Supreme Court No. 90469-3
(COA No. 31132-5-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

RICHARD L. PEARSON, JR.,

Respondent.

STATE OF WASHINGTON'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is the State of Washington.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals [Division III] published decision filed on April 10, 2014, in which the court affirmed the trial court's decision to vacate the jury's special finding regarding a school zone enhancement. A copy of the decision is attached hereto as Appendix A. The State filed a motion for reconsideration of this decision, which was denied on May 29, 2014. A copy of the order denying the motion for reconsideration is attached hereto as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

A. Does Division Three's decision conflict with State v. O'Cain, which requires that a defendant assert his Sixth Amendment right to confrontation at trial in order to preserve the error for appeal?

B. Does Division Three's decision involve a signification question of law under the Constitution of the United States?

IV. STATEMENT OF THE CASE

The defendant, Richard Pearson, was charged with delivery of hydrocodone. The State included a special allegation that the delivery occurred within 1,000 feet of a school bus stop, pursuant to RCW § 69.50.435, attached as Appendix C.

The State called Mr. Michael Martian to testify about the school zone allegation. He is the director of Geographic Information Systems (GIS) for Yakima County. (RP 216). GIS is the keeper of the digital legal map library for the county. (RP 217). The various maps are considered "layers" that can be digitally imposed over an aerial photography map, and are kept as public records by the county. (RP 217-18). One of the layers maintained by GIS shows school bus stops and school properties. The bus stop maps are created using data that is provided yearly from each school district in the county, which is submitted to the State and then to the county. (RP 219). Employing software which uses the coordinates of the bus stops, a circle with a radius of 1000 feet is superimposed on an aerial map to show what stops would be within that circle. (RP 220).

For Pearson's case, Mr. Martian created a map using the location of the drug delivery, 1309 North First Street, as the center point, and a circle showing the location of school bus stops within 1000 feet of that

address. The map was admitted at trial without any objection by Pearson. (RP 221; Ex. 4).

While discussing proposed jury instructions with counsel, Pearson objected to giving the school zone enhancement instruction based on a "lack of foundation." (RP 248). At that point the trial judge told him:

> Actually, the objection I was anticipating on that **that never arose** is that we don't have anybody from the school district to testify whether that was in fact an operational school bus stop on the date in question. **And yet, nobody raised it**. . .

Id. (emphasis added). Pearson's attorney then replied, "And I will raise that objection for what it's worth now." Id.

The court noted the objection and decided to give the special verdict form for the enhancement to the jury. (RP 248, 258). The jury convicted Mr. Pearson, and also found that he delivered a controlled substance to a person within one thousand feet of a school bus stop. (CP 6-7; RP 287-92). However, the court then vacated the jury's special finding. (7-27-12 RP 3-4). The court entered written findings and conclusions of law consistent with its verbal ruling. (8-17-12 RP 21; CP 34-36).

Mr. Pearson was sentenced to a standard range sentence, without the 24-month enhancement. (CP 37-44). The State timely cross-appealed.

(CP 53-66). The Court of Appeals affirmed the trial court's decision, finding that the trial court did not abuse its discretion in vacating the special verdict. See Appendix A. A motion for reconsideration of that decision was denied on May 29, 2014. See Appendix B.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted when a decision of the Court of Appeals conflicts with a decision of the Supreme Court or Court of Appeals. RAP 13.4(b)(1), (2). Review is also appropriate where a significant question of law under the Constitution of the United States is involved. RAP 13.4(b)(3). Here, review is appropriate on both grounds.

A. Division Three's decision conflicts with State v. O'Cain, which requires that a defendant assert his Sixth Amendment right to confrontation at trial in order to preserve the error for appeal.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. But the objection must be made in the trial courts to preserve the error for appeal. State v. O'Cain, 169 Wn. App. 228, 235, 279 P.3d 926 (2012) ("[t]he right to confrontation must be asserted at or before trial or be lost"); see also Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311, 313-14, 129 S. Ct.

2527, 174 L. Ed. 2d 314 (2009) (claim of error premised on the confrontation clause must be asserted at or before trial or be lost).

