No. 44974-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

MICHAEL McCOMAS, Jr., APPELLANT

Appeal from the Superior Court of Mason County
State of Washington

No. 12-1-00478-1

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

TABLE OF CONTENTS

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Page

Table of Cases

State Cases

Federal Cases

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Statutes

Court Rules

A. STATE'S RESTATEMENT OF APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial 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.

5. The court erred in entering conclusion of law 2. CP 7.[1]

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

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

B. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Because the trial court's findings of fact numbers 7 and 9 are supported by substantial evidence in the record, and because it was within the discretion of the trial court to make these findings of fact, the trial court did not err in making these findings.

2. The trial court allowed an audio-recorded version of a witness's prior inconsistent statement to be used as substantive evidence at trial. Because the trial court correctly followed the requirements of *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982), and ER 801(d)(1)(i) when admitting the statement, and

[1] Assignments of Error numbers 5, 6, and 7 are actually numbered as 8, 9, and 10 in Appellant's brief, but because the numbers 5, 6, and 7 are omitted, this appears to be a typographical error; so, the State has renumbered the assignments of error accordingly.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

because the witness testified at trial and was subjected to cross examination, the defendant's confrontation rights were not violated, and the court did not err by admitting the statement into evidence.

3. Because the prior inconsistent statement at issue in this case was audio-recorded rather than written, the witness gave an oral declaration under penalty of perjury rather than a written one, and it is therefore arguable that the oath or affirmation requirement of ER 801(d)(1)(i) was not satisfied in this case. But, even if admission of the statement was error, the error is nonconstitutional, and on the facts of this case the error was harmless.

B. FACTS AND STATEMENT OF THE CASE

On November 15, 2012, Philana McComas walked into the Mason County Sheriff's Office and reported that that her husband, Michael, had choked and hit her. RP 4. When she appeared at the sheriff's office, she was shaken, crying, and visibly upset, and she had visible signs of injury. RP 5-7. Ms. McComas said that she was hit at least a couple of times on the back and that an injury to her neck was caused when her husband choked her. RP 6.

Another deputy, Deputy Cotte, who happened to be accompanied by an "in-training deputy," Deputy Colbenson, also interviewed Ms. McComas later in the day on November 15th. RP 12-13. The deputies

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

went to Ms. McComas's home and, at 5:17 p.m., took an audio-recorded statement from her. RP 14-15. At a pretrial hearing to determine the admissibility of the statement as substantive evidence, a transcript of the audio recording was referred to as "pretrial Exhibit No. 2," but was actually marked as "Pretrial Exhibit 1." RP 14; CP (Pretrial Exhibit 1); CP (List of Exhibits, Defense Motion Hearing).[2] At the conclusion of Ms. McComas's audio-recorded statement, Deputy Cotte asked her the following question:

> [D]o you Philana R. McComas certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that your statement was made freely and voluntarily without any threats or promises of any kind?

RP 15; Pretrial Exhibit 1 at p. 6. To this question, Ms. McComas answered, "Yes." *Id.*

While Deputy Cotte was in Ms. McComas's home taking her statement, he noticed damage to a wall. RP 16. He asked her how the damage occurred, and she told him that her husband, Michael, caused the damage when he threw a plate at the wall. RP 16.

When giving the audio-recorded statement, Ms. McComas said that earlier on the same day, in the morning, she had awoken to sounds of

[2] These documents were designated for the record by supplemental designation of clerk's papers on April 25, 2014, but at the final draft of this brief have not yet been transmitted

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

her husband, Michael McComas, banging things around. Pretrial Exhibit 1 at p. 2. She said that when she "asked him what his problem was he screamed" offensive vulgarities at her "and then... picked up a bunch of dishes and threw them into the wall." *Id.* at 2-3. This incident is what caused the holes in the wall as observed by Deputy Cotte. *Id.* at 3. She said that she then tried to grab her cell phone and run out of the house, but that he attacked her, took her to the ground, and choked her, causing her to black out for a second. *Id.*

In her audio-statement Ms. McComas said that, when she recovered from blacking-out, Michael... "was off doing something, I don't what he was doing, breaking more stuff." *Id.* So, she ran out of the house. *Id.* But because the police station was closed for lunch, she also went to lunch (rather than immediately reporting the inciden), and afterward her friend who is the daughter of a police officer then went with her to the hospital and the police station. *Id.*

On these facts, the State charged Michael McComas with one count of assault in the second degree by strangulation with a special allegation of domestic violence. CP 72.

