing an equal guarantee as that of the federal constitution. See *State v. Self* (1990), 56 Ohio St.3d 73, 78; *State v. McKenzie*, Cuyahoga App. No. 87610, 2006-Ohio-5725, at ¶2. (“Although the ‘face to face’ language of the Ohio Constitution would arguably appear to grant even greater rights to confrontation, the Ohio Supreme Court has construed Section 10, Article I, to parallel that of the federal constitution, rejecting the argument that the section requires an interpretation at its literal extreme.”)



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. 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.* See, also, *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, paragraph two of the syllabus. (“To determine whether a child declarant’s statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply 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.’”)

{¶ 17} We therefore distinguish between police interrogations in an ongoing emergency and interrogations that relate to past criminal conduct. For example, in *Davis*, the supreme court found that questions asked during a 911 emergency call were asked in order to assist the police in responding to an ongoing emergency. *Id.* at 829. However, in the companion case of *Hammon v. Indiana* (2006), 547 U.S. 813, the supreme court held that

statements made to a police officer responding to a domestic violence call were “inherently testimonial” because the complainant had been separated from her husband and an emergency situation no longer existed. With no ongoing emergency at hand, the interrogation of the domestic violence victim had the primary purpose of investigating past criminal behavior. *Id.* at 830-831.

### III

{¶ 18} Although we review decisions on the admission of evidence for an abuse of discretion, *State v. Graham* (1979), 58 Ohio St.2d 350, we apply a de novo standard of review to evidentiary questions raised under the Confrontation Clause. See *State v. Babb*, Cuyahoga App. No. 86294, 2006-Ohio-2209, ¶17; *State v. Simuel*, Cuyahoga App. No. 89022, 2008-Ohio-913, at ¶35.

{¶ 19} The parties agree that there are four separate incidents in this case that gave rise to Confrontation Clause issues: the victim’s statements inside the apartment; the victim’s statements inside the EMS ambulance separately to the police officer and the EMT; and the victim’s statements at the hospital. We examine each in turn.

### A

{¶ 20} The statements made by Austin as she lay on the floor of the apartment were in response to questions that were manifestly asked with the primary purpose of enabling the police officer to meet an ongoing emergency.

{¶ 21} The officer testified that she and her partner responded to an emergency call at Austin's apartment. They found the apartment in the kind of disarray normally associated with a burglary. The obviously injured and distressed Austin lay on the floor with her dress pulled up to her neck and her breasts exposed, suggesting that she might have been the victim of a sexual assault. The officer testified that the "first thing I did was to check to see if she was conscious and to check her."

{¶ 22} Austin's responses to the officer's questions – had someone broken into the house; had Austin been sexually assaulted; and had someone hurt Austin – were made under circumstances that objectively showed they were primarily intended to assist the police in meeting an ongoing emergency. The questions were posed upon initial contact with Austin and, given the defendants' unexplained presence in the premises, under circumstances showing that the apartment had not been secured. Viewed objectively, the questions were posed as part of a response to an ongoing emergency, so Austin's responses were nontestimonial. See *State v. Brown*, Cuyahoga App. No. 87651, 2006-Ohio-6267.

## B

{¶ 23} The statements made by Austin in response to the police officer's questions while inside the ambulance were testimonial because the ongoing emergency had ended and the police officer asked the questions primarily to establish past events that would be relevant for a criminal prosecution.

{¶ 24} The officer stated that her purpose in speaking with Austin as she lay in the ambulance was “to try and get as much information as quickly as possible before they went to the hospital while she was still there on the scene and they were administering aid to her there.” She also said that when she spoke with Austin in the apartment, Austin did not respond to the question of who had assaulted her. The officer said that obtaining information about the assailant before EMS transported Austin to the hospital “was my primary concern[.]” She then asked Austin if she knew who assaulted her; if a man committed the assault; and if the man who had been in the apartment at the time the police arrived had committed the assault.

{¶ 25} The officer candidly admitted that her “primary” purpose in asking Austin these questions was to obtain information for use in a criminal prosecution. Viewed objectively, this search for “information” could only be said to have been for the purpose of establishing or proving past events.

{¶ 26} Any ongoing emergency had long since ceased by the time the officer entered the ambulance to speak with Austin. Although Steele and Pratt were still on scene, when the officer entered the ambulance to speak with Austin there were two police officers, four firefighters, and two EMS personnel on the scene. The assault on Austin had ceased and she was in no further danger. Austin’s responses to the officer’s questions were testimonial. See *State v. McKenzie*, Cuyahoga App. No. 87610, 2006-Ohio-5725.

{¶ 27} Austin's statement to the EMT is reviewed under a different standard. 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." *State v. Stahl* (2006), 111 Ohio St.3d 186, 196, 2006-Ohio-5482, ¶36. There is no suggestion by the defendants that the EMT acted as an agent of the police, so we focus on Austin's expectation at the time of making the statement and consider the EMT's intent in asking his questions only to the extent that intent could affect Austin's expectations. *Id.* at paragraph two of the syllabus. Austin's statements made during the course of medical treatment are nontestimonial if no reasonable person in her position would believe that her statements were made for the purpose of conducting a criminal investigation.

