

66046-2

66046-2

NO. 66046-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,  
v.  
DARRON VAN DOWNEY,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE GREG CANOVA

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

BRIDGETTE E. MARYMAN  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

Handwritten signature and initials.

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**A. ISSUES PRESENTED**

1. A constitutional error is harmless if the court is satisfied beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Here, the State concedes that the victim's statements to Officer Collins were testimonial and thus improperly admitted. However, multiple other witnesses confirmed that the victim identified Downey as her attacker. Given this admissible evidence, was admission of the victim's statements to Collins harmless?

2. To prevail on an ineffective assistance of counsel claim, an appellant must show deficient performance and resulting prejudice. If counsel's conduct can be characterized as legitimate trial strategy, then it cannot be the basis for an ineffective assistance of counsel claim. Trial counsel stipulated that the victim's excited utterances to a civilian witness were admissible because they were not testimonial. Absent any precedent suggesting that such statements are testimonial, was counsel's stipulation a legitimate trial strategy? If not, has Downey failed to demonstrate prejudice?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Darron Downey was charged by amended information with Assault in the Second Degree-Domestic Violence. CP 6-7. The State further alleged that there was evidence of an ongoing pattern of psychological, physical or sexual abuse. Id.

Trial occurred in September 2010. During motions in limine, the State informed the court that it had been unable to find the victim, Diane Brooks, and moved for a pretrial ruling on the admissibility of Brooks's statements to Seattle Police Officers William Collins and Ian Birk. RP 11-12;<sup>1</sup> Supp. CP \_\_ (Sub 44, State's Trial Brief). The State also planned to admit statements that Brooks made to Downey's apartment manager, Peggy Collins, and to Eric Lane, the emergency medical technician ("EMT"). Id. Downey objected to admission of Brooks's statements to Collins and Birk, but stipulated to the admissibility of the statements made to Peggy<sup>2</sup> and Lane. RP 12-13; CP 8-20. The trial court admitted all of the proffered statements. RP 69-71.

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<sup>1</sup> The verbatim report of proceedings consists of one volume and will be referred to as RP.

<sup>2</sup> In order to avoid any confusion with Officer Collins, the State refers to Ms. Collins as Peggy.

The court granted Downey's motion to bifurcate the aggravating factor. RP 17. The court also ruled that Downey's initial statement to Birk was admissible in the State's case-in-chief, but that the rest of Downey's statements were admissible for impeachment purposes only.<sup>3</sup> RP 64-69.

The jury found Downey guilty of Assault in the Second Degree. CP 28. The court granted Downey's motion to dismiss the aggravating factor. RP 206. The court imposed a standard range sentence. CP 77-85.

## 2. SUBSTANTIVE FACTS.

Peggy Collins is the apartment manager for the Wintonia Apartments, a building that serves clients dealing with alcohol, substance abuse, and mental health problems. RP 145. Darron Downey was a resident of the Wintonia apartments, but Diane Brooks was not. RP 146. In fact, Peggy met Brooks for the first

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<sup>3</sup> In a footnote, Downey argues that the case should be remanded for entry of findings of fact and conclusions of law, as required by CrR 3.5(c). Remand is not necessary because the trial court entered written findings on March 31, 2011. Supp. CP \_\_ (Sub 68, Written Findings of Fact); Supp. CP \_\_ (Sub 69, Deputy Prosecuting Attorney's Declaration). Downey cannot show any prejudice caused by the delay in entering findings, and there is no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005).

time at around 3:20 p.m. on April 2, 2010 when Brooks was taking groceries to Downey's apartment. RP 146. Later in the afternoon, Peggy heard a woman shouting, "Where's Miss Peggy?" RP 146. Peggy found Brooks outside her office. RP 147. Brooks was crying and had a large gash in her forehead. RP 147. Brooks's forehead was dented, as if her head had been "bashed in." Id. Brooks told Peggy that Downey had hit her. Id. Peggy immediately locked the door and called 911. Id.

