SUPREME COURT NO. 94223-4

COURT OF APPEALS NO. 74113-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

SIMION MARTINEZ,

Petitioner.

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

The Honorable Leroy McCullough, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Simion Martinez asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Martinez seeks review of the court of appeals decision in State v. Martinez, COA No. 74113-6-I, filed January 17, 2017, attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the court's admission of testimonial hearsay over defense counsel's hearsay objection violated appellant's constitutional right to confront his accusers?

2. Whether the court of appeals decision that a hearsay objection is insufficient to preserve a confrontation clause issue conflicts with this Court's decision in State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012)?

D. STATEMENT OF THE CASE

1. Trial

Following a jury trial, Martinez was convicted of second degree assault of Cesar Bustillo-Diaz. CP 50-56, 58. The state alleged Martinez punched Bustillo-Diaz several times just after

midnight on April 13, 2015, when the two reportedly attended the same wake/memorial at a Burien apartment complex. CP 1-6.

Deputy Andrew Weekley responded to the reported disturbance. RP 29-30. When he arrived, "there was tons of people outside just kind of milling about." RP 31. He noticed Cesar Bustillo-Diaz was bleeding from his face. RP 31-32.

Weekley left Bustillo-Diaz with his partner Scott Mandella and began speaking to the crowd of 15-20 people, "just trying to get any information I could." RP 33. Defense counsel objected – but was overruled – when the prosecutor inquired whether Weekley was able to obtain the suspect's name from the crowd:

> Q. Okay. Did the information you gathered from them help you identify who the suspect was?
>
> A. Yes.
>
> Q. Did you eventually get a name?
>
> A. Yes.
>
> Q. And what was that name?
>
> MS. POLLOCK [defense counsel]: I'm going to object, it's hearsay.
>
> MR. KIM [prosecutor]: For identification.
>
> MS. POLLOCK: But it's not – he's not the one who's doing the identifying.

A. A possible suspect.

THE COURT: Your further comment regarding the objection, Mr. Kim?

MR. KIM: It's for identification.

THE COURT: The objection will be overruled.

RP 34-35.

The prosecutor asked the name of the potential suspect, but Weekley could not remember exactly; however, the name the crowd gave him was close to what he ultimately came up with, after running the name through a database:

> I can't give you the exact, because they said – I remember, and then in my report as well, I remember it being a close match to the person, and that happens all the time. We'll get, you know, Andre Weekley for me, and so I put in A. Weekley in our little search, and it would come back Andy Weekley or Andrew Weekley. And I go, hey, that's – that's a possibility. Ages match, you know, sexes match. So I don't' know the exact name and date of birth I had originally, but through our databases we were able to come up with the name of Simon Martinez.

RP 36.

Defense counsel again objected but the court ultimately allowed Weekley to testify this was the name he was given by the crowd:

> MS. POLLOCK: I'm going to object and move to strike. Now he's not – the question – or – and it's

also nonresponsive. The question was what information he got from the people there, and now he's telling about information he got from his databases.

THE COURT: Sustained. Redirect the witness.

MR. KIM: I will, Your Honor.

Q. Did you get information from these witnesses?

A. Yes.

Q. Did that eventually lead to a name of a suspect?

A. Yes.

Q. What was the name of that suspect?

A. Sorry, Simon Martinez.

MS. POLLOCK: I'm going to object again.

MR. KIM: It's already been ruled on, your Honor.

THE COURT: Just a second. What is the objection now?

MS. POLLOCK: Well, he's giving information that maybe came from some other source that's hearsay, and he's saying eventually, and it's still nonresponsive to the question.

THE COURT: Objection overruled. Exception to the hearsay is identification.

You may answer the question. What's the name?

A. Simon Martinez.

RP 36.

Weekley later clarified he meant "Simion" Martinez. RP 37. Weekley testified the information he gathered came from two people in particular, a man who he did not identify and a woman named Gilma Martinez Crisanto. RP 37-38.

Bustillo-Diaz testified he went to the memorial around midnight. RP 46-49. While on his way, he saw Crisanto, whom he knew only as "Gilma" and offered to give her a ride. RP 50.

Bustillo-Diaz estimated there were about 20 people at the memorial. He testified he recognized Martinez from a picture a police officer later showed him at the hospital. RP 52.

