NO. 19429-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRIS A. FORTH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Waldo F. Stone

No. 93-1-02523-0

SUPPLEMENTAL BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal Cases and Other Jurisdictions

Constitutional Provisions

Statutes

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. As the child victim testified and was cross-examined, thereby satisfying the confrontation clause under ***Crawford***, should this court limit its review to the issue of whether the trial court abused its discretion in admitting child hearsay under the statute?

B. STATEMENT OF THE CASE.

The statement of the case was set forth in the State's original response brief.

C. ARGUMENT.

1. BECAUSE C.F. TESTIFIED AT TRIAL AND WAS SUBJECT TO CROSS EXAMINATION, THE ADMISSION OF HER HEARSAY STATEMENTS UNDER RCW 9A.44.120 DOES NOT IMPLICATE THE CONFRONTATION CLAUSE.

As the United States Supreme Court issued a landmark decision on the confrontation clause since the State filed its initial response brief in this case, it is important to discuss whether that decision has any impact on the issues raised regarding the child hearsay statute. 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 stated that, for purposes of Sixth Amendment analysis, out-of-court statements are classified as either

"testimonial" or "nontestimonial." It held that nontestimonial statements do not implicate the confrontation clause and are admissible if they fall within a hearsay exception, but testimonial statements do implicate the confrontation clause, and are admissible only if the witness testifies at trial, or is unavailable and the defendant has had a prior opportunity to cross-examine. ***Crawford***, 541 U.S. at 59.

Although the decision in ***Crawford*** did not fully define the scope of testimonial statements, the court did set forth examples of a core class of testimonial statements. Included in this core class are: 1) ex parte in-court testimony or its functional equivalent; 2) similar pretrial statements the declarant would reasonably expect to be used prosecutorially; 3) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; 4) statements made during interrogations by law enforcement officers; and finally, 4) "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." ***Crawford***, 541 U.S. at 52-54. Examples of nontestimonial statements would include "off-hand, overheard" remarks, or "a casual remark to an acquaintance." ***Crawford***, 541 U.S. at 51.

The Sixth Amendment provides that a defendant shall enjoy the right to confront witnesses against him and applies whenever assertive conduct is offered against a criminal defendant to prove the truth of the

matter asserted. ***United States v. Owens***, 484 U.S. 554, 557, 108 S. Ct. 838, 841, 98 L. Ed. 2d 951 (1988); ***Tennessee v. Street***, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985). The clause can be satisfied by: (1) the prosecution calling and questioning a witness about the charged incident, and (2) the witness being subject to cross-examination. ***Owens***, 484 U.S. at 558-60. Cross-examination is constitutionally sufficient even if the witness cannot remember the incident at trial or even though the witness denies the incident at trial. ***Owens***, 484 U.S. at 558-60, ***California v. Green***, 399 U.S. 149, 164, 90 S. Ct. 1930, 1938, 26 L. Ed. 2d 489 (1970); ***State v. Price***, 158 Wn.2d 630, 638–39, 146 P.3d 1183 (2006).

Prior to the decision in ***Crawford***, the Washington Legislature enacted the child hearsay statute, which states:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, ... not otherwise admissible by statute or court rule, is admissible in evidence in ... criminal proceedings ... in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120. The statutory language does not distinguish between testimonial and nontestimonial statements. Any admission of a child's testimonial statements will violate the confrontation clause unless the child testifies at trial or the confrontation clause has been otherwise satisfied under ***Crawford***. *See* ***Price***, 158 Wn.2d at 639-650.

The Washington Courts have held that a child's hearsay statements made to family members were nontestimonial and, thus, did not implicate a criminal defendant's confrontation rights. ***State v. Shafer***, 156 Wn.2d 381, 389–90, 128 P.3d 87 (2006); ***State v. Hopkins***, 137 Wn. App. 441, 454, 154 P.3d 250 (2007). Statements to a Child Protective Services caseworker have been found to be both testimonial and nontestimonial depending on the circumstances, ***State v. Hopkins***, 137 Wn. App. 441, 454-56, 154 P.3d 250 (2007); ***State v. Beadle***, 173 Wn.2d 97, 110, 265 P.3d 863 (2011).

In the case now before the court, the trial court admitted statements made by C.F. to her mother and to Linda Olsen, a caseworker for the Oregon Children's Services Division, under the child hearsay statute, RCW 9A.44.120. *See* 11/1/94 RP 59; 11/2/94 RP 7-12 (statements to mom adduced) 40-47 (statements to caseworker adduced). A statement C.F. made to her step-father was admitted after defendant stipulated to the admissibility of the statement. 11/2/94 RP 65, 71. C.F. testified at trial and was subjected to cross examination. 11/3/94 RP 6-26, 26-32.

The statements C.F. made to her mother and step-father were nontestimonial and do not implicate the confrontation clause. While arguably the interview by the caseworker might be classified as "testimonial," the court need not reach this determination because C.F testified at trial and was subject to cross-examination. This ability to cross examine C.F. about the incident and her statement to the caseworker satisfied the confrontation clause and there can be no violation flowing from the admission of her out of court statement to the caseworker even if they were found to be testimonial.

In sum, this court need not be concerned about a confrontation clause violation. The only issue before this court is whether the trial court abused its discretion in admitting the out of court statements under the child hearsay statute, which has been discussed in the initial briefing.

D. CONCLUSION.

The State asks this court to affirm the judgment entered below.

DATED: January 3, 2013.

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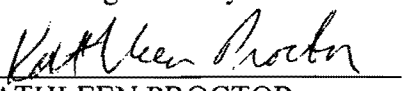

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12/13 [signature]

Date Signature

PIERCE COUNTY PROSECUTOR

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