Officer Ian Birk responded within a few minutes of the 911 call. RP 104. Downey, who was outside the building, approached Birk and said something to the effect of, "You're probably looking for me." RP 105. After Officer William Collins arrived, Birk and Downey went into the lobby while Collins spoke to Brooks. RP 109.

EMT Eric Lane was already in the process of treating Brooks's head laceration when Collins met with her. RP 47. When he arrived, Lane found Brooks sitting down in Peggy's office. RP 136. Brooks was guarded, agitated, and nervous. Id. During his conversation with her, Brooks seemed rattled and confused by everything that was going on. RP 137. She did not provide a lot of detail about what had happened, but repeatedly said that her

boyfriend had hit her. Id. According to Lane, Brooks's head injury was the type that results in scarring. RP 140.

When Collins first talked to Brooks, she was "borderline hysterical," crying and talking quickly. RP 47. She appeared to be frightened and upset, and was not making much sense. Id. After a few questions, Brooks calmed down a little, although she was never actually calm. RP 48. Brooks told Collins that Downey had been drinking all day and had become angry with her. Id. When she decided to leave, Brooks bent down to tie her shoelaces. RP 49. Downey grabbed her from behind, spun her around, and drove her head down into a window frame. Id. Brooks fled the room and ran to get help from the building staff. Id.

After Collins was finished talking with Brooks, Birk talked with her briefly. RP 36. Birk's conversation happened approximately 10 minutes after the 911 call. RP 37. Brooks appeared to be in a lot of pain and it was difficult for Birk to get any answers from her because she was crying so hard. Id. Brooks confirmed that she had been assaulted and that Downey had pushed her down until her head hit a window frame. RP 112.

The officers arrested Downey for assault. RP 89, 112. Brooks was taken by ambulance to Swedish Hospital. RP 89.

Collins met Brooks at the hospital, where he took photos of her injuries, conducted a thorough interview, and helped her prepare a written statement. RP 89-91.

**C. ARGUMENT**

1. THE STATE CONCEDES THAT THE TRIAL COURT ERRED IN ADMITTING BROOKS'S STATEMENTS TO OFFICER COLLINS.

Downey argues that admission of Brooks's statements to Officer Collins violated the Confrontation Clause. The State concedes that Brooks's statements to Collins were testimonial and thus were improperly admitted.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." U.S. Const. amend. VI. In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Court reviewed the history and purpose of this clause, determining that the "principal evil" at which the clause was directed was the civil-law system's use of ex parte examinations and ex parte affidavits as substitutes for live witnesses in criminal cases. Id. at 51. This practice denies the defendant a chance to

test his accuser's assertions "in the crucible of cross-examination" in accordance with the common-law tradition. Id. at 60.

While Crawford avoided providing a comprehensive definition of "testimonial," the Court returned to the issue in Davis v. Washington and Hammon v. Indiana, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The Court rejected the notion that all interrogations by law enforcement officers result in testimonial statements that are subject to the Confrontation Clause. Davis, 547 U.S. at 826. Rather, the Court held that:

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.

Because the ultimate inquiry is whether the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency, the existence of an "ongoing emergency" is among the most important circumstances informing the "primary

purpose" of an interrogation. Michigan v. Bryant, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1143, 1157 (2011).

In Davis, the Court determined that the victim's statements to a 911 operator were related to an ongoing emergency, where she was describing events as they were actually happening and where her 911 call was "plainly a call for help against a bona fide physical threat." Davis, 547 U.S. at 827. The information provided by the victim, including the name of her assailant, was necessary to help resolve the ongoing emergency. Id. In considering the formality of the encounter, the Court noted that the victim's answers were frantic, and that the statements were made in an environment that was not tranquil, or even safe. Id.

In contrast, in Hammon the Court examined a victim's oral and written statements, given to police responding to a domestic disturbance. Id. at 829-30. The Court found that there was no emergency in progress, noting that when the officers first arrived, the victim told them that things were "fine" and that "there was no immediate threat to her person." Id. The Court found that when the officer questioned the victim for a second time, he was seeking to determine what had happened, rather than what was happening. Id. at 830. The police separated Hammon from the victim in order

to "forcibly prevent [him] from participating in the interrogation." Id. Although the interrogation was not as formal as an interview in a police station, the Court noted that the victim's statements "deliberately recounted, in response to questioning, how potentially criminal past events began and progressed." Id.