Bustillo-Diaz had two beers at the memorial and left with Cristanto after about 30 minutes. RP 51, 54-55, 78. Bustillo-Diaz testified that while Crisanto was smoking a cigarette in the parking lot, he heard someone running towards him. RP 56. According to Bustillo-Diaz, "And I just turn around and see – and just – that guy just hit me a lot, a lot of times." RP 56. Bustillo-Diaz said it was the defendant. RP 56, 74.

When the fight was over, someone called 911. RP 60. After speaking to police, Bustillo-Diaz went to the hospital. RP 60. The state offered no medical testimony, but Bustillo-Diaz claimed he received 5-7 stitches on his face. RP 62.

Weekley's partner Scott Mandella arrived at the apartment complex shortly after Weekley. RP 112. Mandella testified Weekley appeared successful in speaking to some of the crowd members, including a woman. RP 113-14.

Mandella went to the hospital and took a verbal statement from Bustillo-Diaz. RP 115. Bustillo-Diaz described his attacker as "a black/white mixed race male." RP 126.

Mandella went back to the police station to create a photo line-up. In creating the line-up, Mandella explained Weekley relayed to him the name of a suspect. RP 116. As Mandella testified, "Deputy Weekley relayed that information to me that was given to him from another witness on scene." RP 116. Although Bustillo-Diaz described his attacker as "a black/white mixed race male," Mandella chose men with "[d]ark skin" or "black" men. RP 118.

While Bustillo-Diaz was still at the hospital, Mandella showed him the photo line-up. RP 62, 119. Bustillo-Diaz testified he

assumed the person who hit him was in the photographs. RP 76. Mandella acknowledged that although montage instructions written in Spanish were available, he provided Bustillo-Diaz with English instructions.[1] RP 123. Bustillo-Diaz picked #3 as his attacker, whom Mandella identified as Martinez. RP 62-63, 126.

Bustillo-Diaz testified never saw Martinez before that night. RP 79.

In closing, the defense disputed the state proved it was Martinez who assaulted Bustillo-Diaz. RP 186. The defense pointed out that Bustillo-Diaz described his attacker as a "black/white mixed race male," whereas Martinez "is not light skinned." RP 187. Defense counsel also pointed out Bustillo-Diaz initially testified he recognized Martinez from the pictures police showed him. RP 187. Moreover, Bustillo-Diaz acknowledged he assumed his attacker was among the photos the police showed him. RP 188. And no one else from the party testified. RP 189.

After three hours of deliberating, the jury informed the court it would be unable to reach a verdict. RP 202-205. Nonetheless, the court directed the jury to resume deliberating. RP 206. The jury

[1] Towards the end of his testimony, Bustillo-Diaz indicated he would feel more comfortable with a Spanish interpreter and was provided one for the end of his direct and cross-examination. RP 68, 73.

ultimately convicted after another day and a half of deliberations. RP 206-211.

2. Appeal

Over defense counsel's hearsay objection, the prosecutor was allowed to elicit from trooper Weekley that various attendees – at least two in particular – identified Martinez as Bustillo-Diaz's attacker. On appeal, Martinez argued that contrary to the trial court's ruling, these out-of-court accusations were not admissible under the identification exception to the hearsay rule. Moreover, Martinez argued their admission violated his right to confront his accusers. Because identity was the main issue at trial, and because there were reasons to doubt Bustillo-Diaz's identification, Martinez argued his conviction should be reversed. Brief of Appellant (BOA) at 10-18.

Division One held that because defense counsel did not expressly object on confrontation clause grounds the issue could not be raised for the first time on appeal. According to the court, the issue could be raised only under the guise of ineffective assistance of counsel. Appendix at 5-7.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

BECAUSE THE APPELLATE COURT'S DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S OPINION IN STATE V. JASPER,[2] THIS COURT SHOULD ACCEPT REVIEW.

The court of appeals decision holds that a hearsay objection is insufficient to preserve a confrontation clause violation. Appendix at 7 (citing State v. O'Cain, 169 Wn. App. 228, 247-48, 279 P.3d 926 (2012)). The appellate court is wrong. Under this Court's decision in State v. Jasper, a hearsay objection adequately apprises the court of the confrontation clause issue. Division One's assertion that defense counsel's objection to "hearsay" leaves the court "in the untenable position of either sua sponte interposing a confrontation clause objection or knowingly presiding over a trial headed for likely reversal on appeal" is unfounded. See Appendix at 6. Testimonial hearsay is still *hearsay*. The court could have avoided the confrontation clause error simply by sustaining defense counsel's proper objection. This Court should accept review. RAP 13.4(b)(1).