---

or assigned page numbers in the record.

Two and a half months later, on January 31, Deputy Noyes again interviewed Ms. McComas. RP 6-7. This second interview occurred because a deputy prosecutor asked Deputy Noyes to interview Ms. McComas again because she was recanting her prior statement. RP 7-8. At the pretrial hearing to determine the admissibility of Ms. McComas's original, November 15th statement, Deputy Noyes testified in regard to the January 31st statement as follows: "And she came in and we talked briefly and then she – initially, she was going to give me a recorded statement but then she decided she would not." RP 7-8. At this interview, Ms. McComas said she did not get strangled or choked. RP 8. She said that she had scuffled with Michael when she tried to take an iPod away from him and that as a result he had fallen on top of her. RP 8. Ms. McComas said the injury to her neck probably was caused by this fall, and she said the scratches were probably caused by her dog. RP 9-10.

At the pretrial hearing, Ms. McComas testified that she remembered going to the sheriff's office on November 15, but that "[e]verything was just a little hectic and fuzzy." RP 21. She testified that she remembered giving a statement that day, but that she did not remember that it was recorded. RP 21-22. She testified that she did not

remember the deputy advising her that her statement was given under the penalty of perjury. RP 22.

Ms. McComas was provided with a copy of a transcript of her audio-recorded statement. RP 22. The transcript was correctly marked and identified at the hearing as "Exhibit No. 1." RP 22. She indicated that she had no memory of giving the statement, to include no memory of the language where she affirmed that the statement was given under penalty of perjury. RP 22-23. She testified that, until the meaning was explained to her two days before her testimony, she did not know the meaning of the word "perjury." RP 23. Through defense questioning, she clarified that when she gave her audio-statement, she did not know the meaning of the word "perjury." RP 23. She testified that mental health issues contributed to her not fully understanding the nature of the statement. RP 24.

The trial court judge who heard the pretrial motion found that, based upon Ms. McComas's demeanor and her responses, her testimony that she did not know the meaning of the word "perjury" was not credible. RP 35; CP 6 (Finding of Fact No. 9). The trial court judge signed written findings of fact and conclusions of law that allowed Ms. McComas's

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

audio-recorded statement to be admitted at trial as substantive evidence as a *Smith* affidavit.[3] CP 4-7.

At trial, Ms. McComas testified again that Michael McComas was her husband. RP 67, 81. She testified that on November 15, 2012, she was at home in Mason County and that she woke up that day at about 9:00 or 10:00 in the morning before she had to go to work. RP 67-68. She said that she awoke to the sound of music. RP 68. She denied that she heard banging, but admitted that she remembered noise. RP 69. She testified to a lack of memory about what happened that day, and when asked to confirm the details of the incident that had occurred that morning, she now answered: "I'm not sure. Maybe." RP 69-70. She said that it was "hard to recall any details." RP 70.

Ms. McComas did, however, admit in her testimony that there were some dishes thrown during the incident. RP 70. She said that she didn't want to argue, so she grabbed her cell phone and immediately left. RP 70. But when pressed to provide details about what had happened before she left, Ms. McComas testified: "I kind of – I kind of just clouded my memory. I don't – couldn't honestly tell you now today." RP 71.

---

[3] *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982).