In O'Cain, Division One of our Court of Appeals gave much weight to this statement from Melendez-Diaz: "It is well settled that the right to confrontation may be waived by failing to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." 169 Wn. App. at 237 (citing Melendez-Diaz, 557 U.S. at 314 n.3). The court indicated that the substance of this statement must be given effect. Id. "It sets forth two principles guiding confrontation clause analysis: (1) **a defendant loses the right to confrontation by not objecting to the offending evidence** and (2) states may—by adopting rules applicable to trial court proceedings—govern the means by which defendants may assert the right to confrontation. Id. (emphasis added).

The Court of Appeals also pointed out that the in Melendez-Diaz, the United States Supreme Court repeatedly referenced the defendant's obligation to assert his confrontation right in the trial court as a premise of its holding. Id. at 239. The following language was highlighted:

> The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections. Melendez-Diaz, 557 U.S. at 327.

> A lot of importance is included within that last quotation. Most important is the clear statement that "[t]he defendant *always* has the burden of raising his Confrontation Clause objection." "Always" means always. It means every time. It means without exception. And it means always, every time, without exception, *in the trial court.*

Id. (emphasis added).

If the confrontation right has to be asserted at the time the offending evidence is admitted, then Pearson waived any right of confrontation in his case. He never raised any motions pre-trial regarding the map. And more importantly, he never objected when the prosecutor moved for admission of the map or when Mr. Martian was testifying about the map. (RP 221). The trial court also heard a post-trial dismissal motion from the defense and the issue of the map was never raised. (RP 240). The only motion raised at that time was related to prosecutorial misconduct and the motion was denied. (RP 240).

The first and only time there was an objection to admissibility of the map was after both parties had rested and were going through jury instructions, shortly before closing arguments. (RP 248). Pearson's objection was based on a "lack of foundation," and not on confrontation grounds. (RP 248). At that point the trial judge told him:

> Actually, the objection I was anticipating on that **that never arose** is that we don't have

> anybody from the school district to testify whether that was in fact an operational school bus stop on the date in question. **And yet, nobody raised it. . .**

(RP 248) (emphasis added). Pearson's attorney then replied, "And I will raise that objection for what it's worth now." (RP 248).

This is clearly not a timely objection. The lack of timeliness was noted by the trial judge, and admitted by counsel, who objected "for what it's worth." His objection did not allow the State any opportunity to cure any problems. It also did not allow the trial court an opportunity to strike testimony or evidence. It also did not preserve any issues for appeal. By the time he did object, after prompting from the trial judge after both parties rested, it was simply too late for him to argue the admissibility of the evidence.

If a defendant's confrontation right is not timely asserted, it is lost. Justice Scalia describes the right to confrontation as being "waived" by a defendant's failure to object, Melendez-Diaz, 557 U.S. at 314 n.3, and being "forfeit[ed] by silence" when no timely assertion is made, 557 U.S. at 326. The United States Supreme Court case of Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), is also significant in this regard. "Important to the Court's analysis was that Bullcoming timely objected at trial, on confrontation clause grounds, both

to the testimony of the witness and to the introduction of the document at issue." O'Cain, 169 Wn.App. at 241 (citing Bullcoming, 131 S. Ct. at 2712). Once again, the United States Supreme Court made clear that the applicability and scope of the confrontation clause is predicated, at least in part, on its requirement that a confrontation clause objection be **timely asserted**—at or before trial—by the defendant. Id. (emphasis added).

A defendant's Sixth Amendment right to confrontation has always been subject to limitations necessary to protect the integrity of court proceedings. O'Cain, 169 Wn.App. at 240. Washington's Evidence Rule (ER) 103 is one such rule. Id. at 243. Pursuant to this rule, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless . . . a timely objection or motion to strike is made, stating the specific ground of objection." ER 103(a)(1). This rule protects the integrity of judicial proceedings by denying a defendant the opportunity to sit on his rights, bet on the verdict, and then, if the verdict is adverse, gain a retrial by asserting his rights for the first time on appeal. O'Cain, 169 Wn.App. at 243. The rule is also consistent with the Supreme Court's discussion of a defendant's obligation to assert the confrontation right at or before trial, as expounded upon in Melendez-Diaz and Bullcoming. Id. at 242-43.

