

NO. 63163-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SHANNON JOHNSON,

Appellant.

2009 DEC 9 PM 4:53  
COURT OF APPEALS  
STATE OF WASHINGTON

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT ..... 1

    1. THE CASE AGAINST JOHNSON RESTED ON IMPROPERLY ADMITTED, UNCONFRONTED, OUT-OF-COURT ACCUSATIONS ..... 1

        a. Jelani Givens-Jackson’s statements to 911 were not calls for help and were not “present sense impressions” under the rules of evidence ..... 1

        b. The complainant’s statements to 911 were testimonial 4

        c. The complainant’s “true identity” was admitted for its truth and was central to proving the second incident ... 6

        d. The improperly admitted unfronted allegations against Johnson contributed to the verdict against him 6

    2. THE STATE’S INADEQUATE EVIDENCE OF NECESSARY PRIOR CONVICTIONS INVALIDATE THE FELONY CONVICTIONS ..... 8

    3. THE INADEQUACY IN THE INFORMATION IS NOT CURED BY OFFERING THE OPPORTUNITY FOR A BILL OF PARTICULARS..... 10

B. CONCLUSION..... 12

TABLE OF AUTHORITIES

**Washington Supreme Court Decisions**

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) ..... 12

State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009)..... 5

State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989)..... 11

State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002)..... 10

State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007) ..... 10

**Washington Court of Appeals Decisions**

City of Seattle v. Termain, 124 Wn.App. 798, 103 P.3d 209 (2004)  
..... 11

State v. Clowes, 104 Wn.App. 935, 18 P.3d 596 (2001)..... 11

State v. Gray, 134 Wn.App. 547, 148 P.3d 1123 (2006), rev. denied, 160 Wn.2d 1008 (2007)..... 9

State v. Martinez, 105 Wn.App. 775, 20 P.3d 1062 (2001)..... 3, 4

State v. Rangel-Reyes, 119 Wn.App. 494, 81 P.3d 157 (2003)..... 3

**United States Supreme Court Decisions**

Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed. 224  
(2006), ..... 5, 6

Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d  
674 (1986) ..... 7

**Federal Decisions**

United States v. Alvarado-Valdez, 521 F.3d 337 (5<sup>th</sup> Cir. 2008) ..... 7

**Statutes**

RCW 26.50.110 ..... 9

RCW 9A.76.170 ..... 10

**Court Rules**

ER 803 ..... 2

**Other Authorities**

Fields v. United States, 952 A.2d 859 (D.C. 2008) ..... 7

A. ARGUMENT.

1. THE CASE AGAINST JOHNSON RESTED ON IMPROPERLY ADMITTED, UNCONFRONTED, OUT-OF-COURT ACCUSATIONS.

The two offenses charged in the case at bar rested on allegations made by non-testifying declarants to police officers or 911 operators who were investigating completed offenses. To the extent there is ambiguity to whether the offenses were fully complete at the time of the 911 calls, the prosecution did not meet its burden of proving the out-of-court declarations were non-testimonial as required by the Sixth Amendment. Furthermore, these unfronted statements were critical to the State's proof and undoubtedly influenced the jury.

a. Jelani Givens-Jackson's statements to 911 were not calls for help and were not "present sense impressions" under the rules of evidence. The prosecution makes several claims central to its confrontation clause arguments that are not borne out by the record. It repeatedly claims that Jelani Givens-Jackson called 911 "immediately" after the incident. But there was no clear timeline. It was never established when the incident occurred, when the calls made, or, importantly, in what sequence they occurred.

The prosecution seizes upon Givens-Jackson's statement that he did not "really live around here" as proof he was lost and sought rescue. But not knowing the name of a cross-street is a far cry from being lost and helpless, and Givens-Jackson expressed no fear for his well-being. In fact, the trial court found Givens-Jackson appeared "very calm. He's very cool. He's very collected." 2/12/09RP 75. Because he "doesn't seem the least bit excited," the court it rejected the State's claim his statement to 911 could be an excited utterance. 2/12/09RP 75-76.

While Givens-Jackson's motive in calling 911 and stating, "the dude drove off with my mom dog," is unclear, he was not clearly calling to report a crime and the trial court expressed puzzlement over Givens-Jackson's purpose. 2/12/09RP 78. The court decided he was seeking "help or assistance of some sort," even though what he wanted was unclear.

If Givens-Jackson was primarily seeking help, rather than reporting an incident to the police for purpose of investigation, his statements to 911 remain inadmissible because they do not fall under an exception to the hearsay rules. Here, the trial court incorrectly found Givens-Jackson's statements were "present sense impressions," under ER 803(a)(1).

The prosecution incorrectly depicts Johnson's objection to the applicability of the present sense impression exception by claiming he objects because the statements came after 911 called back Givens-Jackson following a disconnection in the call. Resp. Brf. at 13. But the re-initiation of the call by the 911 operator is not the most critical issue.