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

When asked whether her husband had choked her, Ms. McComas answered that she had clumsily bounced off the couch and she thought "the dogs kind of got a little rustled up." RP 71. She said, "I – that's really all I remember." RP 71. When asked again whether her husband had choked her, she said: "I don't – I honestly don't think so. I think the dog had stepped on me or something like that." RP 71.

When asked whether she remembered losing consciousness, Ms. McComas testified that she sees yellow and then blacks out when she gets really mad. RP 71-72. When questioned by the prosecutor about whether she remembered saying that she blacked out when she was choked by the defendant, she said, "Oh, no, probably from being so upset...." RP 72. She said that the only thing she could remember was a previous relationship. RP 73.

Deputy Noyes testified at trial that when he saw Ms. McComas on November 15, 2012, she had red abrasions on her neck, scratches on her chest, and a red mark on her lower back. RP 96-99. He identified exhibits 2 and 5 as photographs that accurately portrayed Ms. McComas's injuries as they appeared on November 15th. RP 96-100. These exhibits were admitted into evidence. RP 97, 100.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Deputy Cotte testified that on November 15, 2012, he went to the McComas's house and that while he was there he took two photographs of damage to the wall. RP 106. These photographs, marked as exhibits 3 and 4, were admitted into evidence. RP 106. Deputy Cotte testified that while at the McComas home he recorded Ms. McComas's audio-statement. RP 106. Deputy Cotte identified Exhibit 1 as a copy of a CD of the audio statement. RP 107. Exhibit 1 was admitted into evidence. RP 107-08. The prosecutor asked for permission to publish Exhibit 1 to the jury. RP 107. At the close of trial, Exhibit 1 was provided to the jury along with other admitted exhibits, but it is not clear whether the jury listened to the CD again. RP 196.

Before allowing publication, the trial court explained to the jury as follows:

> [M]any times we find that listening to audio here in this large courtroom with the tall ceiling, it's difficult to pick up all the words and so we do permit that you be able to read along with a written transcription of what is on the statement.
>
> But that written transcription will be picked up right after we finish listening to this. It's not something that becomes evidence.

RP 108. The transcript, which was identical to Pretrial Exhibit 1, except that it did not include a certification from the transcriptionist, was marked as Trial Exhibit 1A. The transcripts were passed out to the jury, and the

audio CD of Ms. McComas's statement was then played to the jury. RP 108-09. The bailiff then collected the written transcripts from the jury. RP 109.

After the State rested, the defendant, Michael McComas, then testified. RP 117. Mr. McComas said that on November 15, 2012, he got off work at about 7:00 a.m., then "came home about 7:30, cleaned out the litter box, did the dishes, put my pizza in the oven, and drank a few beers." RP 121. Ms. McComas woke up at about 8:30 and came out and confronted him about him making too much noise. RP 122, 132.

Mr. McComas then admitted that they began to argue and that he threw two cup-holders into the wall and caused damage to the wall. RP 122, 136-37. Mr. McComas admitted that he pulled Ms. McComas to the ground and held her down by kneeling on her arms while grabbing or pushing her shoulders with his hands, but he claimed that he did this in self-defense because she has a mental disorder and was hitting him and hitting herself. RP 122-29, 145. He explained that "you've got to hold her down with the shoulders and hold her arms down to the ground with your knees so she doesn't punch herself in the face." RP 124-25.

At the close of trial, both the State and the defense proposed self-defense instructions for the jury. RP 153-55. The court instructed the jury

on the defense of self-defense. RP 170-72; CP 34-37 (Jury Instructions 13-16).

During closing arguments, the defense began by stating to the jury "that Mr. McComas admits to having assaulted his wife, not in the sense of committing second degree assault but in the sense of self-defense." RP 187. The defense argued that "the reasonable doubt as to strangulation for second degree assault is definitely there." RP 189. The defense then addressed the lesser included offense of assault in the fourth degree, but argued the defense of self-defense. RP 189-91. The defense summed up that "[t]he proper verdict here is not guilty all the way around based on the self-defense defense that you were instructed on. And if you do not accept that, then the proper verdict is fourth degree assault with the family relation part of it." RP 192-93.