Furthermore, the rule is consistent with Sixth Amendment rights. As explained in O'Cain:

> Requiring the defendant to assert the confrontation right at trial is also consistent with other Sixth Amendment jurisprudence. Indeed, were this not the defendant's burden, the trial judge would be placed in the position of sua sponte interposing confrontation objections on the defendant's behalf—or risk knowingly presiding over a trial headed for apparent reversal on appeal. Such a state of affairs is obviously untenable. Trial judges should be loathe to interfere with the tactical decisions of trial counsel—the delegation of which lies at "the heart of the attorney-client relationship." Taylor v. Illinois, 484 U.S. 400, 417, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). As our state Supreme Court has noted, it would be "ill-advised to have judges ... disrupt trial strategy with a poorly timed interjection." State v. Thomas, 128 Wn.2d 553, 560, 910 P.2d 475 (1996). Indeed, such interjections could impermissibly "intrude into the attorney-client relationship protected by the Sixth Amendment." In re Pers. Restraint of Lord, 123 Wn.2d 296, 317, 868 P.2d 835 (1994).

Id. at 243-44. Here, the Defendant's rights were asserted for him by the court sua sponte. He never timely asserted his rights at trial.

The trial court did not even make any rulings regarding the evidence violating his confrontation rights. (CP 45-49). The trial judge had two concerns with the special finding. One was that a school district representative needed to testify because populations change all the time. (7-27-12 RP 2- 3). The written findings indicate that "[t]he State has to

take the additional step to show that the bus stops are being utilized." (CP 45-49). The other concern was "whether the defendant had the ability to find out where those bus stops were located." (7-27-12 RP 2-3).

Both reasons were invalid reasons to vacate the jury's special finding. It is irrelevant whether a defendant is aware that he is dealing in a drug-free zone. State v. Silva-Baltazar, 125 Wn.2d 472, 482, 886 P.2d 138 (1994). Due process does not require drug dealers know they are within a drug free zone for purposes of ... RCW § 69.50.435; State v. Coria, 120 Wn.2d 156, 166, 839 P.2d 890 (1992). As indicated by this Court in State v. Coria:

> The federal school yard statute has consistently been upheld against attack from the argument that it is irrational because it applies even when children are not present. E.g., United States v. Cross, supra at 68; United States v. Holland, supra at 1218-19. We believe a similar result is required here.
>
> This is apparent in light of the statute's purpose, which we regard as twofold: to keep drug dealers away from children in general, and to keep them away from school bus route stops in particular when children are actually present. Relative to the first objective, it must be remembered that school bus stops are located in areas where children live. See Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs, 92 Wn.2d 831, 835, 601 P.2d 936 (1979) (when a statutory classification is challenged, facts are presumed sufficient to justify it), appeal

> dismissed, 446 U.S. 979 (1980). Therefore the penalty enhancement provision of RCW 69.50.435 may reasonably be viewed as discouraging the development of the violent and destructive drug culture in areas where there are children. Viewed in this way, **whether children are frequently present at school bus stops is unimportant** because it is the children in the areas who are being shielded from the harmful effects of drug crimes. The school bus route stops are simply readily specifiable places that may be used to define those areas.

120 Wn.2d at 172-73 (emphasis added). The Court went on to explain that:

> It is no doubt true that children are present at school bus route stops only at specific times. Nonetheless, if drug dealers were allowed to become established near the stops, then it would be impossible to keep them away from those locations only when children are actually present. **To keep the dealers away from the stops at specific times, it may rationally be supposed that it is necessary to keep them away from the stops at all times.**

Id. at 173 (emphasis added).

The statute also indicates that it is no defense that children were not at the bus stop or that school was not in session. RCW § 69.50.435(3). See Appendix C. There is simply no requirement that the State prove that

the school bus stop was being used at the time of the crime. See RCW § 69.50.435.

As pointed out in O'Cain, defense counsel will often decline to raise a confrontation clause objection to proffered evidence due to "strategic considerations." Id. at 245 (citing Melendez-Diaz, 557 U.S. at 328). Counsel's decision to forego a confrontation clause objection will often benefit the defendant:

> For instance, an adverse declarant's testimony may have a more persuasive effect in person than it would when relayed by a third party. Or, a defendant may not contest the testimony of the declarant, and, in that circumstance, defense counsel may wish to avoid the time and attention that in-person testimony would entail.

