74113-6

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Court of Appeals
Division I
State of Washington

NO. 74113-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SIMION MARTINEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUES PRESENTED

1. Where a defendant waives his constitutional right to confrontation by declining to assert it at trial, the admission of even testimonial out-of-court statements does not violate the Confrontation Clause, and an objection on confrontation grounds may not be raised for the first time on appeal. The defendant in this case did not object to the challenged testimony on confrontation grounds, the challenged statements were made in the context of informal police questioning that was necessary to assess an ongoing emergency, and there is no reasonable doubt that the outcome of the trial would have been the same had the challenged testimony not been admitted. Should this Court reject the defendant's claim that a violation of his constitutional confrontation right occurred and that he is entitled to a new trial as a result?

2. Because indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments, it is a defendant's future ability to pay that is most relevant in determining whether the imposition of appellate costs is appropriate. There is no evidence in the record in this case regarding defendant's likely future ability to pay financial

obligations. Should this Court reject the defendant's request to preemptively prohibit the award of appellate costs to the State?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Simion Martinez, with one count of assault in the second degree based on the allegation that he intentionally assaulted another and thereby recklessly inflicted substantial bodily harm. CP 1. A jury found Martinez guilty as charged, rejecting a lesser-included offense of assault in the fourth degree. CP 48-49. The trial court imposed a standard range sentence of five months in confinement. CP 51, 53. Martinez timely appealed. CP 58.

2. SUBSTANTIVE FACTS.

On an April night in 2015, Cesar Bustillo-Diaz attended a gathering at an apartment in Burien to honor a recently-deceased member of Seattle's Honduran community. 2RP[1] 47. Bustillo-Diaz

[1] The verbatim report of proceedings consists of three volumes. The first (covering September 3, 2015) is separately paginated and will be referred to as 1RP. The second and third (one covers September 8-10, 2015; the other covers September 15 and 17, and October 16, 2015) are consecutively paginated and will be collectively referred to as "2RP."

encountered Gilma,[2] an acquaintance and fellow member of the Honduran community, on the street shortly before going to the gathering, and gave her a ride there. 2RP 49-50. There were approximately 15-20 people in the apartment when Bustillo-Diaz and Gilma arrived. 2RP 51. During the approximately 30 minutes that Bustillo-Diaz spent at the gathering, he observed a man he had not met before (later identified as Martinez) drinking in the kitchen and acting rudely and aggressively. 2RP 52-53. Martinez repeatedly stated, to no one in particular, that someone needed to die that night; others at the gathering attempted to calm Martinez down. 2RP 53-54.

As Bustillo-Diaz was leaving, Gilma asked him for a ride home, and Bustillo-Diaz agreed. 2RP 54-55. Bustillo-Diaz and Gilma went to the parking lot and Gilma finished a cigarette. 2RP 55. As he waited, Bustillo-Diaz heard someone run up behind him; he turned around and saw it was Martinez. 2RP 55-56. Martinez began punching Bustillo-Diaz repeatedly in the face with both hands, continuing even after Bustillo-Diaz fell to the ground.

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[2] Bustillo-Diaz did not know Gilma's last name. 2RP 49. She is identified elsewhere in the record as Gilma Martinez and Gilma Martinez Crisanto. 2RP 38, 108. To avoid confusion with defendant Martinez, Gilma will be referred to by her first name. No disrespect is intended.

2RP 56-59. Bustillo-Diaz bled profusely from his face, and lost consciousness for a few seconds. 2RP 59. Eventually, the attack ended and police officers arrived in response to a 911 call.[3] 2RP 60.

Deputy Andrew Weekley of the King County Sheriff's Office was the first officer to arrive at the scene, and did so within three minutes of the 911 call. 2RP 30-31, 112. He observed Bustillo-Diaz bleeding near a group of 10-20 people that were mingling around outside. 2RP 31-33. Due to the size of the crowd, Weekley was concerned that the suspect might still be present or others in the crowd might be injured. 2RP 33. Leaving his recently-arrived partner with Bustillo-Diaz, Weekley quickly began to talk to the crowd, trying to get any information possible about whether the attacker was still present and whether there were any other victims. 2RP 33, 112.

