NO. 44974-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MCCOMAS, JR.,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Michael McComas, Jr. was charged with assault in the fourth degree after a sheriff's deputy recorded his wife's allegation that her husband tackled her to the ground and strangled her. Prior to trial, Ms. McComas claimed this allegation was false, and the defense moved to exclude the admission of her recorded statement as substantive evidence under ER 801(d)(1)(i). The court denied this motion, relying on State v. Smith.[1] Mr. McComas was found guilty of assault in the second degree after a trial and sentenced to 60 days confinement. Because Smith is no longer valid under Crawford v. Washington,[2] and because Ms. McComas's statement was not given under oath, Mr. McComas's conviction must be reversed.

B. ASSIGNMENTS OF ERROR

1. The court erred by admitting Ms. McComas's prior statement as substantive evidence at trial under ER 801(d)(1)(i).

2. The court erred in entering finding of fact 7. CP 5.

3. The court erred in entering finding of fact 9. CP 6

4. The court erred in entering conclusion of law 1. CP 6.

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[1] 97 Wn.2d 856, 651 P.2d 207 (1982).
[2] 124 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

8. The court erred in entering conclusion of law 2d. CP 7.

9. The court erred in entering conclusion of law 3. CP 7.

10. The court erred in entering conclusion of law 4. CP 7.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under Crawford v. Washington, a court may not analyze a witness's prior out-of-court statement for "reliability" in order to determine its admission at trial. Here, the trial court relied on the Smith test, in which "reliability is the key," to find that Ms. McComas's statement should be admitted under ER 801(d)(1)(i) as substantive evidence. Is Mr. McComas entitled to a reversal of his conviction given the court's error?

2. A prior inconsistent statement by a witness cannot be admitted as substantive evidence unless it meets all of the requirements of ER 801(d)(1)(i). Ms. McComas's statement was not given under oath, as required by the rule. Where the trial court erroneously admitted a statement that does not meet the plain requirements of ER 801(d)(1)(i), must this Court reverse Mr. McComas's conviction?

D. STATEMENT OF THE CASE

Philana McComas went to the Mason County Sherriff's Office and reported that her husband, Michael McComas, Jr., assaulted her. 1

RP 4; 2 RP 99.[3] Deputy Robert Noyes interviewed Ms. McComas and observed marks on her neck, scratches on her chest, and a slightly red area on her lower right back. 1 RP 5; 2 RP 96, 99. He spoke to her only briefly before aid units were called. 1 RP 4-5, 2 RP 101.

Later that evening, two other deputies went to Ms. McComas's home to conduct an interview. 1 RP 13; 2 RP 105. Deputy Justin Cotte took Ms. McComas's oral statement, which she gave him permission to record. 1 RP 14; 2 RP 106; CP 62. In response to questioning, Ms. McComas stated that earlier that morning Mr. McComas had screamed at her that she was a "humongous fat disgusting cunt" and threw a "bunch of dishes" at the wall when she told him to settle down. CP 63. She stated that she tried to collect her cell phone and run from the house, but that Mr. McComas "attacked [her] down to the ground" and "choked" her. Id. Ms. McComas believed that she "kinda" blacked out for a second. Id.

Ms. McComas then ran to her car and had lunch with a friend, after determining that the "police station was closed for lunch or something." Id. She stated that her friend assisted her in going to the

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[3] The verbatim report of proceedings are divided into Volume I and Volume II and will be referred to as "RP" using the volume and page number.

police station after lunch because the friend was the daughter of a police officer. Id. Ms. McComas stated she did not wish to press charges against her husband. 2 RP 66.

After Ms. McComas answered the deputy's questions, Deputy Cotte asked her if she declared, under penalty of perjury, that the foregoing was true and correct. Id. Ms. McComas responded that she did. Id. Mr. McComas was charged with domestic violence assault in the second degree. CP 72.

Ms. McComas later claimed her statement was false. 1 RP 7; 2 RP 79. After the State learned this, Deputy Noyes contacted Ms. McComas to set up a second interview. 1 RP 8. In that interview, which was not recorded, Ms. McComas stated that Mr. McComas had not choked her and that the injuries were a result of her falling and being scratched by her dog. 1 RP 8-10.