Id. Because the failure to raise a confrontation clause objection, if error, must be defense counsel's error alone, it is appropriate that the burden of exercising the right to confrontation is placed squarely upon the defendant. Id.

Recent Washington cases are in accord with the rule espoused in Melendez-Diaz and Bullcoming. In State v. Hayes, 165 Wn. App. 507, 517, 265 P.3d 982 (2011), the Court of Appeals held that a defendant waived the right to confrontation where defense counsel "recognized the constitutional issue and deliberately failed to object to the evidence at

trial." Similarly, in O'Cain, the defendant did not object to the admission of out-of-court statements to medical providers on confrontation clause grounds. 169 Wn. App. at 234. The court pointed out that it has to follow the rule that a confrontation right is lost if it is not timely asserted at or before trial. "A state court is without authority to "fail to implement th[is] rule." Id. at 248 (citing Marmet Health Care Ctr., Inc v. Brown, 132 S. Ct. 1201, 1202, 182 L. Ed. 2d 42 (2012)). Thus, an appellate court cannot review a trial court ruling that was never made.

Here, the tactical decision whether or not to demand the presence of a school district witness is one for trial counsel to make. O'Cain, 169 Wn. App. at 244-45. Defense counsel in this case could have objected to the admissibility of the map, could have claimed that there was no foundation, could have claimed it contained hearsay, and could have claimed that the school district needed to authenticate the map as well. But none of that was ever done. (RP 221). Defense counsel did not have a single question for Mr. Martian. (RP 216-221). When the prosecutor moved for admission of the map, he stated, "no objection." (RP 221).

The State would note that there were also pretrial motions and no motions were made regarding the map. (RP 22-26, 46). In addition, there was a mid-trial motion for directed verdict and no objections were raised then. (RP 227). But it is easy to see why defense counsel would not want

a school district witness to testify. Calling a school district employee would only have emphasized the fact that the drug dealing was taking place close to where young school children wait to get on the bus for school. And because it is a tactical decision, counsel was not ineffective by declining to demand that a school employee testify at trial before the map was admitted.[1]

In State v. Fraser, the Court of Appeals noted the following:

> The rationale of O'Cain is that if a right is forfeited by the defendant, nothing the trial court does or fails to do is a denial of the right, and if there is no denial of a right, there is no error by the trial court, manifest or otherwise, that an appellate court can review.

170 Wn. App. 13, 25-26, 282 P.3d 154 (2012). As such, the appellate court had nothing to review in terms of the admissibility of the map. There was never a confrontation claim raised prior to its admission. The only issue is whether a rational jury could find, based on the evidence, that the delivery took place within 1000 feet of a school bus stop.

As indicated by Division Three of the Court of Appeals in State v. Schroeder, "[t]he defendant *always* has the burden of raising his Confrontation Clause objection..." 164 Wn. App. 164, 167, 262 P.3d 1237 (2011). In Schroeder, the defendant waived his right to confront the

[1] Such tactical decisions are not subject to an ineffectiveness challenge. Strickland v. Washington, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

laboratory analyst by failing to object to the admission of the test certificate and by failing to demand that the State produce the witness at trial. Id. at 168. The case at hand is very similar in that there was no objection to the admission of the map. As such, the evidence was properly considered by the jury in Pearson's case.

B. Division Three's decision involves a significant question of law under the United States Constitution.

This case involves a significant question regarding the Sixth Amendment right to confront witnesses. Pursuant to Crawford v. Washington, the admission of so-called "testimonial" hearsay is prohibited, unless the declarant was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. 36, 59, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177, 199 (2004). However, documents excepted under the hearsay rule as "business records" are generally considered non-testimonial. Id. at 56 (stating that "by their nature [these] were not testimonial"); State v. Jasper, 174 Wn.2d 96, 109, 271 P.3d 876 (2012).

In addition, the admission of public records generally does not violate the rulings in Crawford and its progeny because "public records are generally admissible absent confrontation . . . because--having been created for the administration of an entity's affairs and not for the purpose

of establishing or proving some fact at trial--they are not testimonial." Melendez-Diaz, 129 S. Ct. at 2539-40; State v. Mares, 160 Wn. App. 558, 564, 248 P.3d 140 (2011).

