Supreme Court No. 99644-0
(COA No. 53881-4-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISAIAH NEWTON, JR.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Isaiah Newton Jr., petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Newton seeks review of the decision by the Court of Appeals dated March 9, 2021, a copy of which is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

An accuser's statements to government officials about a past incident are core testimonial statements for which face to face confrontation is mandated by the state and federal constitutions. At the start of his trial, Mr. Newton objected to the prosecution's use of the complaining witness's post-incident statements to investigating officers and security personnel without the opportunity to confront her. The Court of Appeals refused to address the Confrontation Clause error because counsel did not renew the objection during trial.

Where an absent witness's statements falls within the core of the constitutional protections for which confrontation is mandatory and the

defense objects to these statements before trial, was Mr. Newton denied his right of confrontation and does the Court of Appeals refusal to address a plain violation of the right to confrontation, for which an objection was lodged, conflict with the Rules of Appellate Procedure and misconstrue this Court's decision in *State v. Burns*[1]?

D. STATEMENT OF THE CASE

Nekisha Richardson persuaded Isaiah Newton to meet her at BJ's Bingo, a "casino/bingo hall," but she refused to leave when he arrived. RP 25, 73, 82-83. When she eventually came outside, a casino video captured the incident and shows her yelling and gesturing at Mr. Newton. RP 36; Ex. 2. Ms. Richardson "lit into" Mr. Newton, according to an observing security guard. RP 36.

After yelling at Mr. Newton, Ms. Richardson pushed Mr. Newton and tried to punch him. RP 83. Mr. Newton's hands were in his pockets. *Id*.

Mr. Newton initially backed away from Ms. Richardson's advances but lost his temper "a little bit." RP 77. In the ensuing physical struggle, Mr. Newton pushed Ms. Richardson to the ground

[1] 193 Wn.2d 190, 438 P.3d 1183 (2019).

and immediately grabbed her shirt and bag, pulling her several feet across the street. RP 77; Ex. 2 (3:40:31-3:40:58).

Mr. Newton was trying to get Ms. Richardson to come with him; "that's the whole reason I'm at the casino, for her to come with me." RP 77. Once he recognizing Ms. Richardson would not leave, Mr. Newton let go and left. RP 79; Ex. 2 (3:41:02), (3:41:13 - 3:44:23). The physical portion of the incident spanned 30 seconds, from 3:40:31 until 3:41:02.

Ms. Richardson returned to BJ's Bingo where the lead security officer for the casino, Cheryl Baker, detained her and questioned her about what happened, while also on the phone with tribal and Fife police. RP 38.

Even though Ms. Richardson told the lead security guard she did not want police involvement, Ms. Baker informed her there was "no choice," and the police were on their way. RP 39. Ms. Baker requested Ms. Richardson's identification while they waited for Fife police to arrive. RP 39-40, 47-48, 51. RP 39-40. Ms. Baker explained sometimes people refuse to give identification if they have warrants the police would find. RP 51.

Rather than giving the security officer her identification, Ms. Richardson claimed Mr. Newton must have stolen her wallet and identification because she did not have it with her, even though Mr. Newton did not actually take anything from her, as the video of the incident showed. RP 39; Ex. 2.

Ms. Baker gave Ms. Richardson "a statement form for her to fill out" and directed her to "have it ready for when the police arrive." RP 41. Ms. Baker completed her own incident report at the same time. *Id*.

Officer Ryan Micenko, of the Fife Police Department, arrived a few minutes after Ms. Baker placed the call. RP 54-5. Officer Micenko spoke "in depth" to Ms. Baker then questioned Ms. Richardson. RP 54-55. He said Ms. Richardson seemed "a little upset" but not "overly upset." RP 56. She "had calmed down significantly." RP 56.

Ms. Richardson did not want to cooperate but Officer Micenko pressed her for information. RP 66. Officer Micenko told Ms. Richardson that he was required to do a report because it was a domestic violence incident and he needed her side to write his report. *Id.*

Mr. Newton was later arrested and charged with second-degree robbery and fourth-degree assault, both with domestic violence

enhancements. *See* CP 3-4 Information (April 10, 2019). The robbery allegation rested on Ms. Richardson's claim that she did not have identification because Mr. Newton must have taken it. Yet the video showed no property was taken during the incident. After Mr. Newton filed a motion to dismiss the robbery allegation, the prosecution changed count I from robbery in the second degree to attempted second degree robbery. RP 4-5; CP 6-7.