Prior to trial, Mr. McComas moved to exclude Ms. McComas's recorded statement for use as substantive evidence. CP 70. At the hearing on the defense's motion, Ms. McComas testified she had been forced by her friend to go to the sheriff's office. 1 RP 25. She explained she was diagnosed with a number of mental health issues which prevent her from maintaining employment and that she did not

understand what the word "perjury" meant at the time she gave the recorded statement. 1 RP 23, 24.

The trial court denied Mr. McComas's motion, finding that the State was permitted to use Ms. McComas's statement as substantive evidence if she offered inconsistent testimony at trial. CP 7. At trial Ms. McComas testified that she did not believe Mr. McComas had choked or punched her. 2 RP 71, 74. The recorded statement was played for the jury over Mr. McComas's objection. 2 RP 107-08, 109. It was admitted as evidence and the jurors were provided a transcript to read while the recording was played. 2 RP 108. The State later played the recording again during its closing argument. 2 RP 184.

The jury found Mr. McComas not guilty of assault in the second degree, but found him guilty of assault in the fourth degree. CP 17-18. It also found that the McComases were members of the same family or household. CP 16.

Mr. McComas was sentenced to 364 days of confinement, with 304 days suspended. CP 9. Mr. McComas appeals.

E. ARGUMENT

Ms. McComas's Recorded Statement was not Admissible as Substantive Evidence.

When the State learned Ms. McComas was recanting the statement she had given to Deputy Cotte, in which she stated Mr. McComas had tackled her to the ground and strangled her, it contacted her for a second interview. CP 63; 1 RP 7. During that interview, which was not recorded, Ms. McComas indicated that she no longer believed Mr. McComas assaulted her. 1 RP 8.

Prior to trial, in what was deemed a dispositive motion in limine, Mr. McComas moved to exclude Ms. McComas's recorded statement as substantive evidence. 1 RP 1-2. The trial court denied this motion, applying the four factors articulated in State v. Smith, 97 Wn.2d 856, 861-63, 651 P.2d 207 (1982); CP 6.

A trial court's decision to admit evidence is reviewed for abuse of discretion. State v. Nieto, 119 Wn. App. 157, 160, 79 P.3d 473 (2003). A trial court abuses its discretion when it conducts an incomplete legal analysis or bases its ruling on a misapprehension of legal issues. Id. (citing State v. Derouin, 116 Wn. App. 38, 42, 64 P.3d 35 (2003)). Because the court improperly applied the Smith factors,

and failed to consider the oath requirement in ER 801(d)(1)(i), its findings of fact and conclusions of law were made in error and the trial court necessarily abused its discretion. CP 5-7 (Findings of Fact 7, 9; Conclusions of Law 1, 2d, 3, 4).

a. The test developed in *State v. Smith* to determine whether a statement is admissible under ER 801(d)(1)(i) is invalid in light of *Crawford v. Washington.*

i. The legislative history behind ER 801(d)(1)(i).

When considering whether a statement is admissible as substantive evidence under ER 801(d)(1)(i), courts have examined the legislative intent behind Fed.R.Evid. 801(d)(1)(A), from which Washington's ER 801(d)(1)(i) was "taken verbatim." See Smith, 97 Wn.2d at 859; State v. Sua, 115 Wn. App. 29, 43, 60 P.3d 1234 (2003); see also United States v. Day, 789 F.2d 1217, 1222 (6th Cir. 1986); United States v. Ragghianti, 560 F.2d. 1376, 1381 (9th Cir. 1977); Martin v. United States, 528 F.2d 1157, 1161 (4th Cir. 1975).