Here, a foundation was laid that the map was a business record and based on public records. (RP 217-18). Mr. Martian testified as a record keeper of the digital map library for Yakima County. (RP 217). All of the map layers are public records, and kept in the regular course of business. (RP 218). They include layers showing bus stop locations, as well as school properties. (RP 218) Mr. Martian specifically testified how he gets the bus stop locations that become one of the map layers:

> A: The bus stop locations come from each school district. They're required to submit to the State before the school year where the bus stop locations are and they do that to the ESD Department, the Educational School District and they provide a latitude and longitude like a GPS coordinate for each bus stop and that's submitted to the State and we get that information from the State and we plot those points on the map. It becomes an additional map layer.
> Q: And do you keep that in-house?
> A: Yeah, and that sits on the same GIS server that's backed up in part of record.

(RP 210). The creation of the map involves Mr. Martian verifying the address using other public records from the assessor's office and 911

system and then using the program, Art View, to create a 1000 foot circle from the center of a residence. (RP 219).

The database of map layers held by Mr. Martian, and used in the regular course of business, compiled information from public records of various other governmental entities, including the property assessor and the school districts. The only thing that is created in anticipation of litigation is the creation of the 1000 foot circle by Mr. Martian that is layered on top of public records provided by the school district. (RP 220). Furthermore, Mr. Martian testified at trial and was subject to cross examination. Therefore, the admission of the map did not offend the Confrontation Clause because the creator of the document testified. See Bullcoming, 131 S.Ct. at 2715; see also Crawford, 541 U.S. at 59.

The map layer at issue here, the school district data, was not created for the specific purpose of this particular defendant's prosecution, but rather is a generic representation of all the bus stops for the entire school district, and could be relevant to a host of cases. It does not follow that admission of the records violated Pearson's constitutional rights. Such maps are objectively reliable, were not prepared for a specific defendant, and have a sufficient guarantee of trustworthiness.

At the time the State moved for admission, there was simply no argument made by Pearson that the record or any part of the record was

not trustworthy or reliable. Since Pearson never objected to the admission of the map or its reliability, the State was denied the opportunity to address any challenge by presenting additional witnesses to bolster its case. Furthermore, the admission of the map did not violate Pearson's constitutional rights because it is not testimonial evidence under Crawford. As such, Division Three's decision, which held otherwise, is inconsistent with Crawford and Melendez-Diaz.

RCW § 69.50.435(5), attached as Exhibit C, discusses the use of a map to prove the enhancement:

> **This section shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved** by the governing body of a municipality, school district, county, transit authority, or public housing authority **if the map or diagram is otherwise admissible under court rule.**

RCW § 69.50.435(5) (emphasis added). Here, the map was otherwise admissible under court rule.

The next question is whether the evidence is such that a rational trier of fact could find beyond a reasonable doubt that the drug delivery took place within 1000 feet of a school bus stop. The map, combined with the testimony of Mr. Martian, is overwhelming evidence. Based on the

uncontested testimony of Mr. Martian, and the map, admitted without any objection, (RP 221), a rational trier of fact could find beyond a reasonable doubt that the drug delivery took place within 1000 feet of "a school bus stop as designated by a school district," as defined in RCW § 69.50.435(6). See attached Appendix C.

In State v. Henderson, a city planner testified that the parking lot in which the drug deals occurred was within the boundaries of Kurtzman Park and that the park was a city park. 64 Wn. App. 339, 342 824 P.2d 492 (1992). No map was introduced of the park. Id. Mr. Henderson claimed it was necessary for the State to introduce a plat map indicating the boundaries of the park or elicit testimony specifically delineating the boundaries. Id. The Court of Appeals disagreed:

> While RCW 69.50.435(e) permits the introduction of a plat map into evidence to prove the sale took place within park boundaries, the statute also provides: "This section shall not be construed as precluding the prosecution from introducing or relying upon **any other evidence or testimony** to establish any element of the offense." We hold Mr. McDonald's testimony was such that a rational trier of fact could find beyond a reasonable doubt that the sales took place in a public park. See State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

Id. at 342 (emphasis added).

The decision in Pearson's case that there was insufficient evidence conflicts with current case law. In Henderson, testimony without a map was sufficient to prove a drug enhancement. Here, the jury had both testimony from the creator of the map and the map itself, which was admitted without objection. Nothing else is required by the statute or by the Constitution to prove a school zone enhancement.