Before the trial started, the prosecution said it could not locate Ms. Richardson and she would not testify. RP 6, 9. The defense moved the court to prohibit her out-of-court statements "absent the right to confront her." RP 6. The court said it would "take that up when the offer is made," presumably referring to the prosecution's burden of proving out of court statements to authorities are not testimonial. RP 7. Without any offer of proof, the prosecution elicited testimony about what Ms. Richardson said to investigating officials during the post-incident investigation.

Mr. Newton was convicted after a bench trial of both attempted robbery in the second degree and fourth degree assault. The Court of Appeals accepted the prosecution's concession that the fourth degree assault convicted merged with the attempted robbery for purposes of

double jeopardy and ordered that conviction vacated. It affirmed the attempted robbery conviction even though the allegation that Mr. Newton was trying to take property stemmed from Ms. Richardson's out of court statement to the police and security guards that he must have taken something from her when they struggled over whether she would leave the casino.

E. ARGUMENT

The Court of Appeals' refusal to address an objected-to Confrontation Clause violation is contrary to this Court's precedent, undermines the constitutional right to appeal, and conflicts with the Rules of Appellate Procedure

1. The right to confront witnesses face to face is a bedrock constitutional protection that Mr. Newton expressly asserted.

An accused person has the constitutional right to confront witnesses face to face, prohibiting the prosecution from using out-of-court accusations as a substitute for live testimony. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004); *State v. Pugh*, 167 Wn.2d 825, 835, 225 P.3d 892 (2009); U.S. Const. amend. 6; Const. art. I, § 22.

Under both the Sixth Amendment and article I, section 22, Mr. Newton was denied his right to confront his accuser because the

prosecution relied on testimonial statements of an absent declarant. A police officer and a security guard conducting an investigating to aid the police both requires Ms. Richardson to answer questions about a completed incident for the purposes of ascertaining whether and what type of crime had been committed. By extracting information from an accuser after a crime occurred, for the purpose of investigating that crime, the prosecution obtained testimonial statements. It used these statements against Mr. Newton at his trial.

2. The Court of Appeals refused to address the violation of a constitutional right to confront witnesses face to face despite an objection raised in the trial court.

RAP 2.5(a)(3) permits an appellate court to review a manifest constitutional error, even without an objection below. RAP 1.2(a) demands the liberal interpretation of the Rules of Appellate Procedure to promote justice and facilitate decisions on the merits. Article I, section 22 expressly affords a person the right to appeal in all criminal cases as well as the right to meet witnesses against him face to face.

In *State v. Burns*, 193 Wn.2d 190, 199, 438 P.3d 1182 (2019), the defense did not raise any confrontation clause objections at any time during trial. On the contrary, the defense was the first party to elicit some of the complainant's statements to the police immediately after

the incident, when she was "obviously distraught." *Id*. Then on rebuttal, the prosecution asked the officer to give the jury "a full understanding" of the statements the defense mentioned on cross-examination. Id. at 200.

The court also allowed a neighbor's testimony recounting what she overheard the complainant say during the incident and what the complainant told her immediately after the incident. Id. at 199. These statements were admitted as excited utterances and present sense impressions, over the defense's hearsay objections.

On appeal, Burns claimed his right to confrontation was violated. Instead of ruling that the Confrontation Clause was not implicated by the neighbor's testimony, who was not recounting testimonial statements, and the minimal testimony by the police officer would be harmless error, this Court held that a Confrontation Clause violation must be preserved on appeal by an objection that raises this constitutional doctrine.

The Court of Appeals relied on *Burns* to refuse to address the violation of Mr. Newton's state and federal constitutional right to confront the witnesses against him face to face.

But unlike *Burns*, Mr. Newton did object. He informed the court that his right to confrontation would be violated if the prosecution introduced Ms. Richardson's out-of-court statements. RP 6. The trial court said it would rule on the objection as it arose, when the prosecution presented its proffer. RP 7.