Under ER 801(d)(1)(i), a statement is not hearsay if:

> The declarant testified at the trial or hearing and is subject to cross examination concerning the statement, and the statement is... inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

The language in ER 801(d)(1)(i) is the result of a compromise negotiated by the joint House and Senate conference committee after the separate judiciary committees could not reach agreement. Sua, 115 Wn. App. at 43-46. To the advisory committee's original proposal for (i), the House added the following language: "and was given under oath subject to cross-examination, and subject to the penalty of perjury at a trial or hearing or in a deposition..." Id. at 44. However, the Senate expressed concern that this language precluded the use of statements made before a grand jury. Id. at 45. To address that concern, the conference committee eliminated the cross-examination requirement and added in "other proceeding," in order to include testimony taken at grand jury proceedings. Id. at 45-46 (citing Federal Rules of Evidence: House Comm. on the Judiciary, H.R. REP. NO. 93-650, at 13 (1973), reprinted in 1975 U.S.C.C.A.N. 7075, 7086). The resulting language is now embodied in ER 801(d)(1)(i).

ii. Rather than adhering to the plain language of ER 801(d)(1)(i), State v. Smith developed a separate test in which "reliability is the key."

In State v. Smith, the Supreme Court relied on the inclusion of the phrase "other proceeding" to find that a victim's notarized written statement was admissible as substantive evidence because under "the

totality of [the] circumstances" ER 801(d)(1)(i) was satisfied. Smith, 97 Wn.2d at 863. In Smith, the victim was assaulted in a motel room and badly beaten. Id. at 858. She originally named the defendant, who the evidence suggested was her pimp, as her attacker. Id. at 858-59. After the police advised her nothing could be done to help her unless she testified in court, she went to the police station and wrote out a statement describing the details of the assault. Id. at 858. The victim signed each page and the detective signed as her witness. Id. The detective then brought the victim before a notary, where she was read the affidavit portion of the statement and the oath, and the notary subscribed the jurat and seal to the victim's statement. Id. At trial, the victim testified to all of same facts regarding the assault, except she named a different individual as the assailant. Id. She explained she provided the original statement because she was angry with the defendant. Id. at 858-59.

The court examined the legislative history and held that the circumstances in Smith did not meet the definition of "other proceeding," but that the original purpose of the sworn statement – to determine the existence of probable cause – was the same as in those situations that did meet the definition of "other proceeding" (grand jury

indictment, inquest proceeding, filing of a criminal complaint before a magistrate). Id. at 862. Therefore, the court found that the statement was admissible as substantive evidence under ER 801(d)(1)(i). Id. at 862-63. The court was clear, however, to state that "each case depends on its facts with reliability the key" and that while the rule was satisfied in this case, the court was declining to "answer the issue broadly." Id. at 863, 861. It did not interpret the rule to "always exclude or always admit such affidavits." Id. at 861.

Instead, Smith articulated four factors to determine whether an affidavit is admissible as substantive evidence: (1) whether the witness voluntarily made the statement; (2) whether there were minimal guarantees of truthfulness; (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement. 97 Wn.2d at 861-63; State v. Nelson, 74 Wn. App. 380, 387, 874 P.2d 170 (1994).

Since Smith, this Court has applied those factors when determining whether a prior statement is admissible under ER 801(d)(1)(i). State v. Thach, 126 Wn. App. 297, 308, 106 P.3d 782

(2005); Nieto, 119 Wn. App. at 163; Nelson, 74 Wn. App. at 387. However, at least one other court has pointed out the error of the Smith analysis. In Delgado-Santos v. State, 471 So.2d 74, 79 (Fla. Ct. App. 1985), the court disagreed with Smith's case-by-case approach to admitting a statement under its identical rule of evidence. The court stated:

> Smith... purport[s] to make the question turn on the "reliability" of the contents of the particular statement and of the conditions under which it was given. In our view, the basic flaw in this conclusion is that it finds no basis in the statute. While the legislature and Congress may have been ultimately concerned with the "reliability" of a particular statement, they sought to vindicate that concern only by establishing given and objective criteria as to the circumstances, including the kind of forum, under which it was given. And it is for the legislature, not the courts, to determine not only the policy to be promoted, but the means by which that end is to be achieved. By suggesting, without statutory authority, that the determination that the existence of a proceeding can depend upon what is said before it, the Robinson-Smith test of reliability violates this basic principle.

Id. (citing 10 Fla.Jur.2d Constitutional Law § 147 (1979). Delgado-Santos found that a "bright line" test was mandated by the statute and that police questioning clearly was not an "other proceeding." 471 So.2d at 79.

iii. Under Crawford, "reliability" is not an acceptable test for whether a prior statement should be admitted.