The jury returned a not-guilty verdict on the charge of assault in the second degree, but returned a guilty verdict on the lesser included offense of assault in the fourth degree, and it answered "yes" to the special verdict, finding that Michael McComas and Philana McComas were family or household members. RP 197-98; CP 16-18.

C. ARGUMENT

1. Because the trial court's findings of fact numbers 7 and 9 are supported by substantial evidence in the record, and because it was within the discretion of the trial court to make these findings of fact, the trial court did not err in making these findings.

On appeal, a trial court's findings of fact are reviewed to determine whether they are supported by substantial evidence in the record. *State v. Dobbs*, ___ Wn.2d ___, 709, 320 P.3d 705 (No. 87472-7, Mar. 13, 2014). Unchallenged findings of fact are verities on appeal. *In re Davis*, 152 Wn.2d 647, 679-80, 101 P.3d 1, 19-20 (2004). The party who challenges a trial court's finding of fact bears the burden of proving that it is not supported by substantial evidence in the record. *Id.* "'Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true.'" *Id.* at 680-81, (quoting *Ino Ino, Inc. v. City of Bellevue,* 132 Wn.2d 103, 112, 937 P.2d 154, 943 P.2d 1358 (1997), *quoted in In re Gentry,* 137 Wn.2d 378, 410, 972 P.2d 1250 (1999)).

When ruling on the defendant's pretrial motion in limine to exclude the prior inconsistent statement of the victim in this case, the court entered Finding of Fact No. 7, as follows:

> The court finds the alleged victim's testimony in this hearing to be not credible on the issue of understanding the statement was made under penalty of perjury[.]

CP 5. Additionally on this subject, the trial court entered Finding of Fact No. 9, as follows:

> The court finds the alleged victim's testimony in this hearing about understanding the meaning of the word "perjury" was not credible. The court does not find her truthful when discussing her ability to know what the word "perjury" means and finds she does understand the meaning of the word "perjury."

CP 6.

In its oral ruling, the trial court explained that its finding that the witness was not credible was based upon the witness's "demeanor and her responses." RP 35. The trial court's findings of fact are supported by substantial evidence in the record, as found at RP 20-27. Because the trial court judge is in the best position to assess the demeanor and credibility of witnesses, the reviewing court generally will not disturb those findings. *State v. Truong*, 168 Wn. App. 529, 534, 277 P.3d 74 *review denied*, 175 Wn.2d 1020, 290 P.3d 994 (2012), citing *State v. Pierce,* 134 Wn. App. 763, 774, 142 P.3d 610 (2006).

2. The trial court allowed an audio-recorded version of a witness's prior inconsistent statement to be used as substantive evidence at trial. Because the trial court correctly followed the

requirements of *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982), and ER 801(d)(1)(i) when admitting the statement, and because the witness testified at trial and was subjected to cross examination, the defendant's confrontation rights were not violated, and the court did not err by admitting the statement into evidence.

Questions of the admissibility of testimonial evidence are within the sound discretion of the trial court, and a decision to admit such evidence is reviewed for abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361-62, 229 P.3d 669 (2010) (citation omitted). "An erroneous ruling with respect to such questions requires reversal only if there is a reasonable possibility that the testimony would have changed the outcome of the trial." *Id.* at 361.

If a prior inconsistent statement satisfies the elements of ER 801(d)(1)(i), the statement is admissible as substantive evidence. *State v. Smith,* 97 Wn.2d 856, 862–63, 651 P.2d 207 (1982). To determine whether the statement is admissible, "reliability is the key." *Id.* at 861. To assess the reliability of the prior inconsistent statement, the trial court considers whether: (1) the witness voluntarily made the statement; (2) there were minimal guarantees of truthfulness; (3) the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) the witness was

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

subject to cross-examination when giving the subsequent inconsistent statement. *Id.* at 861–63.

