NO. 42855-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

LYRIC LEEYN CLINE,

Appellant.

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

The Honorable Ronald E. Culpepper

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting a 911 call made by the complaining witness.

2. The trial court erred in admitting hearsay statements allegedly made to law enforcement.

3. In the alternative, appellant was denied his constitutional right to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in admitting a 911 recording where the statements made by the complaining witness were testimonial and appellant did not have an opportunity to cross-examine the witness in violation of his right to confrontation?

2. In the event this Court determines that appellant had an opportunity to cross-examine the complaining witness at a pretrial hearing, was appellant denied his right to effective assistance of counsel where defense counsel failed to question the witness?

3. In the event this Court determines that the statements made during the 911 call were nontestimonial, did the trial court err in admitting the statements as excited utterances where the record establishes that the complaining witness was not under the stress of excitement caused by a startling event?

4. Did the trial court err in admitting statements the complaining witness allegedly made to a responding officer where the statements were testimonial and appellant did not have an opportunity to cross-examine the witness in violation of his right to confrontation?

C. STATEMENT OF THE CASE [1]

1. Procedure

On July 5, 2011, the State charged appellant, Lyric Leeyn Cline, with assault in the second degree by strangulation or by recklessly inflicting substantial bodily harm in a domestic violence incident. CP 1. Following a trial before the Honorable Ronald E. Culpepper, a jury found Cline guilty as charged on November 1, 2011. CP 76-77; 9RP 5-8.

On November 29, 2011, the court sentenced Cline to 65 months in confinement with 36 months of community custody and imposed $2300.00 of legal financial obligations. CP 89-100.

Cline filed a timely notice of appeal. CP 82.

2. Pretrial hearing on admissibility of 911 tape.

The State moved to admit a 911 recording of a call made by the complaining witness, Larisa Oien. 2RP 4-6. Oien testified that on June 30, 2011, she called 911 from Home Depot. She was with her boyfriend,

[1] There are 10 volumes of verbatim report of proceedings: 1RP - 09/21/11; 2RP - 10/20/11; 3RP - 10/24/11; 4RP - 10/25/11; 5RP - 10/26/11; 6RP - 10/27/11; 7RP - 10/31/11; 8RP - 11/01/11 a.m.; 9RP - 11/01/11 p.m.; 10RP - 11/02/11, 11/29/11, 12/02/11.

Lyric Cline, earlier that day. After listening to the 911 tape played for the court, Oien acknowledged that she was the caller. 2RP 6-9; Ex. 1. Defense counsel did not ask Oien any questions. 2RP 9. He stated that his understanding was that Oien has recanted her statements. 2RP 12.

The State argued that the 911 call was admissible as an excited utterance and its admission did not implicate Cline's right to confrontation because he had an opportunity to cross-examine Oien and she "will also testify at trial, and he will have an opportunity to cross-examine her." 2RP 12-15. Defense counsel argued that the call made 30 to 40 minutes after the incident does not constitute an excited utterance because she was not under the stress or excitement of a startling event, "[s]he is providing the information in a calm, deliberate fashion. She is understanding the questions. You don't hear her sobbing." 2RP 15-17. Over defense counsel's objection, the court admitted the 911 tape, finding that Oien "was under the influence of a startling event at the time that she made the statements." 2RP 27-28, 45.

3. Pretrial hearing on admissibility of hearsay statements.

The State informed the court that Oien could not be found and requested a hearing to determine whether her statements to Officer Daniel Bortle were admissible in her absence. 5RP 79-80.

Bortle testified that he was dispatched to Home Depot "in regards to a separated domestic dispute between a male and a female." 5RP 91. A 911 call was received at 4:16 p.m. and he arrived at Home Depot at 4:48 p.m. 5RP 127. In the parking lot, Bortle met a man who introduced himself as the female's father. They walked into Home Depot together and he saw several employees standing around a woman who was crying, nervous, and agitated. 5RP 92. Bortle identified the woman as Larisa Oien. 5RP 92-93. Oien said she was afraid and needed help. 5RP 94. Bortle took her outside of the store "for her privacy" because she was not making any sense. He saw bruises on her face, neck and arms and asked if she needed medical assistance but she said, "No." 5RP 94-95.