The prosecution bears the burden on appeal to prove that a statement was nontestimonial before it is admissible. *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). The prosecution did not meet this burden. It did not seek a court ruling on the nontestimonial nature of Ms. Richardson's statements.

The Court of Appeals decision improperly extends *Burns* to a case where the accused person properly lodged an objection, notifying the State it was asserting its right to confront the central witness against him and objecting to her testimonial statements. The right to raise a constitutional error on appeal has long been protected, even when no express objection is raised, where the error is manifest. RAP 2.5(a)(3). Here, Mr. Newton did object and the prosecution used Ms. Richardson's statements to the police and the investigating security officers. He should not face any greater hurdle to having the appellate court decide whether his right to confront witnesses under article I,

section 22 and the Sixth Amendment was violated. This Court should grant review.

F. CONCLUSION

Petitioner Isaiah Newton respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 8th day of April 2021.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ISAIAH WILLIAM NEWTON, JR., Appellant.	No. 53881-4-II UNPUBLISHED OPINION

GLASGOW, J.—Isaiah William Newton Jr. and Nekisha Richardson fought outside BJ's Bingo casino in Fife, Washington. Richardson yelled at Newton, and Newton pushed Richardson down and then dragged her across the ground by her purse strap. Newton was convicted of attempted second degree robbery and fourth degree assault, each with a domestic violence finding.

Newton appeals, arguing that because the State relied on the same physical conduct to convict Newton of attempted second degree robbery and fourth degree assault, the convictions violate double jeopardy. The State concedes that the fourth degree assault conviction should be vacated. Newton also argues that the trial court improperly relied on out-of-court statements Richardson made on the night of the incident because she did not testify at trial and admission of her statements violated the confrontation clause.

We accept the State's concession that Newton's convictions violate double jeopardy, but we hold that Newton failed to preserve his confrontation clause claim for appeal. Accordingly, we affirm Newton's attempted second degree robbery conviction but reverse his conviction for fourth degree assault and remand for the trial court to vacate that conviction and resentence Newton.

FACTS

Newton went to BJ's Bingo casino to talk to Richardson, who was his fiancé. When the two met outside of the casino, they began to argue. Richardson scolded Newton, and Newton threw Richardson to the ground and grabbed onto her purse. Newton attempted to take the purse and drag Richardson across the road. Newton let go and walked away when two security guards from the casino approached the pair. Casino staff called the tribal police who contacted the Fife Police. Richardson talked to a casino staff member about the incident. A Fife Police officer also talked to Richardson.

The State first charged Newton with second degree robbery, but later amended the charges to attempted second degree robbery and fourth degree assault, both with domestic violence designations. The parties proceeded to a bench trial. Richardson could not be located at the time of trial. Newton moved in limine to bar the admission of any out-of-court statements that Richardson made on the night of the incident based on hearsay. Defense counsel then added, "I would have the same objection to any admission of statements by her absent the right to confront her." Verbatim Report of Proceedings (VRP) at 6. The trial court responded, "I think we'll take that up when the offer is made since it was a prior motion." VRP at 7. The trial court therefore did not rule on the admissibility of any out-of-court statements pretrial.

Richardson did not testify at trial. Cheryl Baker, a lead security guard at BJ's Bingo casino who had been on duty the night of the incident, testified. She recalled that after the altercation between Richardson and Newton, Richardson returned to the casino, she was very upset and crying, and she said that she had just been hit. Baker testified that Richardson told her she did not want police involvement. Baker also recalled that Richardson told her Newton must have taken

her wallet and identification because she did not have it with her. Defense counsel did not object to any of Baker's testimony regarding these statements.

Newton testified at trial that he lost his temper and assaulted Richardson by pushing her down. He testified that he had no intention of taking her purse from her. His intention was to make Richardson come with him across the street.

The trial court also admitted and viewed a video of the incident that was obtained from one of the casino security cameras.

The trial court found that Newton physically attacked Richardson by throwing her to the ground and then grabbing onto her purse. The trial court also found that from the totality of the circumstances, it was clear that Newton intended to permanently deprive Richardson of her purse. Based on its findings of fact, the trial court concluded that Newton attempted to deprive Richardson of her purse against her will. The trial court concluded that Newton took a substantial step in committing second degree robbery by engaging in a physical struggle with Richardson over possession of her purse and was thus guilty of attempted second degree robbery. The trial court also concluded that Newton assaulted Richardson when he threw her to the ground and was thus guilty of fourth degree assault. Finally, the trial court concluded that both crimes were committed against a family or household member.

