

63548-4

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No. 63548-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES DERRICK RUFFIN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. MR. RUFFIN'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS VIOLATED WHEN THE STATE INTRODUCED MS. WILSON'S TESTIMONIAL STATEMENTS TO A NURSE AND A 911 OPERATOR BUT DID NOT CALL MS. WILSON TO TESTIFY EVEN THOUGH SHE WAS AVAILABLE

Naomi Wilson did not testify at James Ruffin's trial for assaulting her, but her statements to an emergency room nurse and a 911 operator were admitted as evidence. The State does not argue that Ms. Wilson was unavailable as a witness, but instead argues her statements to emergency room personnel and a 911 operator were not "testimonial" and thus their admission did not violate the Sixth Amendment. Because Ms. Wilson's statements identified Mr. Ruffin as her assailant and described the assault, they were testimonial and their admission violated his federal constitutional right to confront the witnesses against him.

a. Ms. Wilson's statements to an emergency room nurse were testimonial. The Sixth Amendment's confrontation clause is designed to permit a defendant to meaningfully cross-examine the witnesses against him. Crawford v. Washington, 541 U.S. 36, 51, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The constitution thus prohibits the introduction of testimonial statements unless the

witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity to cross-examine her. Id. at 53-54.

The United States Supreme Court has not provided lower courts with a definitive definition of the term “testimonial.” Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 2531-32, 174 L.Ed.2d 314 (2009); Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); Crawford, 541 U.S. at 51-52. Mr. Ruffin therefore provided this Court with two separate analyses supporting his argument that the statements here should be viewed as testimonial – the historical treatment of these statements and the factors utilized in Davis. Brief of Appellant at 15-20.

Rather than address Mr. Ruffin’s historical analysis, the State relies upon modern cases addressing statements to medical treatment providers. First, the State seizes upon a footnote in Melendez-Diaz that it claims demonstrates the Court will not find statements to medical personnel to be testimonial if the case is before it. Brief of Respondent at 12. In Melendez-Diaz, the Court found that affidavits prepared by state crime laboratory employees were clearly within “the core class of testimonial statements”

described in Crawford. Melendez-Diaz, 129 S.Ct. at 2531-32. The footnote relied upon by the State refers to cases cited by the dissent, and the majority explains those cases are not helpful because they pre-date Crawford and thus rely upon the outdated Roberts test for analyzing the confrontation clause.¹ Melendez-Diaz, 129 S.Ct. at 2533 n.2. The Court added that two of the cases relied upon by the dissent addressed medical reports and were thus “simply irrelevant,” as the records were created for purpose of treatment and thus were not covered by the Melendez-Diaz opinion. Id. This footnote does not contain the foretelling of future Supreme Court holdings claimed by the State.

The State also argues Ms. Wilson’s statements were not testimonial because prior Washington cases have found statements to medical personnel to be non-testimonial. Brief of Respondent at 13. As Mr. Ruffin explained, however, the emergency room staff asked Ms. Wilson about past events in part because of their ethical responsibility to document Ms. Wilson’s statements for future reference, including future prosecution. American Medical Association Ethics Opinion 2.02. Unlike the 29-month-old in one of

¹ Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), held that out-of-court statements did not violate the confrontation clause if they demonstrated sufficient indicia of reliability.

the cases cited by the State, Ms. Wilson was no doubt aware her statements were being noted and could be used in court. State v. Fisher, 130 Wn.App. 1, 13, 108 P.3d 1262 (2005), rev. denied, 156 Wn.2d 1013 (2006). Simply arguing Ms. Wilson's hearsay statements were for purposes of medical diagnosis and treatment does not answer the question. Evidence admissible under a hearsay rule is not necessarily non-testimonial for purposes of the confrontation clause. Crawford, 541 U.S. at 61 (confrontation clause protection not subject to "the vagaries of the rules of evidence"); David J. Carey, Reliability Discarded: The Irrelevance of the Medical Exception to Hearsay in Post-Crawford Confrontation Clause Jurisprudence, 64 N.Y.U. Ann. Sur. Am. L. 653, 656 (2009).

Additionally, the State exaggerates the importance of the Ninth Circuit cases denying habeas relief in Moses v. Payne, 555 F.3d 742 (2009). Brief of Respondent at 14. Under the Antiterrorism and Effective Death Penalty Act of 1996's "highly deferential standard for evaluating state court rulings," federal courts may only grant relief if the state court's decision is contrary to or an unreasonable application of federal law clearly established by the United States Supreme Court. Moses, 555 F.3d at 750-51. Since the United States Supreme Court has not addressed whether

accusatory statements to medical personnel are testimonial for purposes of the confrontation clause, this Court's decision could hardly conflict with a United States Supreme Court opinion. *Id.* at 754-55. Thus, the denial of habeas relief does not mean the Washington court's analysis in State v. Moses, 129 Wn.App. 718, 119 P.3d 906 (2005), rev. denied, 157 Wn.2d 1006 (2006), is correct.