VI. CONCLUSION

By not objecting to the admissibility of the map, Pearson waived any right to confront school district officials. Division Three's decision, which found a violation of his Sixth Amendment right to confrontation, conflicts with State v. O'Cain. The special verdict was, therefore, based on substantial and uncontested evidence at trial. It was an abuse of discretion for the trial court to vacate the special verdict.

As such, this Court should grant the State of Washington's Petition for Review. The Court of Appeals decision should be reversed and the case remanded for imposition of the sentencing enhancement.

Respectfully submitted this 30th day of June, 2014,

TAMARA A. HANLON, WSBA 28345
Senior Deputy Prosecuting Attorney

APPENDIX

APPENDIX A

FILED
April 10, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Appellant, v. RICHARD L. PEARSON, Respondent.	)	No. 31132-5-III PUBLISHED OPINION

BROWN, J. – The State appeals the trial court's decision to vacate the jury's special finding that Richard L. Pearson delivered a controlled substance–hydrocodone within 1,000 feet of a school bus stop. The court reasoned a school official was required to validate the bus stops. Because the admission of a map overlay showing the bus stops violated confrontation principles, we agree with the trial court and affirm.

FACTS

On September 22, 2011, a confidential informant purchased hydrocodone (a prescription medication) from Mr. Pearson at his trailer located at 1309 North First Street in Yakima. The State charged Mr. Pearson with delivery of a controlled substance, hydrocodone. The State included a special allegation that the delivery occurred within 1,000 feet of a school bus stop.

Michael Martian, Yakima County's director of Geographic Information Systems (GIS) testified for the State. GIS maintains a digital legal map library for the county and all its departments. Mr. Martian testified that designated areas can be digitally imposed over an aerial photography map for the public record. One map maintained by GIS shows school bus stops and school properties created annually from information that is provided yearly from each county school district. During trial, the State inquired, "[G]etting back to the school bus stops, how are those maps created?" Mr. Martian answered, "The bus stop locations come from each school district. They're required to submit to the State before the school year where the bus stop locations are and they do that to the ESD Department, the Educational School District and they provide a latitude and longitude like a GPS coordinate for each bus stop and that's submitted to the State and we get that information from the State and we plot those points on the map." Report of Proceedings (RP) (May 24, 2012) at 219.

For Mr. Pearson's case, Mr. Martian created a map from its digital information using 1309 North First Street as the center point and depicting a 1,000 foot radius around that center point. The map was admitted at trial without objection.

When the time came for objections to jury instructions, defense counsel objected to the use of a special verdict form for the school bus stop enhancement on the basis that while Mr. Martian had laid a foundation for the map as a business record, he had never testified that any markings on the map within the 1,000 foot radius were bus stops. He told the court, "I thought that was really odd," but that "I was listening for it

and I double checked my notes and stuff but I don't remember him testifying to that effect." RP at 247. When the trial court commented that the objection it had been anticipating was to the fact that no one from the school district had testified, defense counsel stated, "I will raise that objection for what it's worth now, your honor." RP at 248.

Questioning the State further about the lack of a school district official to testify to the bus stop locations and the use of the bus stops on the alleged crime date, the court inquired, "You know it's so far reaching now that we're in the age of *Crawford* and right to confrontation, you know, they have really -- if it's being offered -- if a business record is being offered to establish essentially a fact, which it clearly is. I mean, . . . you gotta really look at that." RP (May 24, 2012) at 252. Nevertheless, the court gave a special verdict instruction.

The jury found Mr. Pearson guilty as charged, and found on the special verdict that he had delivered a controlled substance within 1,000 feet of a school bus stop. The court vacated the jury's special verdict, stating, "I'm not satisfied that the State has met their legal foundation on a lot of levels, quite bluntly. . . . [T]he State simply professes that they can put a map in that has school bus stops marked on it . . . . I think the State has to take the additional step [of having a school official testify about bus stop locations and use]." RP (July 27, 2012) at 3, 4. The court imposed a standard-range sentence. The State appealed.

ANALYSIS

The issue is whether the trial court erred in vacating the jury's special verdict finding that Mr. Pearson's offense occurred within 1,000 feet of a school bus stop.