[3] Unbeknownst to Bustillo-Diaz, Gilma had previously been in a dating relationship with Martinez. 2RP 100-04. The jury did not learn of the relationship, as Gilma did not appear to testify at trial and the trial court excluded testimony by the detective about their relationship as hearsay. 2RP 100-04.

Two people in the crowd gave Martinez's name as the attacker.[4] 2RP 34-35, 37. One of the two was a man who declined to provide his own name; the other was Gilma. 2RP 37-39. When Weekley attempted to get more information from Gilma, she was somewhat respectful, but not particularly cooperative. 2RP 38. She avoided questions and refused to give a written statement. 2RP 38. None of the other people present at the scene were willing to give Weekley their names. 2RP 39.

Bustillo-Diaz was transported to the hospital, where he received five to seven stitches. 2RP 60-62. At the hospital, he gave an oral statement to Officer Scott Mandella, and without hesitation identified Martinez in a photo montage as the person who had assaulted him, stating that he had no doubt. 2RP 115-16, 119-21, 126. Prior to showing Bustillo-Diaz the montage, Mandella read instructions informing Bustillo-Diaz that "the person who committed the crime may or may not be in this group of photographs" and that he was "in no way obligated to identify

[4] Weekley testified that he did not remember the exact name provided by the two people in the crowd, and that frequently a witness may provide a name that, when run through a records database, leads to a true name that is slightly different (such as Andrew versus Andy) but corresponds to the same person. 2RP 35. Weekley testified that the name he received from witnesses was a close match to the defendant's true name, which he obtained after running the name provided through a database.

anyone." 2RP 119-20. Mandella did not provide the instructions in Spanish or use an interpreter because he felt there was no need to; although English was not Bustillo-Diaz's first language, Mandella did not have any trouble communicating with him. 2RP 116, 123-24.

At trial, Bustillo-Diaz, Weekley, and Mandella testified to the facts above.[5] Bustillo-Diaz testified without the assistance of an interpreter until just before the end of the prosecutor's direct examination. 2RP 64-68. The remainder of his testimony was then completed with the assistance of an interpreter. 2RP 73. He indicated that he learned English after he moved from Honduras to the United States in 2008. 2RP 46. When testifying in English, Bustillo-Diaz struggled at times to fully understand and answer the questions asked of him. E.g., 2RP 52. After indicating that he recognized Martinez in the courtroom, he was asked how he recognized him; after expressing some confusion, Bustillo-Diaz stated, "Police officer show me picture." 2RP 52. However, he soon clarified that he had seen Martinez at the gathering before he was assaulted. 2RP 52.

[5] A detective also testified about his unsuccessful efforts to secure Gilma's presence as a witness at trial. 2RP 106-10.

Bustillo-Diaz testified that when he identified his attacker in the montage, he was "positive" he had identified the correct person, because he remembered his attacker's face and had recognized him from seeing him in the kitchen of the apartment where the gathering took place. 2RP 63. Bustillo-Diaz reaffirmed on the stand that he was "certain" that the defendant in the courtroom was the person who assaulted him. 2RP 74.

On cross-examination, Bustillo-Diaz acknowledged via the interpreter that he had told police that he had been punched from behind. 2RP 88. However, he explained that he had meant that the attacker ran up behind him, and clarified that he had turned around at that point to face the person. 2RP 94. When asked to describe his attacker without looking at Martinez in the courtroom, Bustillo-Diaz stated, "He was a person that was not too high, not too low, and dark skin and with dark hair." 2RP 92. He was not asked to clarify whether he meant dark skin for a Honduran, an African-American, or compared to a Caucasian person. 2RP 92.

Defense counsel elicited from Officer Mandella that Bustillo-Diaz had described his attacker as, in defense counsel's words, a "black/white mixed race male." 2RP 125-26. However, Mandella was not asked what words Bustillo-Diaz himself used, nor was

Bustillo-Diaz given the opportunity to explain what skin tone he associated with "black/white mixed race," or whether he considered that description consistent with his testimony at trial that the attacker had "dark skin."

Martinez did not testify or call any witnesses. 2RP 148. In closing argument, he argued both that he was not the person who assaulted Bustillo-Diaz and that Bustillo-Diaz did not suffer substantial bodily harm. 2RP 186. In attacking the reliability of Bustillo-Diaz's identification of Martinez as his attacker, Martinez's principal arguments were that that he "is not light skinned,"[6] and thus did not fit the description initially given by Bustillo-Diaz, and that when Bustillo-Diaz was asked how he recognized Martinez in the courtroom, his initial response referenced being shown Martinez's photo by the police. 2RP 187.