The facts in this case are more similar to Hammon than they are to Davis. Just like in Hammon, it does not appear that there was still an ongoing emergency. At the time that Collins contacted Brooks, Downey was already in Birk's custody. As in Hammon, there were two officers present, and the officers were keeping Brooks and Downey separate. Although Brooks was injured and upset, she was interviewed in the safety of Peggy's office. Downey was cooperative with Birk and--at that moment--posed no danger to Brooks.<sup>4</sup>

Downey argues that there was no emergency because Collins's questions centered on "what happened," as opposed to "what is happening." See Davis, 547 U.S. at 829-30. The focus on past events is not dispositive, though, as an emergency can exist after an assault has ended. Bryant, 131 S. Ct. 1164; State v. Ohlson,

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<sup>4</sup> As the trial court noted, had the officers not arrested Downey, he might have continued to pose a threat to Brooks. RP 71. However, Downey was in custody and was calm and cooperative. It appears that the *immediate* threat to Brooks had ended.

162 Wn.2d 1, 168 P.3d 1273 (2007). However, both Bryant and Ohlson are distinguishable from this case. In Bryant, the Court focused on the fact that the gunman was still on the loose and posed an ongoing threat to the general public. 131 S. Ct. at 1164. In Ohlson, the court noted that the defendant had driven past the victims multiple times, and that there was reason to believe that he would return again. 162 Wn.2d at 16. Here, there is nothing to suggest that Downey continued to pose a threat to Brooks at the time that she gave her statement to Collins.

Under Davis, without an ongoing emergency, Brooks's statements to Officer Collins were testimonial because they were part of an investigation into past criminal conduct. 547 U.S. at 829. Therefore, the State concedes that the trial court erred in admitting Brooks's statements to Officer Collins.

**2. THE ERROR IN ADMITTING BROOKS'S STATEMENTS TO OFFICER COLLINS WAS HARMLESS.**

Nonetheless, even if Brooks's statements to Collins were testimonial and thus improperly admitted, reversal is still not required. Rather, the record plainly demonstrates that any error is harmless beyond a reasonable doubt.

A constitutional error can be harmless if it is proved to be harmless beyond a reasonable doubt. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). Error is harmless if the court is satisfied beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Id. Put another way, such error is harmless if there is "no reasonable probability that the outcome of the trial would have been different had the error not occurred." State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003) (quoting State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

Here, even without Brooks's statements to Collins, the State had ample evidence to prove that Downey assaulted Brooks, including the nontestimonial statements to Peggy and Lane.

Peggy was the first person whom Brooks contacted after the assault. RP 146. Peggy immediately noticed Brooks's head injury, explaining that it looked like Brooks's forehead was dented, as if it had been "bashed in." RP 147-48. Brooks was crying and appeared to be frightened and distressed. RP 146-47. When Peggy asked Brooks what happened, Brooks told her that Downey had hit her. RP 147. Peggy asked what Downey had hit her with,

and Brooks responded that she “wasn’t sure.” Id. Peggy locked the office and called 911. Id. The police arrived five to six minutes later. RP 148.

EMT Eric Lane was the next person to contact Brooks. RP 134. Brooks was guarded, a little agitated, nervous and confused. RP 136. When Lane asked her what happened, Brooks said that her boyfriend had assaulted her. RP 137. Brooks was so rattled by what was going on that she was unable to give details. Id. Instead, she just repeated that her boyfriend had hit her. Id.

When Birk arrived on the scene, Downey approached him and said something to the effect of, “You’re probably looking for me.” RP 105. When Birk talked to Brooks, she was “borderline hysterical,” crying profusely, obviously upset, and appeared to be in a lot of pain. Id. Brooks said that the injury was not the result of an accident.<sup>5</sup> RP 111. She said that Downey had attacked her and pushed her downward until her head hit a window frame. RP 111-12.