The State then chides Mr. Ruffin for addressing the factors relied upon by the Supreme Court in Davis, claiming that test is reserved only for statements to government agents. Brief of Respondent at 14-15 (citing Davis, 547 U.S. at 826). A careful review of Davis, however, reveals no such holding, and the Davis Court looks to at least one case involving statements to a rape victim's mother, not to a government agent. Davis, 547 U.S. at 828 (discussing King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779)).

Moreover, the State offers no alternative method for analyzing the issue other than to declare the statements at issue are not testimonial. Admittedly the Davis Court did not establish a definitive test of what is "testimonial" in all circumstances. Given the Supreme Court's hesitancy at providing any definition of

testimonial, however, Mr. Ruffin's discussion of the Davis factors will guide this court in deciding the issue, much as they were utilized by the Illinois Court in People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675 (2008).

b. Ms. Wilson's statements to the 911 operator were testimonial. The State urges this Court to find Ms. Wilson's statements to the 911 operator were admissible as the facts are similar to those addressed by the Washington Supreme Court in State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009). Brief of Respondent at 11-12. A major factual difference, however, distinguishes this case from Pugh. Unlike the 911 caller in Pugh, Ms. Wilson was in her home with her mother and father. Ms. Wilson did not request medical assistance, and her request for the police was to report a past crime, not to ensure her future safety or obtain medical assistance. It was therefore testimonial for purposes of the federal constitution's confrontation clause.

c. The introduction of Ms. Wilson's statements that Mr. Ruffin assaulted her raises a manifest constitutional issue that may be addressed for the first time on appeal. The State first argues that Mr. Ruffin cannot argue his rights under the confrontation clause were violated on appeal because his attorney only objected

to the testimony on hearsay grounds. Brief of Respondent at 7-9. Mr. Ruffin did not hide this fact in his opening brief, but argued the violation of his confrontation rights under the Sixth Amendment is a manifest constitutional issue that he may raise for the first time on appeal. Brief of Appellant at 26-28. The cases cited by the State demonstrate Mr. Ruffin's point. State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321 (2009) (court would not address an unpreserved issue unless the admission of the evidence in question constituted manifest constitutional error); State v. Guloy, 104 Wn.2d 412, 421, 424-25, 424 n.6, 705 P.2d 1182 (1985), cert. denied, 1020 (1986) (court did not address whether co-conspirator's statements were inadmissible under an evidence rule not mentioned in the trial court, but did address whether the introduction of the same statements violated the defendant's confrontation rights).

This case is significantly different from State v. Lynn, 63 Wn.App. 339, 835 P.2d 251 (1992), where this Court refused to address a constitutional issue arguably arising under the confrontation clause. In Lynn defense counsel had objected to the introduction of a co-defendant's statement, but had not argued the witness was unavailable. When Lynn argued unavailability for the first time on appeal, this Court found the issue was not reviewable

under RAP 2.5(a), noting the parties appeared to have assumed unavailability due to his Fifth Amendment privilege and calling the witness would have been a “formalistic exercise.” Lynn, 63 Wn.App. at 346. Thus, had counsel raised the issue of unavailability at trial, the State could have easily met its burden of proof, and this Court refused to address the issue on appeal. Id.

Here, the opposite appears to be true. The defense was first led to believe by the prosecution that Ms. Wilson would be testifying and it was not until the end of the State’s case the prosecutor announced she would not call Ms. Wilson but might have her testify in rebuttal. Defense counsel was thus unaware of the confrontation clause violation at the time Ms. Wilson’s hearsay declarations were admitted. See United States v. Check, 582 F.2d 668, 676 (2nd Cir. 1978) (excusing lack of specificity of defense counsel’s initial objections where it only gradually became apparent that government was offering inadmissible hearsay through law enforcement officer).

Only two people could testify they observed the altercation between Mr. Ruffin and Naomi Wilson. Because Ms. Wilson did not honor her subpoena, the admission of her hearsay statements

accusing Mr. Ruffin of assaulting her presents an issue of constitutional magnitude.

d. Mr. Ruffin's conviction must be reversed because the introduction of Ms. Wilson's hearsay statements was harmless beyond a reasonable doubt. The complaining witness in this assault prosecution was available to testify but the State chose not to call her as a witness. The introduction of her hearsay statements to a 911 operator and an emergency room nurse were critical for the State to establish Mr. Ruffin assaulted her and the assault was not in self-defense. Mr. Ruffin's conviction must be reversed and remanded for a new trial. State v. Koslowski, 166 Wn.2d 409, 432, 209 P.3d 479 (2009).

2. MR. RUFFIN'S STATE CONSTITUTIONAL RIGHT TO MEET THE WITNESSES AGAINST HIM FACE-TO-FACE WAS VIOLATED BY THE ADMISSION OF MS. WILSON'S STATEMENTS TO MEDICAL PERSONNEL

Article I, section 22 of the Washington Constitution provides greater protection of the accused's right to confront witnesses than does the Sixth Amendment to the United States Constitution. Pugh, 167 Wn.2d at 834-35; State v. Foster, 135 Wn.2d 441, 473, 481, 957 P.2d 712 (1998) (Alexander, J., concurring and dissenting); Johnson, J., dissenting); State v. Shafer, 156 Wn.2d

381, 391, 129 P.3d 87 (2006). In Pugh, the court found statements to a 911 operator did not violate article I, section 22 because the statements would have been admissible at the time of the adoption of the Washington Constitution under the res gestae exception to the hearsay rule. Pugh, 167 Wn.2d at 835-43.