Additional facts are presented below in the sections to which they pertain.

[6] Other than defense counsel's assertion that Martinez "is not light skinned" and Bustillo-Diaz's testimony that his attacker, who he identified as Martinez, had "dark skin," there is no evidence in the record to establish Martinez's true skin tone, as the photo montage admitted at trial was in black and white. 2RP 187.

C. ARGUMENT

1. THE ADMISSION OF NON-TESTIMONIAL HEARSAY DID NOT VIOLATE MARTINEZ'S CONSTITUTIONAL RIGHT TO CONFRONTATION.

Martinez contends that the admission of testimony by Deputy Weekley about learning Martinez's name from the crowd at the scene violated his right to confrontation under the federal and state constitutions. This claim should be rejected. Martinez may not assert his confrontation right for the first time on appeal, the challenged statements were not testimonial, and any error was harmless beyond a reasonable doubt.

a. Additional Relevant Facts.

During Weekley's testimony about getting a suspect name from the crowd at the scene, the prosecutor asked him what the name was. 2RP 35. Martinez objected solely on hearsay grounds. 2RP 35. The prosecutor responded that the answer would be a statement "for identification," and the trial court overruled the objection.[7] 2RP 35. When Weekley answered by explaining that the name given by the two people in the crowd led him to Martinez's legal name, defense counsel objected again on the

[7] Under ER 801(d)(1)(iii), "[a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person."

grounds that the answer contained hearsay and was not responsive to the question asked. 2RP 36. The trial court again overruled the objection, stating, "Exception to the hearsay [rule] is identification." 2RP 36. At no point did Martinez raise an objection on Confrontation Clause grounds. 2RP 35-36.

Later during the trial, Officer Mandella testified without objection that he already had the suspect's name when he prepared the montage for Bustillo-Diaz because Weekley had learned that information from a witness at the scene and had relayed it to Mandella. 2RP 116. Although Mandella did not explicitly state that the suspect identified by the witness was Simion Martinez, that fact was clearly implied by Mandella's surrounding testimony. 2RP 116-21, 126. Martinez assigns no error on appeal to the admission of Mandella's testimony. Br. of Appellant at 1.

b. Martinez May Not Assert His Right To Confrontation For The First Time On Appeal.

i. The right to confrontation is waived if not asserted at trial; RAP 2.5 does not apply.

The Confrontation Clause states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI; see also art. I, § 22 ("In criminal prosecutions the accused shall have the

right ... to meet the witnesses against him face to face."). This Court has held that "United States Supreme Court precedent establishes that it is a defendant's obligation to raise at or before trial a Sixth Amendment Confrontation Clause objection to the admission of statements made by an absent witness. A failure to assert the right at or before trial results in the right being forgone." State v. O'Cain, 169 Wn. App. 228, 232, 279 P.3d 926 (2012); accord Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 2534 n.3, 174 L. Ed. 2d 314 (2009) ("The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections."). The same is true of the confrontation right afforded by article I, section 22. O'Cain, 169 Wn. App. at 252.

This Court has established that Washington's Evidence Rule 103 is one of the "procedural rules governing the exercise of" objections on confrontation grounds referenced in Melendez-Diaz. Id. at 243. ER 103 states, "Error may not be predicated upon a ruling which admits or excludes evidence unless ... a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context."

ER 103(a)(1). An objection in the trial court on different grounds than those argued on appeal is not sufficient to preserve the alleged error. Trueax v. Ernst Home Ctr., Inc., 124 Wn.2d 334, 339, 878 P.2d 1208 (1994).

Considering any confrontation objection to be waived if not asserted at trial is necessary and appropriate because "defense counsel will often decline to raise a confrontation clause objection to proffered evidence due to 'strategic considerations.'" O'Cain, 169 Wn. App. at 245 (quoting Melendez-Diaz, 129 S. Ct. at 2542). A contrary rule would undermine "the integrity of judicial proceedings" by permitting a defendant "to sit on his rights, bet on the verdict, and then, if the verdict is adverse, gain a retrial by asserting his rights for the first time on appeal." Id. at 243. Additionally, requiring a trial court "to *sua sponte* raise a Confrontation Clause objection where defense counsel has determined that no such objection should be interposed or that cross-examination is unnecessary . . . . would impose an impermissible burden on the attorney-client relationship protected by the Sixth Amendment." Id. (citing In re Pers. Restraint of Lord, 123 Wn.2d 296, 317, 868 P.2d 835 (1994)).