{¶ 28} In order to ascertain Austin's expectations at the time she made her statement, we must consider her circumstances as she made her statement from inside the ambulance. The EMT testified that Austin had swelling around her eyes and cheek bone. A cervical collar had been placed around her neck, and she was completely immobilized by the stretcher. Austin's tongue blocked her breathing, so the EMS personnel placed a nasal cannula in her nose. As she lay in the ambulance, the EMT and paramedic assessed her orientation and alertness. The EMT also said that Austin was

significantly less tense inside the ambulance than she had been while inside the house. As the EMT questioned Austin, he was placing an oxygen mask over her face.

{¶ 29} Given these circumstances, we conclude that no reasonable person in Austin's position would have considered the questions, "what happened inside, was there anybody inside the apartment who did that to her" as being made for the purpose of conducting a criminal investigation. The 80-year-old Austin was in obvious physical and emotional distress as she lay in the ambulance, and any reasonable person under those circumstances would have understood the EMT's questions as relating to medical care, not criminal investigation. She had previously spoken with the police officer in her apartment, so she had no reason to understand the EMT's questions as relating to the crime itself.

{¶ 30} Our conclusion is consistent with *Stahl*, in which the supreme court allowed the admission of statements made by an adult crime victim to a nurse at a hospital's specialized unit for victims of sexual assault. Even though a police officer was present during the examination of Stahl's victim, the supreme court found that the circumstances of the examination contained all the indicia of medical treatment, so the victim's statement was made under circumstances which would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.* at ¶46.

{¶ 31} The facts in this case arguably present a more compelling case than *Stahl* for finding that a victim's statements were nontestimonial. Austin's statements to the EMT were made in an ambulance, on the scene of the crime, and outside the presence of any law enforcement officials. They were made during a medical emergency to a person who had been rendering medical treatment to her. We have no basis for concluding that any reasonable person would have thought that her statements, made under the circumstances described, would be used as part of a criminal investigation.

{¶ 32} Although we conclude that no reasonable person in Austin's position at the time would have thought that her answer to the EMT's questions would be used at a later criminal trial, we must nonetheless consider whether the EMT's intent in asking the questions affected Austin's expectations when responding to him. This is an important question because the questioner's intent can nonetheless make an innocuous answer suspect.

{¶ 33} The EMT testified that when he entered the apartment, and before he reached Austin, he saw the police questioning the defendants. He attempted to speak with Austin, but she was unresponsive. After securing Austin inside the ambulance in preparation for taking her to the hospital, he performed a "secondary assessment" of Austin's condition. At the same time, he asked her, "what happened inside, was there anybody inside the apartment who did that to her[.]" Austin replied affirmatively.

{¶ 34} We acknowledge that the EMT's questions could be construed as serving a dual purpose: assessment and investigation. But the contextual ambiguity of the question does not suggest that its primary purpose was investigative. The EMT testified that Austin had an obvious head injury. Information as to the cause of the head injury would have aided efforts to give medical assistance. Austin's inability to respond to the EMT's questioning while inside the apartment caused him to question her again once she was secured inside the ambulance. At all events he was administering medical treatment and testified that his questions had a medical purpose: namely to assess whether Austin was oriented and alert. Additionally, the EMT stated that he questioned Austin for information to include in his run report.

{¶ 35} The EMT's testimony that he remained alert to any statements that might aid a police investigation does not convert his questioning into investigative rather than for medical purposes. It is true that the EMT acknowledged that answers to his questions may yield information that could be used in the courtroom, and he wanted to relay that information to Cleveland Police if not medical. However, at no time did the EMT testify that his purpose in questioning Austin was for investigatory purposes.

{¶ 36} We therefore conclude that the EMT questioned Austin for the primary purpose of medical treatment rather than to obtain information



relevant to the police investigation. Austin's statements, therefore, were nontestimonial.

#### D

{¶ 37} For the same reasons that Austin's statements to the police officer while in the ambulance were testimonial, we find that her statements to the police officer while in the emergency room at the hospital were likewise testimonial in nature. No ongoing emergency existed at the hospital, so the officer's intent in questioning Austin was to gather information for use in a criminal prosecution.

#### E

{¶ 38} In summary, we find that Austin's statements to the police officer made while she lay on the floor of her apartment were nontestimonial because they were made in the midst of an ongoing emergency. The court erred by finding these statements barred by the Confrontation Clause.

{¶ 39} The statements Austin made to the police officer while in the ambulance and at the emergency room were testimonial because the emergency no longer existed. The court did not err by finding these statements barred by the Confrontation Clause.

{¶ 40} Finally, the statements Austin made to the EMT while secured in the ambulance and awaiting transport to the hospital were nontestimonial in nature. The EMT questioned Austin primarily for medical reasons, so the

court erred by finding these statements to be barred by the Confrontation Clause.