An accused person has both state and federal constitutional rights to confront witnesses. Article I, section 22 guarantees an

[2] State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012).

accused shall have the right . . . to meet the witnesses against him face to face. Wash. Const. art. I, § 22 (Amend. 10). Likewise, the Sixth Amendment protects the right of the accused to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The essence of the right to confrontation is the right to meaningfully cross-examine one's accusers. Id. at 50, 59. Consequently, unless the speaker is unavailable and the accused had an earlier opportunity to cross-examine, hearsay evidence of a testimonial statement is inadmissible. Id. at 68.

"Hearsay" is any out-of-court statement offered as "evidence to prove the truth of the matter asserted." ER 801(c); ER 802; State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991). The "core class" of testimonial statements includes those "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.

Trooper Weekley's testimony included out-of-court statements of witnesses who did not testify – at least two, an unidentified man and Gilma Cristanto. In testifying that through talking to these individuals and possibly other crowd members, he obtained the name of a potential suspect – Simion Martinez. Weekley essentially told the jury these other people identified Martinez as Bustillo-Diaz's attacker.

Contrary to the trial court's ruling, the out-of-court statements of these non-testifying witnesses were not admissible as statements made for identification under ER 801(d)(1)(iii) because Weekley was not the individual who made the identification. State v. Grover, 55 Wn. App. 252, 257, 777 P.2d 22 (1989) (witness' statement to police identifying Grover as the robber was admissible through the officer, because even though the witness testified she did not remember her identification, she was in court and subject to cross examination).

Based on the factors addressed in Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), Weekley's repetition of what the non-testifying witnesses told him amounted to testimonial hearsay. The police questioning of the witnesses in the parking lot, including Crisanto and the other

unidentified witness, was somewhat formal. Weekley testified Crisanto was "respectful but uncooperative." RP 38. As Weekley explained, "It took a very long time for me to get information from her, because she was avoiding the questions, didn't want to talk to me, didn't – didn't want to help out." RP 38. Whether that qualifies as "formal" under Crawford, it was, in the words of the Davis Court, formal enough. Id. at 830.

More significant, however, is the fact that the assault already occurred and Weekley was "trying to figure out if the bad guy was still there, and other victims, who saw it, just trying to get any information I could." RP 33. The witnesses' statements were made in the midst of a crime scene investigation, not while reacting to meet an ongoing emergency. The witnesses' statements therefore were within that core class of statements a reasonable person would expect to be used prosecutorially. Such is also evident from the fact Crisanto did not want to talk to police and the fact the other unidentified witness did not give his name. RP 38-39.

Based on the pertinent Davis factors, the witnesses' out-of-court statements were testimonial and prohibited by the confrontation clause. As Simion argued on appeal, the court erred in overruling defense counsel's timely objection and allowing such

testimony, which the state thereafter elaborated on several times more.

But Division One refused to consider the issue on grounds defense counsel did not say the magic words. The appellate court's decision is contrary to this Court's decision in Jasper, wherein this Court reached the merits of the confrontation clause issue even though defense counsel likewise did not say the magic words.

At issue in Jasper and its companion cases was whether the certifications as to the existence or nonexistence of records were testimonial for purposes of the confrontation clause. Jasper, 174 Wn.2d at 108. In one of the companion cases, Moimoi was charged with unregistered contracting. A construction compliance inspector (Mathew Jackson) testified he was in charge of investigating a complaint regarding Moimoi. Jackson testified he had access to a department of labor and industries (DLI) database of contractors he could search to determine whether a particular contractor was registered. He also testified he checked the database to see if Moimoi was a registered contractor. However, he did not tell the jury the results of his search. Jasper, 174 Wn.2d at 107.

