

64909-4

64909-4

NO. 64909-4-1

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

KEITH RAWLINS,

Appellant.

---

---

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

The Honorable Charles R. Snyder, Judge

---

---

OPENING BRIEF OF APPELLANT

---

---

DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issue Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Procedural Facts</u> .....	1
2. <u>Evidence at trial</u> .....	2
C. <u>ARGUMENT</u> .....	5
PERMITTING POLICE OFFICERS TO RELATE THE WOMAN'S STATEMENTS VIOLATED RAWLINS' SIXTH AMENDMENT CONFRONTATION RIGHTS.....	5
D. <u>CONCLUSION</u> .....	13

## **TABLE OF AUTHORITIES**

	Page
<b><u>WASHINGTON CASES</u></b>	
<b><u>State v. Davis</u></b> 154 Wn.2d 291, 111 P.3d 844 (2005).....	10
<b><u>State v. Easter</u></b> 130 Wn.2d 228, 922 P.2d 1285 (1996).....	12
<b><u>State v. Jenkins</u></b> 53 Wn. App. 228, 766 P.2d 499 <u>review denied</u> , 112 Wn.2d 1016 (1989) .....	11
<b><u>State v. Kirkpatrick</u></b> 160 Wn.2d 873, 161 P.3d 990 (2007).....	10
<b><u>State v. Koslowski</u></b> 166 Wn.2d 409, 209 P.3d 479 (2009).....	6, 7
<b><u>State v. Kronich</u></b> 160 Wn.2d 893, 161 P.3d 982 (2007).....	10
<b><u>State v. Ohlson</u></b> 162 Wn.2d 1, 168 P.3d 1273 (2007).....	9
<b><u>State v. Pugh</u></b> 167 Wn.2d 825, 225 P.3d 892 (2009).....	9
<b><u>State v. Rivera</u></b> 51 Wn. App. 556, 754 P.2d 701 (1988).....	6, 7
<b><u>State v. Smith</u></b> 148 Wn.2d 122, 59 P.3d 74 (2002).....	6, 7, 11
<b><u>State v. Stephens</u></b> 93 Wn.2d 186, 607 P.2d 304 (1980).....	12

**TABLE OF AUTHORITIES (CONT'D)**

Page

**FEDERAL CASES**

**Barber v. Page**

390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)..... 6

**Crawford v. Washington**

541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).. 1, 6-8, 10

**Davis v. Washington**

547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)..... 8, 10

**United States v. Owens**

484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988)..... 11

**White v. Illinois**

502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992)..... 8

**OTHER JURISDICTIONS**

**Fresneda v. State**

483 P.2d 1011 (Alaska 1971)..... 6

**RULES, STATUTES AND OTHER AUTHORITIES**

ER 801 ..... 1, 10, 11

ER 804 ..... 7

U.S. Const. Amend VI ..... 1, 5

A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's Sixth Amendment right to confront the witnesses against him by admitting out-of-court statements from a non-testifying witness.

2. The trial court also erred when it found the statements were not hearsay under ER 801(d)(1).

Issue Pertaining to Assignments of Error

Under Crawford v. Washington,<sup>1</sup> the State may not introduce testimonial statements of a non-testifying witness unless (1) the State has established the witness' unavailability and (2) the defendant had a prior opportunity to cross-examine the witness. Although the State satisfied neither of these requirements, and the statements were inadmissible hearsay, the prosecution was permitted to use the statements to convict appellant at trial. Was this a violation of appellant's Sixth Amendment rights?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County Prosecutor's Office charged appellant Keith Rawlins with one count of Felony Violation of No Contact Order

---

<sup>1</sup> Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

– Domestic Violence. CP 37-38. The State alleged that in October 2009, Rawlins had contact with his wife, Jan Sellers, in violation of a no contact order. CP 35. A jury found Rawlins guilty, the court imposed a standard range sentence, and Rawlins timely filed his Notice of Appeal. CP 2-10, 14, 21.