Once they were outside, Oien said she and her boyfriend had a dispute and he assaulted her and took her car, "she was more worried about getting her car back than she was about the injuries that I observed all over her body." 5RP 96. She described the assault that began in their apartment and then when they left in her car, he assaulted her again while she was driving. 5RP 96-100. Oien managed to get out of the car and run to Home Depot. 5RP 100. She did not know where he went and said she was afraid to go back to her apartment. 5RP 100-01. She identified her boyfriend as Lyric Cline. 5RP 103. Oien filled out a written statement and left with her father to stay at his house. 5RP 102.

Bortle explained that when there is a "significant assault" in domestic violence cases, officers usually alert dispatch to let "people know if you do come in contact with this subject, probable cause has been established for arrest." 5RP 126. However, he did not notify dispatch and went to his patrol car to write his report. 5RP 102, 126. Bortle acknowledged that while he was talking to Oien, she said she had used methamphetamine earlier and she exhibited behavior associated with someone under the influence of methamphetamine. 5RP 111-12.

The State argued that Oien's statements were excited utterances because "she was still laboring under the stress of what had happened to her" and they were nontestimonial "especially for the fact that the defendant was -- it was unknown where he was." 5RP 131-33. Defense counsel argued that her statements were testimonial because she was not seeking help, "It is for the purpose of an investigation, and she is relaying it to law enforcement in response to questions." 5RP 133-37. The court admitted Oien's statements, concluding that her statements were excited utterances and nontestimonial because she "was wandering around, had been injured" and the "primary purpose of her call was to get assistance." 5RP 145-46.

4. Trial testimony [2]

Officer Bortle testified that when he and Oien's father went into Home Depot, he saw Oien who was frantic and crying, waving her hands in front of her face. 5RP 159-60. She had bruises around her neck, arms, nose, and eyes. 5RP 160. There were a lot of people gathering around her so he took her outside to get her full attention but she was still very distracted and kept crying. 5RP 162-63. Bortle asked her about her injuries and she said her boyfriend assaulted her at their apartment. They got into an argument and he punched her, strangled her, and picked her up off her feet and threw her onto a bed. 5RP 163-65. Oien grabbed her keys and "proceeded to drive away from the area with him in the car." 5RP 167. Somehow he brought a knife with him and threatened to kill her and kill himself. 5RP 168. When she pulled over and tried to get out of the car, he punched her and strangled her again. She escaped and ran to Home Depot. 5RP 168-69. Oien identified her boyfriend as Lyric Cline. 5RP 179-80.

Oien said she did not need medical assistance so medics were not called. 5RP 170. She left with her father to stay at his house. 5RP 179. While Bortle was writing his report, he heard dispatch reporting a possible domestic violence incident at an address that he recognized as the father's home. He went to the address and saw Oien standing in the driveway.

[2] Larisa Oien did not testify at trial.

5RP 180. She told him that Cline "was there, and he took off running." 5RP 180-81. Officers searched for Cline but could not find him. 5RP 181. They located Oien's car approximately a block away unoccupied. 5RP 182.

While on patrol the next day, Bortle recognized Oien's car in the parking lot of an AM/PM. 5RP 184-85. As he approached the car, he saw Oien in the driver's seat with a male passenger. Bortle went to the passenger side of the car and asked the male if he was Lyric Cline and he said, "Yes." 5RP 186. Bortle immediately pulled Cline out of the car and arrested him. 5RP 186.