During Jackson's testimony, the state admitted into evidence a certification authored by Pamela Bergman, the clerical supervisor for the contractor registration section of DLI. The following exchange took place:

> [State]: Again, Mr. Jackson, how – how did you determine whether or not Mr. Moimoi was a registered contractor?
>
> [Jackson]: Well, any time that we issue a civil infraction or a complaint with the King County Prosecutor's Office we obtain a search of the records letter, which is a sealed letter from the supervisor or the keeper of the records of – of the contractor file section.
>
> That person will type the letter out, basically stating the individual person's registration status and seal that letter as a – authenticated document of that's [sic] person's status as a registered contractor.
>
> [State]: Mr. Jackson, I'm handing you what's been marked as State's Exhibit 1, do you recognize that?
>
> [Jackson]: Yes, I do.
>
> [State]: How do you recognize that?
>
> [Jackson]: This is the letter that I just explained to you about. It's from Pamela Bergman (phonetic) and Pamela is the keeper of the – the supervisor of the records – the files for the contractors in Olympia.

Jasper, at 107 (citation to record omitted).

Bergman's certification stated:

> [W]e have searched our records from January 1980, to the present and are unable to locate a previous or current registration for Laki Moi Moi [sic] under that specific name located at 10118 Des Moines Memorial Drive, Seattle WA 98168 doing business as L & L Concrete, Seattle Concrete and Landscape as being registered with this section as a specialty or general contractor.

Jasper, at 107 (citing to record omitted).

Moimoi objected to the introduction of the certification on the ground it was made for purposes of litigation and was not routinely kept in the course of the agency's business. The district court overruled the objection, concluding it was a self-authenticating business record. The jury found Moi Moi guilty. Id. at 108.

Moimoi appealed to the Superior Court, where he argued the certification was testimonial. The court disagreed. Moimoi's motion for discretionary review was transferred to this Court. Relying on the recent decision in Melendez-Dias v. Massachusetts, 557 U. S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), this Court held admission of the certification violated Moimoi rights under the confrontation clause. Jasper, 174 Wn.2d at 116.

Most significant here, this Court rejected the state's argument Moimoi's objection was insufficient to preserve the confrontation clause issue:

> In Moimoi, the State contends the constitutional argument was not adequately raised at trial and should therefore not be reviewed. We disagree. Though Moimoi did not directly reference the confrontation clause in objecting to the admission of the certification, we conclude his objection sufficiently preserved the issue for appeal. The constitutional ground was readily apparent from his claim that the certification was a record prepared solely for use at trial, which does not qualify as a business or public record under RCW 5.45 or RCW 5.44.040. Such records are plainly subject to confrontation clause analysis. See [Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)]. That Moimoi's objection was sufficient to apprise the court and counsel of the confrontation clause issue is supported by the fact that the State litigated the issue in the superior court without protest and supported Moimoi's motion for discretionary review on the sole issue of the alleged confrontation clause violation.

Jasper, 174 Wn.2d at 108, n.2 (emphasis added).

Moimoi's speaking objection was tantamount to objecting that the certification did not qualify as a business record. And this Court held that was sufficient to apprise the trial court of the confrontation clause issue.

Under this Court's reasoning in Moimoi, defense counsel's objections here that the prosecutor was calling for "hearsay" and

"information that came from some other source that's hearsay" was sufficient to apprise the court and counsel of the confrontation clause issue. These objections were made while the officer was about to testify as to what other people told him. The confrontation clause issue was abundantly clear both from the context and the nature of defense counsel's objections.

In holding the issue was not preserved, Division One relied on its earlier decision in O'Cain, 169 Wn. App. 228. But O'Cain is wholly inapposite. There, the objection to the out-of-court statements was *relevance*. O'Cain, 169 Wn. App. at 234. Whereas testimonial hearsay is still hearsay, testimonial hearsay is not necessarily irrelevant. Therefore, whereas a hearsay objection is sufficient to apprise the court and counsel of the confrontation clause issue, a relevance objection is not. The two situations are not in any way similar. When the objection is relevance, Division One's observation that failing to hold the defense to its burden to object on confrontation clause grounds puts the court in an untenable position of interposing its own objection or knowingly presiding over a trial that may likely be reversed on appeal. But this rationale does not hold water when the objection is hearsay.

Division One's decision goes too far and is illogical. This Court should accept review. RAP 13.4(b)(1).

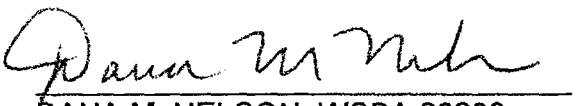
F. CONCLUSION

The appellate court's decision is illogical and conflicts with this Court's decision in Jasper. This Court should accept review. RAP 13.4(b)(1).