As Johnson explained in his opening brief, “[a]n answer to a question may not be a present sense impression.” State v. Martinez, 105 Wn.App. 775, 782, 20 P.3d 1062 (2001), overruled on other grounds, State v. Rangel-Reyes, 119 Wn.App. 494, 81 P.3d 157 (2003). A present sense impression must be spontaneous, evoked by the occurrence itself, unembellished by premeditation, reflection, or design; it is not a statement of memory or belief. Id.

After Givens-Jackson's initial statement saying to 911 that “the dude just drove off with my mom dog,” the 911 operator extracted information from Givens-Jackson about the incident so the operator could alert police. CP 37-40.<sup>1</sup> Givens-Jackson's statements were response to the 911 operator's specific and directed questions. The 911 operator interjected repeatedly,

asking: “what” Givens-Jackson wanted to report; the address of his present location; his name; his phone number; the kind of vehicle the people were in; the color of the vehicle; the number of car doors on the car; how he knew the driver; whether the driver was his mother’s boyfriend; what the driver and his mother were fighting about; what direction the car went.

This statement was not a “spontaneous or instinctive utterance of thought” evoked by the occurrence itself. It was evoked by the 911 operator who wanted specific information from Givens-Jackson and thus, it does not qualify as a present sense impression. Martinez, 105 Wn.App. at 782.

b. The complainant’s statements to 911 were testimonial. As recounted in Johnson’s Opening Brief, Tralenea Givens spoke to the 911 operator for the purpose of reporting a crime. In response to all initial questions posed, she repeatedly injected the license plate of the car was in which her boyfriend was driving. Then she reported a complaint about her own treated by the car’s driver – the driver had thrown her out of the car and her hand was bleeding as a result. CP 40-42. Her hand was not a concern to her -- when asked by 911 if she needed medical

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<sup>1</sup> A transcript of Jelani Givens-Jackson’s admitted statement to 911 is

attention, she declined, saying, "I'm just gonna wash it off." CP 42-43.

During the 911 calls, she did not report a need for immediate emergency assistance for her son. In fact, when she belatedly mentioned her son's presence, she alleged her son was involved in assaulting her as well. CP 44. She assumed her boyfriend was driving her son to his school. CP 44. And later she indicated that he had dropped her son off on the corner. CP 45. In any event, she expressed no need for immediate aid for her son. To the contrary, she wanted the police to stop the car in which her boyfriend was driving and insistently provided the license plate of his car for this purpose. The prosecution substantially distorts her testimony by claiming the incident prompting the call was a concern for her son. Her testimonial statement was an effort to have her boyfriend investigated by the police and, because she did not testify, it was improperly admitted as explained in the Opening Brief and as dictated by the analysis of Davis v. Washington, 547 U.S. 813, 827, 126 S.Ct. 2266, 165 L.Ed. 224 (2006), and State v. Koslowski, 166 Wn.2d 409, 419, 209 P.3d 479 (2009).

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attached to the Opening Brief, as Appendix A.

c. The complainant's "true identity" was admitted for its truth and was central to proving the second incident. The prosecution asserts that Tralenea Givens' out-of-court statement to an investigating police officer admitting she was Tralenea and not her sister Latenea was a statement of her "true identity." Resp. Brf. at 16. Yet the prosecution simultaneously contends that Tralenea's statement identifying herself as being in the car was not offered for its truth.

Tralenea Given's statement to the police officer investigating the crime was plainly offered, admitted, and used for its truth. It was her "true identity" and was elicited in the course of and for the purpose of investigating a completed crime. The "purpose of the exercise was to nail down the truth about past criminal events." Davis, 547 U.S. at 830. Her statements were testimonial, and even if a portion of those statements were not testimonial, they should have been redacted. Their admission absent Johnson's opportunity for confrontation violated the Sixth Amendment.

d. The improperly admitted unconfrosted allegations against Johnson contributed to the verdict against him. In determining whether a confrontation clause violation impermissibly affected a trial, "the correct inquiry" must include the reviewing

court's assumption that "the damaging potential of the cross-examination" would have been fully realized, and then its consideration of whether it is possible the jury relied on the improperly admitted evidence. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5<sup>th</sup> Cir. 2008) (harmless error analysis following confrontation violation requires court to assess whether possible jury relied on testimonial statement when reaching verdict); see also Fields v. United States, 952 A.2d 859 (D.C. 2008) (finding improperly admitted drug analysis not harmless when government could not prove it did not contribute to the verdict obtained).

Here, Givens-Jackson's detailed description of events surely contributed to the verdict. He confirmed the allegations against Johnson and lent an air of heightened dangerousness to the underlying conduct, given that Givens' son, of an unknown age, was present and involved. Likewise, Tralenea Givens' statements were the central proof of the charged incident and their admission most certainly contributed to the verdict for count I.