In the instant case, the trial court correctly engaged in each of the required considerations. RP 32-35; CP 4-7. The instant case is unique, however, because, although the statement was reduced to a written transcript prior to its admission, initially the statement was audio-recorded rather than written. Trial Exhibit 1; Pretrial Exhibit 1; Trial Exhibit 1A.

First, it is apparent that the trial court correctly found that the statement was made voluntarily because the voluntary nature of the statement is apparent from the audio-recording itself and from the witness's testimony. RP 20-27, 33-34, 66-92; Pretrial Exhibit 1; Trial Exhibits 1, 1A. In *State v. Smith,* 97 Wn.2d 856, 862–63, 651 P.2d 207 (1982), the Court found that the statement at issue in that case was voluntary because the witness in that case "voluntarily wrote the statement herself." *Id.* at 863. The State asserts that, as in *Smith*, the voluntariness of the witness's statement is shown in the instant case because, although the statement in the instant case was audio-recorded rather than written, the voice on the audio-recording is the witness's own voice, the witness spoke for herself and chose her own words, and there is no hint of coercion. RP 20-27, 33-34, 66-92; Pretrial Exhibit 1; Trial Exhibits 1, 1A.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Second, the court in the instant case found that the witness's statement satisfied minimal guarantees of truthfulness. CP 7. At the close of the witness's audio-recorded statement, Deputy Cotte asked her the following question:

> And do you, Philana R. McComas, certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and your statement was made freely and voluntarily without any threats or promises of any kind?

Trial Exhibit 1A, at p. 6; Pretrial Exhibit 1, at p. 6.

The Court in *Smith* found in favor of reliability of the witness's statement in that case because the witness "swore to it under oath with penalty of perjury before a notary." *Smith*, 97 Wn.2d at 863. In the instant case, there was no notary, and the record does not support an argument that Deputy Cotte was authorized by RCW 5.28.010 to administer an oath and that the oath was administered as required by RCW 5.28.020.

But ER 801(d)(1)(i) does not require a notary or the administration of an oath in compliance with RCW 5.28.010 and .020. The audio-statement at issue in the instant case – except that it was oral rather than written – complied with the requirements of RCW 9A.72.085 because the oral declaration specifically stated that it was made under the penalty of

perjury, and the time and place of making the declaration were established by Deputy Cotte's testimony. Trial Exhibit 1A, at p. 6; Pretrial Exhibit 1, at p. 6; RP 13-15, 105-08.

The language of RCW 9A.75.085 states that the oath requirement of a court rule may be proved "by an unsworn *written* statement" that is executed in compliance with the terms of the statute. (Emphasis added). Here, the statement was initially oral, rather than written, but was reduced to writing in the form of a transcript prior to trial. Trial Exhibit 1A, at p. 6; Pretrial Exhibit 1, at p. 6; RP 13-15, 105-08.

The third *Smith* factor, that the statement was taken in one of the four legally permissible ways for determining probable cause, was established in this case. The Court in *Smith* found that "the taking of statements from witnesses and the presentment of them to the prosecuting attorney" was one of the four legally permissible ways of establishing probable cause. *Smith*, 97 Wn.2d at 862.

Finally, as in *Smith*, the witness here was subject to cross examination when she gave her subsequent, inconsistent statement at trial. RP 81-91, 92-93. Because the witness testified at trial and was subject to cross examination on both her current testimony and her prior inconsistent statement, the admission of her prior inconsistent statement into evidence

was not barred by *Crawford v. Washington*.[4] *See, e.g., State v. Grover,* 55 Wn. App. 252, 259, 777 P.2d 22, *review denied,* 113 Wn.2d 1032, 784 P.2d 531 (1989) (holding there is no violation of the confrontation clause when the defendant is given an opportunity to cross examine the declarant of a ER 801(d)(1)(iii) hearsay exception).