Dated this 16th day of February, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SIMION MARTINEZ, Appellant.	No. 74113-6-I DIVISION ONE UNPUBLISHED OPINION FILED: January 17, 2017

APPELWICK, J. — During Martinez's trial for second degree assault, his counsel objected on hearsay grounds to testimony identifying Martinez as the assailant. For the first time on appeal, Martinez contends the testimony violated his right to confront the witnesses against him. This contention cannot be raised for the first time on appeal. We affirm.

FACTS

Based on allegations that Martinez punched Cesar Bustillo-Diaz during a wake at a Burien apartment complex, the State charged him second degree assault.

At trial, King County Sheriff's Deputy Andrew Weekley testified that on April 13, 2015, he responded to a report of a disturbance at an apartment complex. When he arrived, "there w[ere] tons of people outside just kind of mingling around." One man, Cesar Bustillo-Diaz, was bleeding from his face. Concerned that "somebody else might be injured" and/or that the "suspect might be there," Deputy Weekley

began speaking to the crowd "trying to figure out if the bad guy was still there, any other victims, who saw it, just trying to get any information I could."

The prosecutor inquired whether Weekley was able to obtain the suspect's name from the crowd:

> [PROSECUTOR:] Okay. Did the information you gathered from them help you identify who the suspect was?
>
> [DEPUTY WEEKLEY:] Yes.
>
> [PROSECUTOR:] Did you eventually get a name?
>
> [DEPUTY WEEKLEY:] Yes.
>
> [PROSECUTOR:] And what was that name?
>
> > [DEFENSE COUNSEL]: I'm going to object, it's hearsay.
> >
> > [PROSECUTOR]: For identification.
> >
> > [DEFENSE COUNSEL]: But it's not -- he's not the one who's doing the Identifying.
>
> [DEPUTY WEEKLEY:] A possible suspect.
>
> > THE COURT: Your further comment regarding the objection, Mr. Kim?
> >
> > [PROSECUTOR]: It's for identification.
> >
> > THE COURT: The objection will be overruled.

(Emphasis added.)

When the prosecutor asked for "the possible suspect's name that you gathered from this crowd," Deputy Weekley testified:

> I can't give you the exact [name]. . . . I remember it being a close match to the person, and that happens all the time. We'll get, you know, Andre Weekley for me, and so I put in A. Weekley in our little search, and it would come back Andy Weekley or Andrew Weekley. And I go, hey, that's – that's a possibility. Ages match, you know, sexes match. So I don't know the exact name and date of birth I

had originally, but through our databases we were able to come up with the name of Simon Martinez.

Defense counsel objected again:

> [DEFENSE COUNSEL]: I'm going to object and move to strike. Now he's not -- the question -- or -- and it's also nonresponsive. The question was what information he got from the people there, and now he's telling about information he got from his databases.
>
> THE COURT: Sustained. Redirect the witness.
>
> [PROSECUTOR]: I will, Your Honor.
>
> [PROSECUTOR:] Did you get information from these witnesses?
>
> [DEPUTY WEEKLEY:] Yes.
>
> [PROSECUTOR:] Did that eventually lead to a name of a suspect?
>
> [DEPUTY WEEKLEY:] Yes.
>
> [PROSECUTOR:] What was the name of that suspect?
>
> [DEPUTY WEEKLEY:] Sorry, Simon Martinez.
>
> [DEFENSE COUNSEL]: I'm going to object again.
>
> [PROSECUTOR]: It's already been ruled on, your Honor.
>
> THE COURT: Just a second. What is the objection now?
>
> [DEFENSE COUNSEL]: Well, he's giving information that maybe came from some other source that's hearsay, and he's saying eventually, and it's still nonresponsive to the question.
>
> THE COURT: Objection overruled. Exception to the hearsay is identification. You may answer the question. What's the name?
>
> [DEPUTY WEEKLEY:] Simon Martinez.

(Emphasis added.)

Deputy Weekley subsequently clarified he meant "Simion" Martinez. He also testified the information he gathered came from two people in particular, a man who he did not identify and a woman named Gilma Martinez Crisanto.