Newton appeals.

ANALYSIS

I. DOUBLE JEOPARDY

Newton argues that because the State relied on the same physical conduct to convict Newton of attempted second degree robbery and fourth degree assault, the convictions violate

double jeopardy. The State concedes that the fourth degree assault conviction should be vacated, and we accept the State's concession.

"'The constitutional guaranty against double jeopardy protects [defendants] against multiple punishments for the same offense.'" *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011) (quoting *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991)); *see* U.S. CONST. amend. V; WASH. CONST. art. I, § 9. Under these provisions, a defendant can be charged with multiple charges arising from the same conduct, but double jeopardy prohibits multiple convictions for the same conduct. *State v. Hall*, 168 Wn.2d 726, 729-30, 230 P.3d 1048 (2010). We review double jeopardy claims de novo. *State v. Classen*, 4 Wn. App. 2d 520, 531, 422 P.3d 489 (2018). The remedy for a violation of double jeopardy is to vacate the lesser conviction or the conviction that carries a lesser sentence. *State v. Albarran*, 187 Wn.2d 15, 21-22, 383 P.3d 1037 (2016).

It is clear from the record here that Newton's fourth degree assault and attempted second degree robbery convictions were based on the same conduct—pushing Richardson to the ground and pulling on her purse, dragging her across the ground. Accordingly, we accept the State's concession and reverse Newton's fourth degree assault conviction.

II. CONFRONTATION CLAUSE

Newton also argues that his constitutional right to confront witnesses against him was violated when the trial court admitted out-of-court testimonial hearsay statements that Richardson made to casino staff. We hold that Newton failed to preserve this issue for appeal.

The confrontation clause of the Sixth Amendment to the United States Constitution provides criminal defendants the right to confront the witnesses against them. *State v. Davis*, 154 Wn.2d 291, 298, 111 P.3d 844 (2005). In *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct.

1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that an out-of-court testimonial statement is inadmissible unless the witness is unavailable and the defendant has had an opportunity to cross-examine that witness. *Davis*, 154 Wn.2d at 298.

A defendant must assert his right to confrontation at trial to preserve the challenge for appeal. *State v. Burns*, 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019) (holding that a RAP 2.5(a)(3) manifest constitutional error analysis does not apply to unpreserved confrontation clause claims, relying in part on *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 n.3, 327, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)). The confrontation clause analysis is statement-specific and a general objection "may not be sufficient to properly apprise the trial court as to the particular statements to which [they are] objecting." *State v. Dash*, 163 Wn. App. 63, 72, 259 P.3d 319 (2011). "[S]uch a general objection may not be sufficient to preserve the claim of error for appeal." *Id.*

Generally, if a judge makes a definite, final ruling on a motion in limine, then the losing party is deemed to have a standing objection, and further objection is not required to preserve the error. *State v. Powell*, 126 Wn.2d 244, 256-57, 893 P.2d 615 (1995). But when a trial judge reserves the ruling, "'[A]ny error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.'" *Id.* at 257 (quoting *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991)). In that instance, the party is required to object again during trial to preserve the issue for appeal. *Id.*

Here, Newton moved in limine to prohibit the admission of any out-of-court statements that Richardson made on the night of the incident. But the trial court reserved ruling on the motion, noting that the issue should be taken up when the offer of evidence was made. The trial court did not rule on the motion pretrial, and Newton failed to further object when Baker discussed things

that Richardson said on the night of the incident during her trial testimony. The trial court never had an opportunity to rule on the admissibility of specific statements. Because the trial court did not rule pretrial and Newton did not object during trial, he failed to preserve the issue for appeal, and we do not address it.

We affirm Newton's conviction of attempted second degree robbery, but we reverse and remand for the trial court to vacate his conviction for fourth degree assault and for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Sutton, A.C.J.

Maxa, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 53881-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Transmittal Information

Filed with Court:	Court of Appeals Division II
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Appellate Court Case Title:	State of Washington, Respondent v. Isaiah William Newton, Jr, Appellant
Superior Court Case Number:	19-1-01333-0

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