The Court in *Smith* found in favor of reliability of the witness's prior inconsistent statement because the witness "admitted at trial she had made the statement and gave an inconsistent statement at trial where she was subject to cross examination." *Smith*, 97 Wn.2d at 863. In the instant case the witness gave only weak admissions that she had made the prior inconsistent statement. RP 72, 76, 79. But, because her statement was audio-recorded, it was irrefutably obvious that she made the statement. Trial Exhibits 1, 1A.

In conclusion on this topic, the State avers that the trial court correctly applied the requirements of *State v. Smith,* 97 Wn.2d 856, 862–63, 651 P.2d 207 (1982), and ER 801(d)(1)(i) and properly admitted the witness's audio-recorded, prior inconsistent statement into evidence.

3. Because the prior inconsistent statement at issue in this case was audio-recorded rather than written, the witness gave an

[4] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

> oral declaration under penalty of perjury rather than a written one, and it is therefore arguable that the oath or affirmation requirement of ER 801(d)(1)(i) was not satisfied in this case. But, even if admission of the statement was error, the error is nonconstitutional, and on the facts of this case the error was harmless.

The defendant in this case was charged with assault in the second degree, but the jury was instructed in regard to both assault in the second degree and in regard to the lesser included offense of assault in the fourth degree. CP 72; CP 31-33 (Jury Instructions No. 10, 11, 12); RP 169-70.

The audio-recorded statement at issue in this case was primarily composed of the victim's statement about an act of strangulation, which supported the charge of assault in the second degree. Trial Exhibit 1, 1A; Pretrial Exhibit 1. The defendant testified and denied the act of strangulation, but he admitted the act of assault in the forth degree and claimed that is was justified as an act of self-defense. RP 122-29, 136-37, 145. During closing argument, the defendant argued his self-defense theory to the jury. RP 187-93.

Despite McComas's claims of self-defense, the jury acquitted him of assault in the second degree but found him guilty of assault in the forth degree. CP 17, 18. Substantial evidence other than the victim's audio-recorded statement supports the jury's verdict. Close scrutiny shows that

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

the victim's audio-recorded statement probably had no effect on the jury's verdict, because the statement is insubstantial in regard to the lesser included charge of assault in the fourth degree. Trial Exhibit 1, 1A. The substantial evidence the jury saw was photographs of injuries to the victim and photographs of substantial damage that McComas caused by throwing objects into the wall. Trial Exhibits 2, 3, 4, and 5. Further substantial evidence that the jury received was McComas's admission that he assaulted the victim. RP 122-29, 136-37, 145. It is apparent that the jury when weighing McComas's credibility or when considering the court's instructions on self-defense believed McComas's admission that he assaulted the victim but apparently rejected the defense of self-defense. CP 17.

"Nonconstitutional error in admitting hearsay evidence requires reversal only if it is reasonably probable that the error materially affected the trial's outcome." *State v. Neal,* 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993), citing *State v. Tharp,* 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The State contends that on the facts of this case, even if it was

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

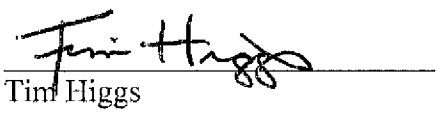
error to admit the victim's audio-recorded statement into evidence, it is improbable that the statement had any effect on the jury's verdict of guilty for the lesser included offense of assault in the fourth degree, which was admitted to by the defendant and was supported by corroborating evidence.

D. CONCLUSION

For the reasons argued above, the State respectfully requests that the Court sustain the trial court's judgment of guilty in this case for the lesser included offense of assault in the fourth degree, domestic violence.

DATED: April 28, 2014.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

MASON COUNTY PROSECUTOR

April 28, 2014 - 6:12 PM

Transmittal Letter

Document Uploaded: 449749-Respondent's Brief.pdf

Case Name: State v. McComas

Court of Appeals Case Number: 44974-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Tim J Higgs - Email: timh@co.mason.wa.us

A copy of this document has been emailed to the following addresses:

kate@washapp.org