When reviewing a trial court's ruling to vacate a special verdict based on lack of sufficient evidence, we review the court's order for an abuse of discretion. *State v. Park*, 88 Wn. App. 910, 914, 946 P.2d 1231 (1997). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The State must prove each element of the enhancement beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995). We review to see whether a rational trier of fact could have found the facts needed for the enhancement beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. *Id.*

RCW 69.50.435(1)(c) provides a sentence enhancement for anyone who delivers a controlled substance "[w]ithin one thousand feet of a school bus route stop designated by the school district." To establish whether the offense occurred within 1,000 feet of a school bus stop, the State must provide "a map produced or reproduced by any municipality, school district, [or] county, . . . for the purpose of depicting the location and boundaries of the area . . . within one thousand feet of any property used for a . . . school bus route stop." RCW 69.50.435(5). This map "shall under proper authentication, be admissible and shall constitute prima facie evidence of the location

and boundaries of those areas" if the "municipality [or] school district . . . has adopted a resolution or ordinance approving the map." *Id.* There is no complying resolution or ordinance adopted by Yakima County; nevertheless, RCW 69.50.435(5), "shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved by the governing body of a municipality [or] school district . . . if the map or diagram is *otherwise admissible* under court rule." *Id.* (emphasis added).

Problematic here is that the map is not otherwise admissible. As the trial court correctly points out, the Confrontation Clause is implicated.

The United States Constitution's Sixth Amendment Confrontation Clause guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right "applies to 'witnesses' against the accused . . . , those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *State v. Jasper*, 174 Wn.2d 96, 109, 271 P.3d 876 (2012) (quoting *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). "Testimonial" hearsay statements may not be introduced against a defendant at trial unless the proponent of the evidence shows (1) the declarant witness is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant witness. *Crawford*, 541 U.S. at 68; *State v. Lee*, 159 Wn. App. 795, 815, 247 P.3d 470 (2011), *review denied*, 177 Wn.2d 2012 (2013). If the hearsay statements are not "testimonial,"

however, they do not implicate the Confrontation Clause and no such showing is required. *Lee*, 159 Wn. App. at 815.

In *Crawford,* the United States Supreme Court did not give a comprehensive definition of "testimonial" but observed that the core class of "testimonial" statements include those "pretrial statements that declarants would reasonably expect to be used prosecutorily." 541 U.S. at 51. In other words, "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are testimonial. *Id.* at 52. More recent United States Supreme Court cases have also held that documents specifically prepared for use in a criminal proceeding fall within this core class of testimonial statements. *See Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 310-11, 324, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (holding three forensic "certificates of analysis" stating that a substance tested positive as cocaine were testimonial).

Here, Mr. Martian provided a digital map generated by the county with information supplied by a school district official. One of the purposes of the information is to ascertain whether RCW 69.50.435(1)(c) has been implicated. Thus, the county map is prepared for potential use in a criminal proceeding. This falls within the core class of testimonial statements. Therefore, Mr. Pearson had a right to confront the school district official. Since there is no showing the declarant witness was unavailable or Mr. Pearson had a prior opportunity to cross-examine the declarant witness, the map generated by information from a school district official was inadmissible. Without more,

sufficient evidence did not exist to support the jury's special verdict. The trial court did not abuse its discretion in vacating the jury's special verdict.

Sentencing affirmed.

Brown, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

APPENDIX B

FILED
MAY 29, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Appellant, v. RICHARD L. PEARSON, Respondent.	)	No. 31132-5-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered the State's motion for reconsideration of this court's decision of April 10, 2014 and having reviewed the records and files herein, is of the opinion the motion should be denied. THEREFORE,

IT IS ORDERED, the motion for reconsideration is hereby denied.