Over twenty years after the Smith decision, the United States Supreme Court decided Crawford v. Washington, 124 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In Crawford, the Court explained the inherent problem with granting the courts power to determine whether an out-of-court statement is "reliable." 541 U.S. at 63. "Reliability is an amorphous, if not entirely subjective, concept." Id. Too frequently, it found, courts end up attaching the same significance to opposite facts (e.g. the Colorado Supreme Court found a statement was reliable because it was "detailed" and the Fourth Circuit found a statement was reliable because it "fleeting"; the Virginia Court of Appeals found a statement reliable because the witness was in custody while the Wisconsin Court of Appeals found a statement reliable because the witness was not in custody). Id. (internal citations omitted). When left to the court's discretion, too many facts can be turned either in favor or against the "reliability" of a statement.

While the issue in Crawford was the admissibility of a statement where the witness was not available for cross-examination at trial, its findings about reliability affirm the concerns raised in Delgado-Santos.

As the court pointed out in Delgado-Santos, the legislature provided specific, objective criteria under which a prior statement may be admitted under ER 801(d)(1)(i). 471 So.2d at 79. Smith's detour from that objective criteria, to a finding instead that "reliability is the key," is invalid under Crawford. The court erred when it relied on the Smith factors to admit Ms. McComas's statement as substantive evidence at trial. The trial court's decision must be reversed, and Mr. McComas's conviction must be vacated.

b. Even if the Court finds *State v. Smith* remains good law, Ms. McComas's statement was inadmissible because it was not given "under oath" as required by ER 801(d)(1)(i).

i. Separate from any analysis under the Smith factors, in order for a statement to be admitted as substantive evidence under ER 801(d)(1)(i), the State must show it was given under oath.

The court is "obligated to construe ER 801(d)(1)(i) according to its plain meaning, and to give effect to all of its language." Sua, 115 Wn. App. at 48. When a statement is not given under oath, it is not admissible as substantive evidence under ER 801(d)(1)(i). Id. at 49.

In Sua, the alleged victim told detectives her mother's boyfriend put his hands down her pants and the mother told detectives that the boyfriend expressed an interest in bearing a child with the alleged

victim. 115 Wn. App. at 32. Each provided a written statement and signed under a paragraph that said: "The above is a true and correct statement to the best of my knowledge. No threats or promises have been made to me nor any duress used against me." Id. at 33. At trial, both the alleged victim and her mother recanted. Id. at 33-34. The State initially sought to admit the prior statements as impeachment evidence, but after the defense moved to dismiss the case for insufficient evidence, the court admitted the statements as substantive evidence under ER 801(d)(1)(i). Id. at 34-36.

This Court reversed, finding that it could not "just ignore ER 801(d)(1)(i)'s requirement that the out-of-court statement of an in-court witness be 'given under oath subject to the penalty of perjury.'" Id. at 48. It distinguished the circumstances in Sua to those in Smith and Nelson, finding that in Smith, the victim took an oath from a notary public, and in Nelson, the statement was notarized and met the requirements of RCW 9A.72.085, which sets forth when an unsworn form may be treated as a sworn statement. Id.; Smith, 97 Wn.2d at 858; Nelson, 74 Wn. App. at 389. In Sua, the witness never went before a notary public and there was no evidence the statement had been "given

under oath and subject to [the] penalty [of] perjury." 115 Wn. App. at 47 (internal quotations omitted).

Similarly, in Nieto, this Court found a prior statement inadmissible under ER 801(d)(1)(i) because the "boilerplate language" used on the witness's written statement was ambiguous. 119 Wn. App. at 162. The Court found:

> Unlike the police interviews in State v. Smith and State v. Nelson, no notary was present here, nor were any other formal procedures involved. [The witness] testified that she did not read the "penalty of perjury" language, and she said the language had no meaning to her.