Bustillo-Diaz testified that he attended the wake. When asked if he recognized Martinez, Bustillo-Diaz said he recognized him from a picture a police officer showed him at the hospital. According to Bustillo-Diaz, Martinez was "so rude . . . and he repeat a lot of times [that] someone [was] going to die." Later, he heard someone running towards him. Bustillo-Diaz pointed at Martinez and said, "I just turn around and see . . . that guy just hit me a lot, a lot of times." He testified that he received 5-7 stitches on his face. He was "positive" when he picked Martinez's photo from the montage and was "certain" that Martinez was the person who assaulted him.

Deputy Weekley's partner, Officer Scott Mandella, generally corroborated Deputy Weekley's testimony about his exchange with the crowd members:

> [PROSECUTOR:] Did you know of a suspect's name before creating the photo lineup?
>
> [OFFICER MANDELLA:] Yes, I did.
>
> [PROSECUTOR:] Okay. How did you obtain that?
>
> [OFFICER MANDELLA:] Deputy Weekley relayed that information to me that was given to him from another witness on scene.

Based on the information he received from Deputy Weekley and Bustillo-Diaz, Officer Mandella created a photo montage and showed it to Bustillo-Diaz. Without hesitation, Bustillo-Diaz picked a photo of Martinez. Officer Mandella testified that prior to showing Bustillo-Diaz the montage, he informed him 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 anyone."

Martinez did not testify or call any witnesses. In closing argument, defense counsel argued that the state failed to prove beyond a reasonable doubt that Martinez was the assailant. Counsel pointed out that while Bustillo-Diaz described his attacker as a "black/white mixed race male," Martinez "is not light skinned." Counsel also noted that Bustillo-Diaz initially testified that he recognized Martinez from the pictures police showed him at the hospital and that he had assumed his attacker was among the photos the police showed him.

After three hours of deliberation, the jury informed the court it could not reach a verdict. The court directed the jury to resume deliberating. The jury subsequently returned a guilty verdict. Martinez appeals.

DECISION

Martinez contends the trial court's admission of hearsay statements violated his right to confrontation under the state and federal constitutions.[1] Specifically, he contends the statements were nontestimonial hearsay and were therefore inadmissible. Martinez does not dispute that this issue is raised for the first time on appeal. The State counters that this challenge can be raised for the first time on appeal via only an ineffective assistance of counsel claim. We agree.

[1] Sixth Amendment of the United States Constitution and Article 1, section 22 of the Washington Constitution.

In State v. O'Cain, 169 Wn. App. 228, 247-48, 279 P.3d 926 (2012), we declined to consider a confrontation clause argument raised for the first time on appeal. At trial, O'Cain objected to evidence on relevance grounds and did not assert a violation of his right to confrontation. We noted that under Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), a defendant loses the right to confront witnesses by failing to assert it at trial. Id. We reasoned that if it were not the defendant's burden to object on confrontation grounds, trial judges would be placed in the untenable position of either sua sponte interposing a confrontation objection or knowingly presiding over a trial headed for likely reversal on appeal. Id. at 243. We concluded that objecting on confrontation grounds is a tactical decision for counsel and that, absent such an objection, ER 103 precludes the predication of error on confrontation grounds and trumps RAP 2.5(a)(3) (allowing appellate courts to consider errors, including "manifest error affecting a constitutional right," for the first time on appeal). Id.

We reached the same conclusion in State v. Fraser, 170 Wn. App. 13, 26-27, 282 P.3d 152 (2012). There, the defendant objected to evidence at trial on the ground that it was more prejudicial than probative. Id. at 25. For the first time on appeal, he argued that the evidence violated his right to confrontation. Id. We reaffirmed our decision in O'Cain, holding that Fraser waived his confrontation argument by not objecting on that ground at trial. Id. at 26. We then added an alternative analysis that "[i]f" RAP 2.5(a)(3) is read as a state procedural exception to the objection requirement for confrontation clause errors,

Fraser would still not be entitled to review because he failed to make a showing of manifest constitutional error. Fraser, 170 Wn. App. at 26-27. Fraser is consistent with O'Cain.