DATED: 5/29/14

PANEL: Jj. Brown, Siddoway, Fearing

FOR THE COURT:

Siddoway, CJ

LAUREL H. SIDDOWAY
CHIEF JUDGE

APPENDIX C

Rev. Code Wash. (ARCW) § 69.50.435

*** Statutes current through 2013 3rd special session ***

TITLE 69. FOOD, DRUGS, COSMETICS, AND POISONS
CHAPTER 69.50. UNIFORM CONTROLLED SUBSTANCES ACT
ARTICLE IV OFFENSES AND PENALTIES

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 69.50.435 (2013)

§ 69.50.435. Violations committed in or on certain public places or facilities -- Additional penalty -- Defenses -- Construction -- Definitions

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:

(a) In a school;

(b) On a school bus;

(c) Within one thousand feet of a school bus route stop designated by the school district;

(d) Within one thousand feet of the perimeter of the school grounds;

(e) In a public park;

(f) In a public housing project designated by a local governing authority as a drug-free zone;

(g) On a public transit vehicle;

(h) In a public transit stop shelter;

(i) At a civic center designated as a drug-free zone by the local governing authority; or

(j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter

may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

(2) It is not a defense to a prosecution for a violation of this section that the person was unaware that the prohibited conduct took place while in a school or school bus or within one thousand feet of the school or school bus route stop, in a public park, in a public housing project designated by a local governing authority as a drug-free zone, on a public transit vehicle, in a public transit stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter.

(3) It is not a defense to a prosecution for a violation of this section or any other prosecution under this chapter that persons under the age of eighteen were not present in the school, the school bus, the public park, the public housing project designated by a local governing authority as a drug-free zone, or the public transit vehicle, or at the school bus route stop, the public transit vehicle stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter at the time of the offense or that school was not in session.

(4) It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter.

(5) In a prosecution under this section, a map produced or reproduced by any municipality, school district, county, transit authority engineer, or public housing authority for the purpose of depicting the location and boundaries of the area on or within one thousand feet of any property used for a school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or a civic center designated as a drug-free zone by a local governing authority, or a true copy of such a map, shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas if the governing body of the municipality, school district, county, or transit authority has adopted a resolution or ordinance approving the map as the official location and record of the location and boundaries of the area on or within one thousand feet of the school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or civic center designated as a drug-free zone by a local governing authority. Any map approved under this section or a true copy of the map shall be filed with the clerk of the municipality or county, and shall be maintained as an official record of the municipality or

county. This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or testimony to establish any element of the offense. This section shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved by the governing body of a municipality, school district, county, transit authority, or public housing authority if the map or diagram is otherwise admissible under court rule.

(6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:

(a) "School" has the meaning under RCW 28A.150.010 or 28A.150.020. The term "school" also includes a private school approved under RCW 28A.195.010;

(b) "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system;

(c) "School bus route stop" means a school bus stop as designated by a school district;

(d) "Public park" means land, including any facilities or improvements on the land, that is operated as a park by the state or a local government;

(e) "Public transit vehicle" means any motor vehicle, streetcar, train, trolley vehicle, or any other device, vessel, or vehicle which is owned or operated by a transit authority and which is used for the purpose of carrying passengers on a regular schedule;

(f) "Transit authority" means a city, county, or state transportation system, transportation authority, public transportation benefit area, public transit authority, or metropolitan municipal corporation within the state that operates public transit vehicles;

(g) "Stop shelter" means a passenger shelter designated by a transit authority;

(h) "Civic center" means a publicly owned or publicly operated place or facility used for recreational, educational, or cultural activities;

(i) "Public housing project" means the same as "housing project" as defined in RCW 35.82.020.

STATE OF WASHINGTON,

Petitioner,

vs.

RICHARD L. PEARSON, JR.,

Respondent.

Case No.: 31132-5-III

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on June 30, 2014, by agreement of the parties, I mailed a copy of the State's Petition for Review to Richard L. Pearson at 702 E. 3rd Street, Cle Elum, WA 98922.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of June, 2014 at Yakima, Washington.

TAMARA A. HANLON, WSBA #28345
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YAKIMA COUNTY PROSECUTOR

June 30, 2014 - 4:00 PM

Transmittal Letter

Document Uploaded:	311325-Pearson Petition for Review.pdf
Case Name:	STATE OF WASHINGTON V. RICHARD L. PEARSON
Court of Appeals Case Number:	31132-5
Party Respresented:	STATE OF WASHINGTON
Is This a Personal Restraint Petition?	☐ Yes ☑ No
	Trial Court County: ____ - Superior Court # ____

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: PETITION FOR REVIEW

Comments:

No Comments were entered.

Sender Name: Tamara A Hanlon - Email: tamara.hanlon@co.yakima.wa.us