Gregory Williams testified that he went to Home Depot after receiving a call from his daughter, Larisa Oien. He went inside the store with an officer who was already there. 5RP 235. Oien had several injuries on her body and face. 5RP 237. They moved to a private area outside of Home Depot where the officer "could interview her and talk." 5RP 237. Thereafter, he drove home with Oien. 5RP 238. As he drove up the driveway, he saw Cline standing on the porch. Williams ordered him to leave and told him that they called 911. Cline ran down the street and out of sight. 5RP 238-41. Williams acknowledged that he was aware that his daughter has a drug problem. 5RP 246.

A crime scene technician identified photographs that she took of Oien's injuries. 6RP 264-74. A research analyst for LESA (Law Enforcement Support Agency) identified a CD of a 911 call that she recorded. Over defense counsel's objection, the court admitted the CD as evidence and the jury heard the 911 call in its entirety. 6RP 275-82; Ex. 1. Lynne Berthiaume, a forensic nurse, testified as an expert in the area of strangulation. 7RP 305-06. She reviewed the police reports, photographs of the victim, the victim's written statement, and the 911 recording. 7RP 309-10. Berthiaume never met or examined the victim but determined that the photographs indicated "vigorous strangulation" and "multiple strangulations." 7RP 312-24.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING THE 911 RECORDING AND STATEMENTS TO THE OFFICER THEREBY VIOLATING CLINE'S RIGHT TO CONFRONTATION WHERE THE STATEMENTS WERE TESTIMONIAL AND CLINE HAD NO OPPORTUNITY TO CROSS-EXAMINE THE WITNESS.

Reversal is required because the trial court violated Cline's right to confrontation by erroneously admitting the 911 recording and statements to the officer where the statements were testimonial and Cline had no opportunity to cross-examine the witness and the error was not harmless.

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); U.S. Const. amend VI. "[T]he Clause's ultimate goal is reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Crawford, 541 U.S. at 61-62 (citing Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth."); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").[3]

The Confrontation Clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless' the witness 'was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.' " Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)(quoting Crawford, 541 U.S at 53-54).

[3] Crawford overruled Ohio v. Roberts, 448 U.S. 56, 66,100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), which held that the Confrontation Clause does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate indicia of reliability," a test met when the evidence either falls within a "firmly rooted hearsay exception" or "bears particularized guarantees of trustworthiness."

Nontestimonial hearsay, "while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Davis, 546 U.S. at 821. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Id. at 822. "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." Id.

The United States Supreme Court adopted four factors to determine whether the primary purpose of the interrogation is to enable police to assist in an ongoing emergency or to establish or prove past events: 1) whether the speaker is speaking of events as they are actually occurring or instead describing past events; 2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; 3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and 4) the level of formality of the interrogation. State v. Pugh, 167 Wn.2d 825, 896, 225 P.3d 892 (2009)(citing Davis, 547 U.S. at 827).

a. 911 Recording

1. Statements made during the 911 call were testimonial.

In Davis v. Washington, a 911 operator received a call made during a domestic disturbance. Officers arrived at the house within four minutes of the 911 call and saw the victim in a shaken and frantic state with fresh injuries on her forearms and face. The victim did not testify at trial but the trial court admitted the 911 recording. Davis, 547 U.S. at 817-19. The United States Supreme Court applied the four factors and concluded that the 911 call was nontestimonial because the victim's statements were made about events as they were actually happening, a reasonable listener would recognize that she was facing an ongoing emergency, the call was a cry for help against a physical threat, and the environment was unsafe. Id. at 827-28. The Court emphasized that the victim was alone, unprotected by police, in apparent immediate danger from the defendant, and seeking aid, not relating past events. Id. at 831-32.

In State v. Pugh, Bridgette Pugh called 911 reporting that her husband was beating her up. She said he was walking away but he was just outside and she needed an ambulance. When officers arrived at the apartment, Mrs. Pugh had a bruised face and a chipped tooth. The officers arrested Mr. Pugh in the parking lot of the apartment. Mrs. Pugh did not

testify at trial but the trial court admitted the 911 tape as an excited utterance. Pugh, 167 Wn.2d at 829-31. The Washington Supreme Court applied the Davis factors and concluded that the statements were nontestimonial because the overriding purpose in calling 911 was to obtain police assistance to ensure her safety and receive medical assistance for her injuries. The court determined that Mrs. Pugh "obviously" thought she was still in danger and the operator was trying to "resolve a present emergency." Id. at 833-34.