For the foregoing reasons, this Court has determined that RAP 2.5, which generally permits appellate review of a manifest constitutional error even if it was not raised below, may not be used to raise a Confrontation Clause challenge for the first time on appeal. Id. at 246; RAP 2.5(a)(3). Although Washington appellate decisions prior to Melendez-Diaz permitted such a claim, this Court has determined that they are no longer good law in that regard in light of Melendez-Diaz and subsequent United States Supreme Court precedent. O'Cain, 169 Wn. App. at 246 (holding that State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007) is inconsistent with Melendez-Diaz, and thus was overruled by State v. Jasper, 174 Wn.2d 96, 100, 271 P.3d 876 (2012)); but see State v. Fraser, 170 Wn. App. 13, 26-27, 282 P.3d 152 (2012) (acknowledging that "[a]rguably, RAP 2.5(a) is a procedural rule by which Washington State allows defendants to raise confrontation clause objections for the first time on appeal if they can show a manifest error," but holding that if so, alleged error was not manifest).

Because RAP 2.5 does not trump the requirement that a defendant assert his confrontation right at trial or forever waive any objection, Martinez's failure to raise a Confrontation Clause

objection in the trial court precludes review of his claim on appeal. See O'Cain, 169 Wn. App. at 246.

ii. Even if this Court were to consider this claim under RAP 2.5, Martinez has failed to establish that a manifest constitutional error occurred.

In order to have a claim reviewed for the first time on appeal under RAP 2.5, a defendant must demonstrate that the error is (1) manifest, and (2) of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5(a). Not every alleged constitutional error is a manifest constitutional error. State v. Lynn, 67 Wn. App. 339, 343-44, 835 P.2d 251 (1992) ("[I]t is important that 'manifest' be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals."). A manifest error is an error that is unmistakable, evident or indisputable and that causes "actual prejudice" by having "practical and identifiable consequences in the trial of the case." State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015); State v. Hayes, 165 Wn. App. 507, 514-15, 265 P.3d 982 (2011).

The Confrontation Clause bars the admission of "testimonial" hearsay unless the declarant is unavailable to testify and the

defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The prosecution has the burden of establishing that statements are nontestimonial. O'Cain, 169 Wn. App. at 235 (citing State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009)). However, "a defendant properly put[s] the government to its burden . . . . by asserting the right [to confrontation] at trial." Id.

Thus, in the absence of a Confrontation Clause objection by a defendant at trial, the right to confrontation "is forfeited by the defendant, [and] nothing the trial court does or fails to do is a denial of the right[;] . . . if there is no denial of a right, there is no error by the trial court, manifest or otherwise, that an appellate court can review." State v. Fraser, 170 Wn. App. 13, 25-26, 282 P.3d 152 (2012) (describing rationale of O'Cain with approval). This Court has held in the alternative that even if a defendant's Confrontation Clause right could be violated without being asserted in the trial court, the alleged error is not manifest where the challenged evidence is cumulative of other evidence. Fraser, 170 Wn. App. at 26-29.

Here, there was no manifest Confrontation Clause error by the trial court. Even if the trial court had been obligated to *sua*

sponte raise a confrontation objection on Martinez's behalf, the now-challenged testimony by Weekley was cumulative and nearly identical to unchallenged testimony by Mandella. Martinez has thus failed to establish that the admission of Weekley's testimony regarding the out-of-court witness statements was a manifest constitutional error. See id. at 26-29. This Court should therefore decline to review Martinez's confrontation claim.

c. Even If This Court Reaches The Merits Of Martinez's Confrontation Claim, The Claim Must Fail Because The Out-Of-Court Statements Were Not Testimonial.

In determining the limits of the Confrontation Clause, the question posed by the United States Supreme Court in Davis v. Washington was whether, objectively considered, interrogations that took place produced testimonial statements. 547 U.S. 813, 826-30, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Statements that are "testimonial" cause the declarant to be a "witness" within the meaning of the Confrontation Clause. Id. at 821 (citing Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional

limitations upon hearsay evidence, is not subject to the Confrontation Clause." Id. at 821.