2. Evidence at trial

Jan Sellers did not testify at trial. The defense objected to any prosecution witness testifying to statements attributed to Sellers in which she identified herself, arguing the statements were hearsay and their use would violate Rawlins' right to confront the witnesses against him. RP 11-14. The court rejected both arguments but gave the defense a continuing objection. RP 14-15.

Lummi Police Officer Faustino Perez testified that on the evening of October 16, 2009, he and a second Lummi officer contacted those present at a trailer located at 3103 Lummi Shore Road in response to a landlord/tenant dispute. The owner of the trailer had asked the officers to remove the tenant. RP<sup>2</sup> 34-37. Keith Rawlins was one of several individuals at the trailer when

---

<sup>2</sup> "RP" refers to the verbatim report of proceedings for January 5, 2010.

officers arrived. RP 38, 45-46.

According to Officer Perez, who testified over a defense objection, officers collected identifying information from those present and a woman at the trailer identified herself as Jan Sellers. RP 40, 55-56. Dispatch advised that there was a no-contact order preventing Rawlins from having contact with Sellers. RP 41-42, 47. Perez testified that Rawlins and the woman were close enough to one another that Rawlins would have been aware she was also on the property. RP 43-44. Officer Perez did not collect any information from the woman to confirm her identify – such as her social security number or driver's license number. RP 57-58.

Neither Rawlins nor the woman who identified herself as Sellers is Native American. Therefore, the Lummi officers called the Whatcom County Sheriff's Office for assistance.<sup>3</sup> RP 46-47. Rawlins was detained until a sheriff's deputy arrived. RP 48-49. Whatcom County Sheriff's Deputy Mark Jilk responded to the scene. RP 4.

---

<sup>3</sup> Another non-Native individual at the trailer had an outstanding arrest warrant, further requiring the assistance of Whatcom County Sheriff's Deputies. RP 40-41, 46.

Deputy Jilk obtained information from Rawlins and the woman and confirmed the no-contact order. RP 9-10. Similar to Perez, Jilk also testified – again, over a defense objection – that the woman identified herself as Jan Sellers and said her date of birth was February 25, 1963. RP 11, 15-16.

When Jilk informed the woman that Rawlins was going to be arrested, the woman became upset, began crying, and then became angry. RP 18-19, 31, 50-51. Rawlins asked Deputy Jilk to give personal property he had been carrying to the woman. RP 21-24. According to Officer Perez, the woman “requested if she could give her husband a kiss before he was taken to jail.” RP 51. The two then hugged and kissed before Rawlins was taken from the scene. RP 24-25, 51-52.

Deputy Jilk conceded that individuals sometimes give false information when asked to identify themselves because, for example, they may have outstanding warrants. RP 30. He did not confirm that the woman who identified herself as Sellers was in fact Sellers by asking to see her driver’s license or other picture ID. RP 30-31. Nor did he compare a physical description of Sellers with the woman at the scene. RP 31. The woman refused to fill out any paperwork and refused to sign her name. RP 33-34.

A court administrator from Bellingham Municipal Court testified that in October 2009, there was a protection order in place preventing Rawlins from contacting Jan Sellers and he had twice previously been convicted of violating the order. RP 64-97. The documents indicate that Sellers' date of birth is February 25, 1963. RP 67, 69.

During closing, defense counsel argued the State had failed to prove that the woman at the scene was in fact Sellers, noting neither officer had verified her identity through photo identification or physical characteristics. RP 125-128. The prosecutor pointed out that Sellers and the woman at the scene had the same date of birth. RP 120. The prosecutor also noted that the woman had identified herself as Sellers and argued, when combined with the circumstances at the scene, her identity had been proved beyond a reasonable doubt. RP 120-123, 128-129.

C. ARGUMENT

PERMITTING POLICE OFFICERS TO RELATE THE  
WOMAN'S STATEMENTS VIOLATED RAWLINS'  
SIXTH AMENDMENT CONFRONTATION RIGHTS.

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that “testimonial statements” may not be introduced against the defendant unless (1) the Government has established the witness’ unavailability *and* (2) the defendant has had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 50-56, 59.