Unlike in Davis and Pugh, the record here establishes that Larisa Oien was not speaking of events as they were occurring but was describing past events, a reasonable listener would recognize that she was not facing an ongoing emergency, the statements were not necessary to resolve a present emergency but instead to learn of past events, and she was in a safe environment at customer service in Home Depot.

Oien began the call by telling the operator that her boyfriend just beat her up and took her car. She said she was at Home Depot and the incident occurred about 30 or 40 minutes ago. She described her injuries but said she did not need medical attention. Oien gave the operator Cline's name and description. When asked about a weapon, she said Cline had a knife and was suicidal. She said Cline took off and she had no idea where he went. Ex. 1. Throughout the call, Oien never expressed any

sense of fear that she may still be in danger. She was not crying out for help. Except for an instant when the operator asked for her name, she was calm and conversational. Clearly, the 911 call was testimonial because the circumstances objectively indicate that there was no ongoing emergency, and that the primary purpose of the call was to establish or prove past events.

2. Admission of the 911 tape violated Cline's right to confrontation because Oien did not testify at trial.

Testimony at a preliminary hearing satisfies the constitutional requirement for confrontation if the defendant was given an opportunity to cross-examine the witness about out-of-court statements. State v. Mohamed, 132 Wn. App. 58, 65, 130 P.3d 401 (2006). Here, the court held a pretrial hearing where Oien testified that she called 911 from Home Depot and that she was with her boyfriend, Lyric Cline, earlier that day. Oien acknowledged that she was the caller on the 911 tape. 2RP 6-9. Defense counsel did not ask Oien any questions but the prosecutor assured the court that "[s]he will also testify at trial, and he will have an opportunity to cross-examine her." 2RP 13. The court reaffirmed that the State would call Oien as a witness at trial and she would be subject to cross-examination. 2RP 22-23.

Unlike in Mohamed, where defense counsel did cross-examine the victim at a preliminary hearing, Cline's counsel had no reason to question Oien because he expected to have the opportunity to cross-examine her at trial and he was aware that she had recanted her statements. 2RP 12. Defense counsel's understanding was consistent with Officer Bortle's testimony that when he saw Oien the day after the incident, she said her injuries were from an altercation with a female, not Cline. 5RP 119.

The record substantiates that defense counsel did not question Oien at the pretrial hearing because he reasonably relied on the State's assurance that she would testify at trial. Consequently, reversal is required because admission of the 911 recording that was testimonial violated Cline's right to confrontation where Oien did not testify and was not subject to cross-examination. Crawford, 541 U.S. 68-69.

3. In the event this Court concludes that Cline had an opportunity to cross-examine Oien at the pretrial hearing, reversal is required because Cline was denied his right to effective assistance of counsel.

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. The right to effective assistance of counsel is "fundamental to, and implicit in, any meaningful modern concept of

ordered liberty." State v. A.N.J., 168 Wn.2d 91, 96, 225 P.3d 956 (2010). "The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial." State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

To demonstrate ineffective assistance of counsel, a defendant must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced defendant, i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)(citing Thomas, 109 Wn.2d at 225-26)(applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Oien testified at a pretrial hearing where the State moved to admit a recording of a 911 call made by Oien accusing Cline of beating her up. 2RP 4-9; Ex. 1. Defense declined to ask Oien any questions. 2RP 9. The trial court admitted the 911 tape as an excited utterance, "Certainly, she was not screaming and yelling, but I think that she was under the influence of a startling event at the time that she made the statements." 2RP 27.