A statement is testimonial if it is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Id. at 826 (quoting Crawford, 541 U.S. at 51). The United States Supreme Court adopted the following test:

> 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. 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. at 822 (footnote omitted).

The Supreme Court held that the hearsay statements in a 911 call in Davis were not testimonial because the circumstances "objectively indicate [the call's] primary purpose was to enable police assistance to meet an ongoing emergency." Id. at 828. In determining whether the statements were testimonial, the Court focused on differences between the 911 operator's questions in Davis and the interrogation in Crawford. In Davis, the victim on the call was describing events as they actually happened, the victim

was facing an ongoing emergency, the answers were necessary for law enforcement to resolve the emergency, and the questioning during the call was less formal than the structured formal interrogation in Crawford concerning past events. Id. at 827-28. A 911 operator's questions about surrounding circumstances, including the identity of the alleged assailant, are relevant "so that the dispatched officers might know whether they would be encountering a violent felon." Id. The Supreme Court also noted that:

> the difference in the level of formality between the two interviews [Crawford versus Davis] is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

Id.

In contrast, the Davis court held that where a different victim gave a statement to police about what had occurred in a domestic violence incident that had since ended, the statements were testimonial. Id. at 829-30. The Court explained that, like in Crawford, the officer had determined that there was no ongoing emergency, and was simply trying to determine "what happened"

rather than "what is happening." Id. The Court determined that the questioning was "formal enough," noting that the suspect has been removed from the room and prevented from intervening, and the questioning was intended solely to further the officer's criminal investigation. Id. at 830.

The Washington Supreme Court has explained that the primary purpose test "requires courts to make an objective appraisal of the interrogation itself." State v. Ohlson, 162 Wn.2d 1, 11, 168 P.3d 1273 (2007). The court identified the factors that informed the decision in Davis regarding the primary purpose of police questioning and resulting statements: "(1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation." Id. at 11-12.

Here, the primary purpose of Deputy Weekley's questioning of the crowd at the scene was to enable the responding officers to meet and resolve what was, as far as they knew, an ongoing emergency. Weekley arrived within three minutes of the 911 call, and immediately saw that Bustillo-Diaz was bleeding profusely next to a large crowd. 2RP 30-31. He was concerned about whether the attacker was still present in the crowd and whether there were

other victims who needed aid, and those were the questions he promptly asked the crowd. 2RP 33. Weekley's testimony establishes that, as far as he knew, the situation posed an ongoing threat of harm, and his questions of the crowd were designed to quickly elicit the information needed to assess and resolve the emergency.

Moreover, the circumstances were incredibly informal. Rather than sitting down with an identified witness after the emergency was over to take a statement about what had happened in the past, as was the case with the statements *that were* found to be testimonial in Davis and Crawford, Weekley was addressing a large and unidentified crowd in an attempt to quickly get basic information necessary to determine what was happening at the time in order to address the potentially-ongoing emergency. While the record indicates that Weekley at some point spent a "long time" trying to get information from Gilma, it does not indicate that this was prior to her and the unidentified male initially providing Martinez's name. 2RP 37-39.

The record establishes that the challenged statements occurred in response to informal police questioning that occurred very soon after the assault and was necessary for the officers to

assess and resolve what was, as far as they reasonably knew, an ongoing emergency. The statements were therefore not testimonial, and their admission did not implicate Martinez's confrontation right.

d. Even If This Court Were To Determine That Martinez's Confrontation Right Was Violated, The Error Was Harmless Beyond A Reasonable Doubt.

A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Any constitutional error in allowing Weekley to testify that he received Martinez's name from witnesses at the scene was harmless beyond a reasonable doubt.

Bustillo-Diaz had a prolonged opportunity to observe Martinez prior to the assault, as he had noted Martinez's presence in the kitchen and his aggressive behavior throughout the 30 minutes that Bustillo-Diaz spent in the apartment. Bustillo-Diaz was face to face with Martinez immediately before and during the assault, and instantly recognized him from seeing him in the apartment. When presented with a montage of six very similar

looking men shortly after the assault, Bustillo-Diaz identified Martinez as his attacker immediately and with complete confidence.