Here, Mr. Ruffin argues that statements to a health care provider would not have been admitted in trial at the time of the adoption of the Constitution, providing ample supporting authority. Brief of Appellant at 29-35. The State responds with a Gunwall analysis, but provides this Court with no authority to rebut Mr. Ruffin's argument that the evidence would not have been admitted at a trial in 1889, despite the Pugh Court's use of this approach.² Brief of Respondent at 20-21.

This Court should find hearsay statements to a medical provider were not admissible at the time of the writing of Washington's Constitution, and article I, section 22 forbids their admission when the available declarant does not testify. Moreover, the admission of this critical evidence was not harmless, and Mr. Ruffin's conviction must be reversed.

² An analysis under the factors announced in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), is not required. Pugh, 167 Wn.2d at 835.

3. MR. RUFFIN'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

Mr. Ruffin argues the prosecuting attorney committed misconduct in closing argument where she (1) suggested Ms. Wilson's failure to appear in court was Mr. Ruffin's responsibility, (2) urged the jury to convict Mr. Ruffin for reasons other than the proof of the elements of the charged crime and (3) argued the jury had to determine whether the State's witnesses or the defendant were telling the truth. Although defense counsel did not object to the misconduct, this Court must reverse if it finds the prosecutor's argument so flagrant and ill-intentioned that it could not have been cured by an appropriate instruction. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

The prosecution must produce witnesses that offer testimony against the defendant. Melendez-Diaz, 129 S.Ct. at 2533-34. Whether the defendant could subpoena the witness is irrelevant. Id. at 2540. Here, the prosecuting attorney decided not to call an available witness after introducing her hearsay statements accusing Mr. Ruffin of assault. The prosecutor then suggested to the jury it was Mr. Ruffin's fault that the witness did not appear and testify. 5/11/09RP 19-20, 26, 55. The State argues the prosecutor was

simply referring to facts in evidence that supported Ms. Wilson's failure to testify, but fails to respond to Mr. Ruffin's arguments about why the argument was improper. Brief of Respondent at 24-25. There was no evidence Ms. Wilson did not appear because she was afraid of Mr. Ruffin or was talking with him about the case. And it was the State's decision not to call Ms. Wilson or seek a material witness warrant that caused her absence. The State's argument was misconduct.

A public prosecutor may not seek a conviction by appealing to the jurors' passions or prejudices. Belgarde, 110 Wn.2d at 507. This includes not only appeals to racial prejudice, but also calls for sending a message that crime will not be tolerated in the jurors' community. State v. Perez-Mejia, 134 Wn.App. 907, 916, 918, 143 P.3d 838 (2006). Here the prosecutor called for the jury to give Mr. Ruffin his "just desserts" and convict him because he "attempted to assassinate the character of the mother of his children," he raised a self-defense claim, and he "beat Naomi Wilson like a dog." 5/11/09RP 35-36. This appeal to the jurors' passions and prejudice constituted misconduct.

Finally, the prosecutor argued there were two versions of events – one presented by the State and one by the defense – and

only one was “true.” 2/11/09RP 23. This argument constitutes misconduct because the jury is not responsible for determining the truth, but simply deciding if the State met its burden of proof. State v. Anderson, 153 Wn.App. 417, 429, 220 P.3d 1273 (2009); State v. Wright, 76 Wn.App. 811, 825, 888 P.2d 1214, rev. denied, 127 Wn.2d 1010 (1995). The State relies upon Wright, where this Court held that in an appropriate case, the prosecutor may argue the jury must find the State’s witnesses “got it wrong” in order to believe the defendant. Wright, 76 Wn.App. at 823-25. This is different from the situation here, where the prosecutor told the jury only one version of events was “true.”

Additionally, the Wright holding is limited to cases where “the parties present the jury with conflicting versions of the facts and the credibility of the witnesses is the central issue.” Id. at 825. Ms. Wilson did not testify and the State intentionally presented only her hearsay statements; it is unclear her credibility was at issue. Moreover, her hearsay statements did not directly address Mr. Ruffin’s self-defense claim. Wright is thus inapplicable to this case, and this Court should find the prosecutor’s argument was improper under Anderson.

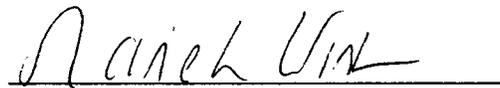
The instances of prosecutorial misconduct here were
flagrant and ill-intentioned, and a jury instruction could not have
cured their prejudice. Mr. Ruffin's conviction must be reversed and
remanded for a new trial

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant,
James Ruffin requests his conviction for second degree assault be
reversed and remanded for a new trial.

DATED this 5th day of May 2010.

Respectfully submitted,



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