As to the second incident, the prosecution omits the very critical lapse in Officer Ryan Keith's ability to identify the person in

the car as Tralenea and not Latanea Givens as originally claimed. Keith had no idea what Latanea Givens looked like. He conceded the two women were sisters, only a few years apart in age, and yet he never compared the person he saw in the car with a picture of Latanea. 2/18/08RP 46. He did not know what either person looked like. The jury would have discounted Keith's basis of knowing the identity of the person in the car absent Tralenea's police station admission of her identity. The errors are not harmless and require reversal.

2. THE STATE'S INADEQUATE EVIDENCE OF NECESSARY PRIOR CONVICTIONS INVALIDATE THE FELONY CONVICTIONS.

Johnson timely objected to the prosecution's inadequate proof of two of Johnson's alleged prior convictions for violating court orders. It is an essential element of the offenses for which Johnson was charged that he had two prior convictions obtained under specified legal criteria.

Here, the prosecution offered two purported judgments and sentences but neither listed the crime for which Johnson had been convicted. Exs. 8 & 9 (attached as App. B & C to Appellant's Opening Brief). The prosecution urges this Court to parse the documents and surmise that they must have been issued pursuant

to the appropriate statutory authority, yet the prosecution offered no evidence establishing the necessary factual predicate and has no additional proof now.

The prosecution fundamentally claims that attaching a “DV” or “domestic violation” label to a municipal court document establishes the statute from which the offense arose. But as Johnson argued below, not all anti-harassment orders fall under the precise qualifying statutes. 2/19/09RP 22. Unlike State v. Gray, 134 Wn.App. 547, 558, 148 P.3d 1123 (2006), rev. denied, 160 Wn.2d 1008 (2007), close examination of the documents presented does not yield proof that the conviction was issued under the necessary statutory authority. In Gray, the prior Seattle Municipal Court conviction cited to statutes that demonstrated it was issued under the necessary RCW. No such evidence was presented here.

Here, the trial court simply inferred that any document implying “domestic violence” must result in a conviction under the authorizing statute even if they could have done a “better job spelling it out.” 2/19/09RP 28-31. But this analysis ignores the specific and particular requirements of the statute. RCW 26.50.110 (5) requires that the offender had “two previous convictions for

violating the provisions of an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.”

The existence of two previous occasions of violating no-contact orders is an essential element. State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Even if the validity of the prior conviction is a question for the trial court, the prosecution is not absolved of proving this element and it did not do so in the case at bar.

3. THE INADEQUACY IN THE INFORMATION IS NOT CURED BY OFFERING THE OPPORTUNITY FOR A BILL OF PARTICULARS

The bail jumping cases the prosecution focuses on are inapplicable to the case at bar. The bail jumping statute requires the prosecution to specify a particular offense charged and the defendant’s knowing failure to appear in court. RCW 9A.76.170(1); State v. Williams, 162 Wn.2d 177, 184, 170 P.3d 30 (2007). The bail jumping statute varies the penalty imposed based on the classification of the charged offense. RCW 9A.76.170(2). In Williams, the court ruled that the charging document must provide the accused with notice of the penalty, by either listing the

classification of the charged offense or otherwise specifying the name of the charged offense. 162 Wn.2d at 185. In Williams, the same charging document accused the defendant of committing a particular offense and failing to appear in court for this same offense, and by listing the offense in the charging document, he received the necessary notice. Id.

The offense of felony violation of a no contact order requires as its essential elements that the accused person violates a no contact order having been previously convicted of two violations of no contact orders issued under specific statutory authority. The accused person receives notice of the particular underlying conduct by receiving notice of the particular underlying offenses.

Contrary to the prosecution's claim, merely reciting the statutory language is not always sufficient to provide the necessary factual notice. City of Seattle v. Termain, 124 Wn.App. 798, 803, 103 P.3d 209 (2004); State v. Clowes, 104 Wn.App. 935, 941, 18 P.3d 596 (2001). In Termain, the Court faulted the charging document for failing to identify the underlying no-contact order with any degree of specificity. Termain relied on State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989), whose "core holding" was that a defendant must be apprised not only of the legal elements

but also “of the conduct of the defendant which is alleged to have constituted the crime.” Id. (citing Leach, 113 Wn.2d at 688-89; State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991)).

Here, Johnson was not informed of the underlying conduct that was an essential element of the charge. The insufficient charging document denied him the notice to which he is entitled.

B. CONCLUSION.

For the foregoing reasons and those contained in Appellant’s Opening Brief, Mr. Johnson respectfully requests this Court reverse his convictions and remand his case for a new trial.

DATED this 9<sup>th</sup> day of December 2009.

Respectfully submitted,



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COURT OF APPEALS  
DIVISION ONE

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREA VITALICH, DPA	(X)	U.S. MAIL
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**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF DECEMBER, 2009.

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