Id. at 163. Although the witness in Nelson also testified she did not realize her statement was taken under penalty of perjury, the State in Nelson presented evidence that the prosecutor reviewed the statement with her and explained the importance of the affidavit, and the notary testified it was standard practice to ask the witness if she had read the affidavit before notarizing the document. Id.; Nelson, 74 Wn. App. at 389-90. Because this was not done in Nieto, the court reversed.

ii. Ms. McComas's statement was inadmissible because it was not given under oath.

Here, Deputy Cotte asked Ms. McComas if she would provide a recorded oral statement. CP 62. She agreed. Id. Upon providing the

statement, Deputy Cotte immediately asked Ms. McComas if she declared her answers were true and correct under penalty of perjury. CP 66. Ms. McComas responded "yes." Id. This was not sufficient to meet the oath requirement under ER 801(d)(1)(i), and the trial court erred in finding that it was. CP 6 (Conclusion of Law 1).

First, no evidence was presented that Deputy Cotte was qualified to administer an oath. A court, judge, clerk of a court, state-certified reporter, or notary public, is authorized to administer oaths. RCW 5.28.101. The State did not show that Deputy Cotte held one of these titles.

In Sua, this Court relied, in part, on United States v. Day, 789 F.2d 1217 (6th Cir. 1986) when finding the witness's prior statement was inadmissible. 115 Wn. App. at 48. In Day, the court held that although the statement at issue was characterized as "sworn," the State failed to present evidence as to whether the special agent who conducted the interview "had legal authority to administer an oath that would invoke the penalty of perjury upon a showing that the declarant perjured himself." 789 F.2d at 1221. As the proponent of the statement, it was the State's burden to prove, by affirmative evidence, that Deputy Cotte had this authority. See id.

Second, Deputy Cotte never actually administered an oath. In Washington, an oath may be administered as follows:

> The person who swears holds up his or her hand, while the person administering the oath thus addresses him or her: "You do solemnly swear that the evidence you shall give in this issue (or matter) now pending between..... and ..... shall be the truth, the whole truth, and nothing but the truth, so help you God."

RCW 5.28.020. Ms. McComas was not instructed, prior to questioning, that she would be asked to affirm her responses were true and correct, subject to penalty of perjury. 1 RP 17; CP 62. Only after Ms. McComas had given the responses was she asked to declare their truthfulness. 1 RP 17; CP 66.

As in Nieto, Ms. McComas testified that she did not understand what the word "perjury" actually meant. 1 RP 23; 119 Wn. App. at 162. While the trial court rejected this part of Ms. McComas's testimony, there was no evidence that Deputy Cotte, or anyone else, explained what "perjury" meant. CP 5-6 (Findings of Fact 7, 9); 1 RP 17. Deputy Cotte testified only that she did not hesitate when responding "yes" and that she appeared to understand his questions. 1 RP 15-16.

In addition, unlike in Smith and Nelson, which involved written statements, Ms. McComas was never given the opportunity to review her statement prior to acknowledging its truthfulness. Smith, 97 Wn.2d at 858; Nelson, 74 Wn.App. at 383. Instead, having just provided a taped recording to a sheriff's deputy, she was asked if she had just told the truth. It is not surprising she would respond that she had, regardless of whether she understood the consequences of her affirmation. Thus, the trial court's conclusion that "minimal guarantees of truthfulness" were satisfied "based on a totality of the circumstances" was made in error. CP 7 (Conclusions of Law 2d, 3).

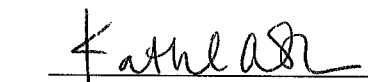
Because the State did not show that Deputy Cotte was authorized to administer an oath, and because the evidence shows that he in fact did not administer an oath, either in the words used or in the timing of when it was given, the trial court erred in admitting the statement at trial under ER 801(1)(d)(i). The trial court's decision must be reversed, and because the State relied on the inadmissible recording, Mr. McComas's conviction must be vacated.

F. CONCLUSION

Because the Smith test is invalid under Crawford, and Ms. McComas's statement was not given under oath, the trial court erroneously admitted her statement as substantive evidence under ER 801(1)(d)(i). Accordingly, Mr. McComas is entitled to have the trial court's decision reversed, his conviction vacated, and the case remanded for further proceedings.

DATED this 20th day of February 2014.

Respectfully submitted,



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	)	
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	)	
Appellant.	)	

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