A confrontation clause challenge is reviewed de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

Here, the State did not establish unavailability. A witness is unavailable under the Confrontation Clause “only if the witness was demonstrably unable to testify in person.” Crawford, 541 U.S. at 45. at 1360. Before a witness can be declared unavailable, the State must make a good-faith effort to obtain the witness’ presence and the witness must rebuff that effort. Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); State v. Smith, 148 Wn.2d 122, 132, 59 P.3d 74 (2002). “Good faith” has been interpreted to mean “untiring efforts in good earnest.” State v. Rivera, 51 Wn. App. 556, 559, 754 P.2d 701 (1988) (quoting Fresneda v. State, 483 P.2d 1011, 1017 (Alaska 1971)).

“[C]ourts have required prosecutors to utilize available statutory procedures to produce a witness for trial before the witness

may be considered unavailable.” Smith, 148 Wn.2d at 133. A witness’ mere failure to honor a subpoena is insufficient. Rivera, 51 Wn. App. at 560. Issuance of a warrant, coupled with other reasonable efforts, may satisfy the standard. Rivera, 51 Wn. App. at 560. Certainly, however, “[i]f it becomes apparent that a witness is no longer cooperating, resort to statutory mechanisms to compel attendance must be utilized.” Rivera, 51 Wn. App. at 560 (citations omitted); see also ER 804(a)(2) (for hearsay exceptions, a witness is unavailable where she “persists in refusing to testify . . . despite an order of the court to do so.”).

Here, the record does not reveal what, if any, efforts the State made to secure Sellers as a trial witness. This is insufficient to claim unavailability. Moreover, the defense did not have a prior opportunity to cross-examine Sellers on her alleged assertions.

The only remaining question for confrontation purposes is whether Sellers’ assertions were “testimonial.” The State bears the burden to demonstrate that a missing witness’ statements were nontestimonial. Koslowski, 166 Wn.2d at 417 n.3.

Although the Crawford Court found it unnecessary to articulate a comprehensive definition of “testimonial statements,” the Court provided examples of a core class of statements falling within

the definition. These include “a formal statement to government officers,” “statements that declarants would reasonably expect to be used prosecutorially,” and “[s]tatements taken by police officers in the course of interrogations.”<sup>4</sup> Crawford, 541 U.S. at 52; see also Id. at 58 n.8 (victim’s statement in White v. Illinois, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992), “to an investigating police officer” was testimonial).

The woman’s statements to Officer Perez and Deputy Jilk were testimonial because both officers were collecting information through interrogation at the scene. Moreover, if – as the State contends – the woman was Sellers, she would have been well aware of the no-contact order and reasonably expected the information she provided would be used prosecutorially. Indeed, this is precisely how the State used her statements to police at Rawlins’ trial.

In Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Supreme Court made clear that “initial police inquiries at a crime scene . . . are within the definition of police interrogation as contemplated by Crawford.” State v. Ohlson, 162

---

<sup>4</sup> The Court made clear its use of “interrogation” in the colloquial, rather than technical legal, sense. Structured police questioning qualifies. Crawford, 124 S. Ct. at 1365 n.4.

Wn.2d 1, 17 n.3, 168 P.3d 1273 (2007) (citing Davis, 547 U.S. at 822 n.1). Summarizing Davis, the Washington Supreme Court has said:

whether statements made during police interrogation are testimonial or nontestimonial is discerned by objectively determining the primary purpose of the interrogation. If circumstances objectively indicate that the primary purpose is to enable police assistance to meet an ongoing emergency, the elicited statements are nontestimonial. If circumstances indicate that the primary purpose is to establish or prove past events, the elicited statements are testimonial. Characteristics to consider when objectively assessing the circumstances of the interrogation include the timing of the statements, the threat of harm, the need for information to resolve a present emergency, and the formality of the interrogation. . . .

Ohlson, 162 Wn.2d at 15; see also State v. Pugh, 167 Wn.2d 825, 832, 225 P.3d 892 (2009) (distinguishing between questioning to deal with an ongoing emergency and questioning designed to establish past events potentially relevant to later criminal prosecution).