#### IV

{¶ 41} Having found Austin’s initial statements to the police and her statement to the EMT were nontestimonial, we next consider whether the statements were inadmissible hearsay or fell within the excited utterance exception to the hearsay rule. *Crawford*, 541 U.S. at 68; *McKenzie*, *supra*.

{¶ 42} Evid.R. 803(2) defines an “excited utterance” as “[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.” For an alleged excited utterance to be admissible, four prerequisites must be satisfied: (1) an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while still under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have personally observed the startling event. See *State v. Brown* (1996), 112 Ohio App.3d 583, 601.

{¶ 43} Although the court stated that “there is no doubt that a ‘startling event’ occurred, and that, as she answered Officer Anderson’s and EMT Taylor’s questions, Ms. Austin remained under the stress of the events which ultimately led to her death[,]” it stated that it “need not address the excited utterance exception to the hearsay rule under Evid.R. 803(2)” in light of its finding that Austin’s statement was testimonial.

{¶ 44} Rulings on the admissibility of evidence are reposed in the first instance within the broad discretion of the trial judge. *State v. Duncan* (1978), 53 Ohio St.2d 215, 219, citing *Potter v. Baker* (1955), 162 Ohio St. 488, 500. Given the court's refusal to rule on whether Austin's statement to the EMT constituted an excited utterance, we express no opinion on the issue. The court must consider that matter in the first instance on remand.

{¶ 45} This cause is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, J., CONCURS

SEAN C. GALLAGHER, P.J., CONCURS IN  
JUDGMENT ONLY WITH SEPARATE OPINION

SEAN C. GALLAGHER, P.J., CONCURRING IN JUDGMENT ONLY:

{¶ 46} I agree with the majority's analysis and conclusion that the victim's statements to the police officer in the apartment and to the EMT in the

ambulance were *not* testimonial. I also agree that the statements to the police officer at the hospital were testimonial. Finally, I agree that the statements to the officer in the ambulance were testimonial, albeit for different reasons. Further, I disagree with the majority's decision not to address the issue of whether the nontestimonial statements qualify as excited utterances under Evid.R. 803(2).

{¶ 47} I disagree with the majority's view that the emergency had ended by the time the victim was questioned by the officer in the ambulance. I do not believe the record supports such a conclusion. Simply because the assault had ended and the victim was placed in an ambulance, purportedly removed from "harm's way," does not, in and of itself, end the emergency. Here, the testimony established that, although the officers did not know it, the perpetrators were still on scene; therefore, it cannot be said the scene was secured. The potential for danger or for the compromising of a crime scene still existed. Further, the victim was still in fear when she spoke with both the EMT and the officer in the ambulance, likely because she knew the perpetrators were still on scene. Thus, it cannot be said the "emergency had long since passed," or that the police or others in the area were not in potential danger.

{¶ 48} Drawing a bright line rule regarding whether, and under what circumstances, an emergency is deemed passed is not prudent. It should be decided on a case-by-case basis. Further, whether an emergency has truly passed is but one factor to consider.

{¶ 49} In addition, although the officer admitted that her primary purpose in asking Austin the questions in the ambulance was to obtain information for use in

a criminal prosecution, I believe that an officer's subjective understanding of the situation is only one factor to consider when determining if the statements by the victim are testimonial.

{¶ 50} In my view, the victim's statement to the police officer was testimonial only because of the specific manner in which the statement occurred and not because the emergency had purportedly passed. Here, the victim first revealed the identities of those who assaulted her to the EMT while she was receiving medical treatment. The EMT then summoned the officer to speak with the victim again. The officer then attempted to elicit the same information from the victim. Under these circumstances, even under the stress of the moment, an objective witness could reasonably believe that the statement to the officer would be available for use at a later trial. *Crawford*, 541 U.S. at 52. Therefore, I concur that the officer's questions in the ambulance could be viewed as investigatory, and the victim's responses testimonial.

{¶ 51} We should be clear that the act of an officer directly questioning a victim in an effort to alleviate an emergency does *not* necessarily result in testimonial statements. Officers in all situations "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." *Davis*, 547 U.S. at 831. The fact that the officer asked questions related to who committed the crime does not automatically render the victim's statements "testimonial." As we stated in *State v. McKenzie*, Cuyahoga App. No. 87610, 2006-Ohio-5725, "[o]ne cannot alert the

police to the presence of a perpetrator of a crime without being accusatory. That fact alone does not render the statement testimonial.”

{¶ 52} In this instance, had the officer asked the questions and secured the responses independent of the EMT, the statements to the officer may well have been deemed nontestimonial.

{¶ 53} Finally, because the record has been fully developed and this case has already been appealed twice, I see no reason not to address the hearsay issue. An excited utterance is “a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Evid.R. 803(2). Nevertheless, because the majority declines to make this determination, I defer to the trial court on this issue.