Bustillo-Diaz identified Martinez again at trial as the man he had seen in the kitchen and the man who had attacked him, indicating once more that he was completely certain. Martinez identified no true weaknesses in either of Bustillo-Diaz's identifications—the things that he argued should trouble the jury had either been satisfactorily explained by Bustillo-Diaz, or were things that Bustillo-Diaz had not been given the opportunity to explain but were easily explicable by cultural differences and Bustillo-Diaz's imperfect grasp of English. In contrast, the jury heard no details that would have allowed them to assess the basis for the out-of-court identification of Martinez by Gilma and the unidentified male. Given the jurors' inability to assess the reliability of the information provided to Weekley, it is unlikely that they placed any significant weight on the challenged testimony.

Finally, even had the challenged testimony by Weekley not been admitted, the jury would still have heard nearly identical unchallenged testimony by Mandella. In light of the above, this Court should reasonably be convinced beyond a reasonable doubt

that the jury's verdict would have been the same had the challenged testimony not been admitted.

e. To The Extent Martinez Also Assigns Error To The Trial Court's Overruling Of His Hearsay Objection, The Error Was Harmless.

Martinez assigns error on appeal only to the alleged violation of his constitutional right to confrontation. However, to the extent that this Court rejects his Confrontation Clause challenge but interprets his opening brief as also assigning error to the trial court's ruling on the basis that it was contrary to the rules of evidence, this Court should find that the error was harmless.

The State concedes that admission of the out-of-court statements through Weekley was not proper under ER 801(d)(1)(iii), as the prosecutor and trial court believed, because that rule requires that the declarant testify at trial (and has done so since long before Crawford). However, where there is no violation of the Confrontation Clause, the erroneous admission of hearsay evidence is not of constitutional magnitude. State v. Greiff, 141 Wn.2d 910, 928, 10 P.3d 390 (2000). A non-constitutional error is harmless if there is not a reasonable probability that the outcome of the trial would have been materially affected had the error not

occurred. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

For all the reasons articulated above regarding the harmlessness beyond a reasonable doubt of the alleged error, it is even more clear that there is no reasonable probability that the outcome of the trial would have been materially affected had the challenged statements not been admitted. This Court should therefore also reject any implicit claim that Martinez is entitled to a new trial on non-constitutional grounds, and should affirm his conviction.

2. THE IMPOSITION OF APPELLATE COSTS IS APPROPRIATE IF THE STATE PREVAILS IN THIS APPEAL.

Martinez asks this Court to rule that, should the State prevail on appeal, Martinez should not be required to repay appellate costs on the grounds that he is currently indigent. This claim should be rejected. It is a defendant's future ability to pay costs, rather than his present ability, that is most relevant in determining whether it would be unconstitutional to require him to pay appellate costs. Because the record contains no information from which this Court could reasonably conclude that Martinez has no likely future ability

to pay, this Court should not forbid the imposition of appellate costs.

As in most cases, Martinez's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the record contains almost no information about Martinez's financial status or employment prospects, and the State did not have the right to obtain information about his financial situation.

Martinez obtained an ex-parte Order Authorizing Appeal In Forma Pauperis after presenting a declaration regarding his current financial circumstances. CP 59-64. The declaration contained no information about Martinez's employment history, potential for future employment, or likely future income, nor did the trial court make any findings regarding Martinez's likely future ability to pay financial obligations. CP 59-64.

It is a defendant's future ability to pay, rather than simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to

enforce collection of the assessments). The record is devoid of any information that would support a finding that the defendant is unlikely to have any future ability to pay appellate costs.

Martinez is only 31 years old, and received a sentence that involved no additional confinement after sentencing. CP 3, 52. He thus has the vast majority of his working years ahead of him. Because the record in this case contains no evidence from which this Court could reasonably conclude that the defendant has no future ability to pay appellate costs, any exercise of discretion by this Court to prohibit an award of appellate costs in this case would be unreasonable and arbitrary.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Martinez's conviction and allow the imposition of appellate costs.

DATED this 19th day of July, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
STEPHANIE FINN GUTHRIE, WSBA #43033
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Dana Nelson, the attorney for the appellant, at Nelsond@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Simion Martinez, Cause No. 74113-6, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 19th day of July, 2016.

C Brame

Name:
Done in Seattle, Washington