Like the defendant in O'Cain, Martinez objected to the challenged evidence at trial, but not on confrontation grounds.[2] Under O'Cain, Martinez waived his confrontation claim and cannot raise it for the first time on appeal. Martinez does not argue that a hearsay objection in the trial court is an exception to the holding in O'Cain and that it is sufficient to preserve a confrontation clause challenge for appeal. To the extent there was any violation of Martinez's right to confrontation below, it was caused by defense counsel's decision not to object on confrontation grounds. The proper challenge on appeal or collateral review would be a claim of ineffective assistance of counsel. See O'Cain, 169 Wn. App. at 245. Martinez does not advance such a claim on appeal.[3]

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[2] We note that the failure to object on confrontation grounds may deprive the State of an opportunity to create a full record regarding the nature and purposes of the police questioning and the testimonial or nontestimonial nature of the witness's responses. Without a developed record, it may be impossible to determine whether a claimed error is *manifest* constitutional error under RAP 2.5(a)(3). State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (holding that without a developed record a claimed error cannot be manifest and does not satisfy RAP 2 .5(a)(3)); State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995)(to show that a claimed error is manifest, the trial court record must be sufficiently developed to show actual prejudice).

[3] The State also contends that the challenged evidence "was cumulative and nearly identical to unchallenged testimony by Mandella." The State concludes that because the evidence was cumulative of other evidence, there was no manifest constitutional error under RAP 2.5(a). See Fraser, 170 Wn. App. at 26-29. Martinez did not respond to these arguments.

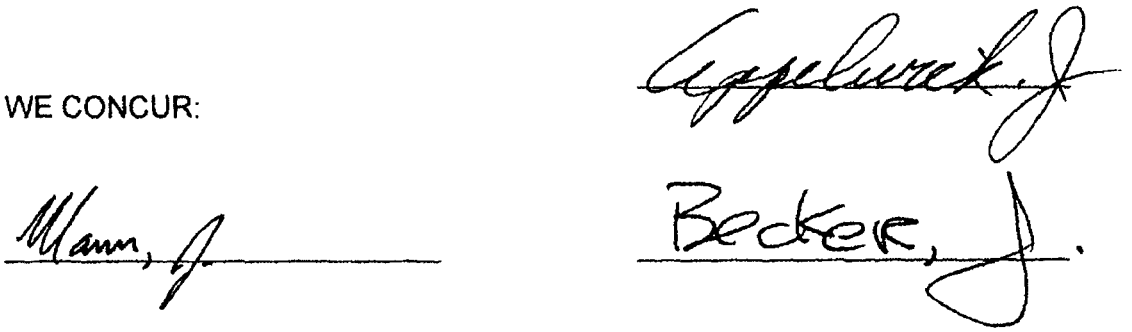
Martinez requests that we preclude an award of costs to the State under RAP 14.2 on the ground that he is indigent. Appellate courts may require an adult offender convicted of an offense to pay appellate costs. RCW 10.73.160(1). The commissioner or clerk will award costs to the State if the State is the substantially prevailing party on appeal, "unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. We entrust indigency determinations to the trial judge and will defer to a finding of indigency absent a showing of good cause not to do so. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016). We "give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f).

The State argues that we should not defer to the trial court's indigency finding in this case, because the order does not contain findings or information about Martinez's future ability to pay. But, Sinclair makes clear that during trial and sentencing, both parties have access to information about "the defendant's age, family, education, employment history, criminal history, and the length of the current sentence" that influence the State's discretionary decision to seek costs. Sinclair, 192 Wn. App. at 391-92. Here, the trial court found Martinez indigent and has not found that his financial condition has improved or is likely to improve. We therefore presume that Martinez remains indigent. The State does not point to anything in the record suggesting that his financial condition is likely to

improve. Although the State notes that Martinez is in his early thirties and received "no additional confinement after sentencing," these facts are insufficient to overcome the presumption of indigency. An award of appellate costs is not appropriate in these circumstances.

Affirmed.

WE CONCUR:



NIELSEN, BROMAN & KOCH, PLLC

February 16, 2017 - 3:04 PM

Transmittal Letter

Document Uploaded: 741136-Petition for Review.pdf

Case Name: State v. Simion Martinez
Court of Appeals Case Number: 74113-6

Party Respresented:
Is this a Personal Restraint Petition? ○ Yes ◉ No

Trial Court County: King - Superior Court # 15-1-03369-3

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
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- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
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Comments:

I mailed a copy to my client Simion Martinez

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