Officer Perez's and Deputy Jilk's primary purpose in questioning the woman who identified herself as Sellers was not to handle an ongoing emergency. Perez and the second Lummi officer were on scene to deal with an owner/tenant eviction matter, the woman did not complain about anything to the Lummi officers, and it

appears the officers had the scene under control. Compare State v. Davis, 154 Wn.2d 291, 295-296, 301-305, 111 P.3d 844 (2005) (identification of assailant during frantic 911 call reporting violation of no-contact order, where officers not yet on scene, not testimonial), aff'd sub nom. Davis v. Washington, 547 U.S. 813 (2006). Nor was there an emergency when Deputy Jilk arrived. Rawlins was already detained.

The formality of the interrogations is not entirely clear, but this was not a frantic situation in which a witness was hysterically providing information. The interrogations were sufficiently formal to elicit historical information establishing the woman's identity, probable cause for arrest and evidence for later use at trial. Therefore, Sellers' statements to both officers were testimonial.

While the trial court concluded Sellers' statements to the officers were not hearsay under ER 801(d)(1), "the existence of an applicable hearsay exception is not dispositive as to" whether a statement is testimonial under the Confrontation Clause. State v. Kronich, 160 Wn.2d 893, 901-902, 161 P.3d 982 (2007) (quoting State v. Kirkpatrick, 160 Wn.2d 873, 882, 161 P.3d 990 (2007)); see also State v. Davis, 154 Wn.2d at 299 (noting that Crawford had disposed of the notion that evidence falling under a firmly rooted

hearsay exception is per se admissible without confrontation).

Specifically, the trial court relied on that portion of ER 801(d)(1) excluding statements from the definition of hearsay where “[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.” RP 11-14. Since the woman identifying herself as Sellers (the declarant) was not present for trial, her statements to the officers fall outside this rule. In any event, even if they fell within the rule, this would not satisfy constitutional guarantees. See United States v. Owens, 484 U.S. 554, 560, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988) (statements of identification, which “would traditionally be categorized as hearsay,” subject to constitutional confrontation guarantees despite rule-based exclusion from hearsay definition); see also State v. Jenkins, 53 Wn. App. 228, 235 n.5, 766 P.2d 499 (discussing Owens), review denied, 112 Wn.2d 1016 (1989).

Constitutional error that violates a defendant's right to confront witnesses requires reversal unless this Court is convinced beyond a reasonable doubt that any reasonable fact finder would have reached the same result without the error. Smith, 148 Wn.2d at 138-

39. Constitutional error is presumed prejudicial, and the burden is on the State to prove it harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). This Court looks at the untainted evidence admitted at trial to determine if it is so overwhelming that it necessarily leads to a finding of guilt. Smith, 148 Wn.2d at 139.

Without the statements from the woman at the scene to the officers indicating that she was Sellers, providing her date of birth, and describing Rawlins as her husband, evidence of Rawlins' guilt was not overwhelming. As the defense correctly noted during closing argument, neither of the testifying officers bothered to obtain picture identification from the woman or confirm that her physical characteristics matched those of Sellers. And the woman refused to fill out any forms or sign her name in the officers' presence. Deputy Jilk conceded individuals sometimes lie to officers concerning their identity. While the woman's demeanor (crying) and the couple's embrace make it clear Rawlins had a close personal relationship with this woman, it was the woman's statements to police identifying herself as Sellers that ensured conviction.

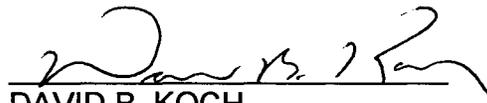
D. CONCLUSION

Rawlins was denied his right to confront the witnesses against him and his right to a fair trial. His conviction should be reversed and the case remanded for a new trial.

DATED this 31<sup>st</sup> day of August, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH  
WSBA No. 23789  
Office ID. 91051

Attorneys for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64909-4-I
	)	
KEITH RAWLINS,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF AUGUST, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]    MACDUFFIE SETTER  
          WHATCOM COUNTY PROSECUTOR'S OFFICE  
          311 GRAND AVENUE  
          SUITE 201  
          BELLINGHAM, WA 98225

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF AUGUST, 2010.

x *Patrick Mayovsky*

*2010 AUG 31 PM 14:16*