The record substantiates that defense counsel's performance was deficient in failing to take advantage of the opportunity to question Oien about the 911 call. In light of her admission to Officer Bortle that her injuries were from an altercation with a female, not Cline, it is evident that Oien would have recanted her statements if defense counsel had directly asked about them. Cline was prejudiced by defense counsel's deficient performance because there is a reasonable probability that even if the court was skeptical about Oien changing her story, it would not have admitted the 911 tape as an excited utterance if she admitted that her statements were the result of fabrication. See State v. Brown, 127 Wn.2d 749, 757-59, 903 P.2d 459 (1995)(911 tape was inadmissible as an excited utterance because victim fabricated statements).

Reversal is required because Cline was denied his constitutional right to effective assistance of counsel.

4. In the event this Court concludes that Oien's statements were nontestimonial, reversal is required because the hearsay statements were not excited utterances.

Hearsay is inadmissible but a recognized exception to the hearsay rule is an excited utterance. ER 802, 803(a)(2). 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." ER 803(a)(2). A proponent of excited utterance evidence must satisfy three "closely connected requirements" that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007).

The excited utterance exception is based on the reasoning that "under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control." State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, Evidence section 1747, at 195 (1976)). The utterance of a person in such a state is believed to be "a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock," rather than an expression based on reflection or self-interest. Id.

> ER 803(a)(2) should be interpreted in a sufficiently restrictive manner as not to lose sight of the basic elements which distinguish excited utterances from other hearsay statements. This is necessary in order to preserve the real purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present.

State v. Dixon, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

Oien's first statement to the operator was, "My boyfriend just beat me up and took my car basically." She said she was at Home Depot and the incident happened 30 to 40 minutes ago. Only for an instant, when the operator asked for her name, she exhibited emotion and the operator told her to take a deep breath. But for that passing moment, she was calm and conversational while she responded to questions. Essentially, her only statement as the call continued that was not in response to questioning was when she wanted to give the operator her license plate number. Ex. 1.

The "crucial question" is whether the declarant was still under the stress of excitement caused by a startling event. State v. Briscoeray, 95 Wn. App. 167, 173, 974 P.2d 912, review denied, 139 Wn.2d 1011, 994 P.2d 848 (1999). "The key to the requirement that the statements be made while under the stress of excitement caused by the startling event is spontaneity." Id. It is indisputably evident that Oien was not acting spontaneously, she was not in fear, she was not calling for help. While speaking with the operator, she was also speaking to someone in the background at Home Depot customer service. There was no sense of fear or urgency in her voice. When asked, she said she did not need medical attention. She was more concerned about getting her car back. Clearly, Oien was no longer under the stress of any startling event.

Reversal is required because the trial court abused its discretion in admitting the 911 tape as an excited utterance because no reasonable judge would have made the same ruling. State v. Woods, 143 Wn.2d 561, 595-97, 23 P.3d 1046 (2001).

b. Statements to Officer Bortle

In the companion case in Davis v. Washington, police responded to a report of a domestic disturbance at the home of Hershel and Amy Hammon. When they arrived, Mrs. Hammon was on the front porch appearing somewhat frightened but she said "nothing was the matter." She gave them permission to enter the house where they found Mr. Hammon in the kitchen. They spoke with the Hammons in separate rooms to investigate what had happened. Mrs. Hammon wrote out in an affidavit that Mr. Hammon broke their furnace and shoved her down on the broken glass; hit her in the chest and threw her down; broke their lamps and phone; tore up her van where she could not leave the house; and attacked her daughter. Mrs. Hammon did not testify but the trial court admitted her affidavit and allowed the responding officer to testify that she said Mr. Hammon pushed her onto the ground, shoved her head into the broken glass, and punched her twice. Davis, 547 U.S. at 819-21.

The United States Supreme Court concluded that Mrs. Hammon's statements were testimonial because "[i]t is entirely clear from the

circumstances that the interrogation was part of an investigation into possibly criminal past conduct." Id. at 829. The Court reasoned that there was no ongoing emergency and that when objectively viewed, the primary purpose, if not the sole purpose, of the interrogation was to investigate what had happened, not what was happening. Id. at 829-30. With regard to formality, the Court determined that it was "formal enough" that Mrs. Hammon's interrogation was conducted in a separate room away from her husband. Id. at 830. The Court "necessarily" rejected the implication that virtually any initial inquiries by police will be nontestimonial, concluding that where statements are neither a cry for help nor provided to enable officers to immediately end a threatening situation, the fact that the statements were responses to initial inquiries "is immaterial." Id. at 832.

In State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009), police responded to a 911 call reporting a robbery at the home of Violet Alvarez. Officers arrived at the home in two minutes finding Ms. Alvarez extremely emotional and very upset. Ms. Alvarez said she was outside of her house when three men pulled up in a car. One of the men took out a gun and told her to go into the house. They forced her to the ground, tied her hands, and covered her face with a shirt. The men took her wallet, cash, credit cards, a ring removed from her finger, other jewelry, and the

keys to her house and car. Ms. Alvarez died before trial but the court admitted her statements to police. Koslowski, 166 Wn.2d at 412-15.

The Washington Supreme Court applied the Davis factors and concluded that Ms. Alvarez's statements were testimonial. The Court determined that she was describing events that had already occurred; that a reasonable listener would recognize that she was not facing an ongoing emergency; the primary purpose of the interrogation was to establish past events potentially for later criminal prosecution; and a "certain level of formality occurs when police engage in a question-answer sequence with a witness." Koslowski, 166 Wn.2d at 422-30.

As in Davis and Koslowski, Oien's statements to Officer Bortle at Home Depot were clearly testimonial. The record establishes that when Bortle spoke with Oien, she was recounting past not present events because the alleged incident was over; a reasonable listener would recognize that she was not facing an ongoing emergency where she was in a safe environment at Home Depot; the purpose of the interrogation was to learn what happened in the past, not to resolve a present emergency because there was no threat of Cline showing up at Home Depot; and there was enough formality in that Bortle took Oien outside to question her in private. 5RP 92-103, 126.

Oien's statements were testimonial where the circumstances objectively indicate that there was no ongoing emergency and that the primary purpose of the interrogation was to prove past events potentially relevant to later criminal prosecution. Reversal is required because admission of Oien's statements violated Cline's right to confrontation where Oien did not testify and consequently Cline had no opportunity to cross-examine her. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford, 541 U.S. at 68-69.

2. REVERSAL IS REQUIRED BECAUSE ADMISSION OF OIEN'S STATEMENTS IN VIOLATION OF CLINE'S RIGHT TO CONFRONTATION WAS NOT HARMLESS ERROR.

Error in admitting evidence in violation of the Confrontation Clause is subject to a constitutional harmless error test. Lilly v. Virginia, 527 U.S. 116, 139-40, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999); State v. Mason, 160 Wn.2d 910, 927, 162 P.3d 396 (2007). If the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Reversal is required because the record substantiates that without admission of Oien's statements, there was no overwhelming, untainted evidence to prove that Cline committed assault in the second degree beyond a reasonable doubt.

E. CONCLUSION

For the reasons stated, this Court should reverse Mr. Cline's conviction because he was denied his constitutional right "to be confronted with the witnesses against him." [4]

DATED this 24th day of August, 2012.

Respectfully submitted,

Valerie Marushige

VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Lyric Leeyn Cline

[4] As one of the trial judges who refused Sir Walter Raleigh his right to confrontation later lamented, "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." Crawford, 541 U.S. at 44.

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of August, 2012 in Kent, Washington.

Valerie Marushige

VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Lyric Leeyn Cline, DOC # 329963, Coyote Ridge Corrections Center, P.O. Box 769, Connell, Washington 99326.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of August, 2012 in Kent, Washington.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

MARUSHIGE LAW OFFICE

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