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<sup>5</sup> It does not appear that Downey is challenging the admission of Brooks’s statements to Birk. Although he assigns error to the admission of Brooks’s “statements to the police,” his argument only addresses her statements to Collins. Downey never argues that the trial court erred in admitting the statements made to Birk. This Court should not consider an assignment of error not supported by argument. See Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005).

Brooks's statements to any of these witnesses, combined with Downey's admission and all of the witnesses' observations and non-hearsay testimony, provide sufficient evidence to prove that Downey assaulted Brooks. There is no reason to believe that the outcome of the trial would have been different without Brooks's statements to Collins. See Powell, 126 Wn.2d at 267.

3. DOWNEY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Downey argues that trial counsel provided ineffective assistance when he stipulated to the admissibility of Brooks's statements to Peggy. Downey's claim fails because counsel's decision to stipulate to the evidence was a legitimate tactical decision. Moreover, Downey cannot show that he was prejudiced by counsel's failure to object to the statements.

a. Counsel Employed A Legitimate Trial Strategy.

To prevail on an ineffective assistance of counsel claim, Downey must show (1) that his attorney's conduct fell below an objective standard of reasonableness, and (2) that this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668,

687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If a defendant fails to demonstrate either prong, the inquiry ends. Id. at 78.

Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. Because an ineffective-assistance claim can function as a way to escape rules of waiver and raise issues not presented at trial, the Strickland standard must be scrupulously applied. Harrington v. Richter, \_\_\_ U.S. \_\_\_, 131 S. Ct. 770, 788 (2011).

On review, the relevant inquiry is "whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 688. There is a "wide range" of reasonable performance, and a recognition that even the best criminal defense

attorneys take different approaches to defending someone. Id. at 689. If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Counsel's decisions about whether or not to object are quintessentially tactical decisions, and only in egregious circumstances relating to evidence central to the State's case will the failure to object constitute incompetent representation that justifies reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). To prevail on a claim of ineffective assistance of counsel based on a decision not to object, the defendant must show three things: 1) that there were no legitimate tactical reasons for not objecting; 2) that the trial court would have sustained an objection if one had been made; and 3) that the result of the trial would have been different if an objection had been made and sustained. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Downey offers no authority to suggest that the statements at issue are testimonial. Indeed, there is no clearly established Supreme Court precedent on whether and when statements made to someone other than law enforcement personnel are testimonial. Bryant, 131 S. Ct. at 1155 n.3. Furthermore, it is reasonable to conclude that an objective witness would not foresee that statements would be available for use at a later trial, where the statements were made by a speaker seeking help from a stranger immediately following a traumatic event. See Davis, 547 U.S. at 822; Crawford, 541 U.S. at 52.

Here, after the assault, Brooks ran to Peggy's office yelling, "Where's Miss Peggy?" She was crying and frightened, and never asked Peggy to call 911. Brooks was clearly seeking help and shelter. Nothing about the encounter would lead a reasonable person to foresee that her statements would be available for use at a later trial.

To support his claim that Brooks's statements were testimonial, Downey relies upon Division Two's decision in State v. Powers, 124 Wn. App. 92, 98-99, 99 P.3d 1262 (2004). Downey's reliance on Powers is misplaced. In Powers, which was decided before Davis and Bryant, the issue was whether statements to a

911 operator were testimonial. Id. Based on the content and nature of the victim's conversation with the 911 operator, the court ruled that the statements were testimonial. Id. at 102. Unlike a 911 operator, Peggy was not acting as an agent of law enforcement. See Davis, 547 U.S. at 823 n.2. The holding in Powers is neither controlling nor persuasive in this case.

Downey cannot show that the trial court would have sustained an objection to Peggy's testimony. Trial counsel's stipulation to the admissibility of Brooks's statements to Peggy was a reasonable tactical decision.

b. Brooks Has Not Demonstrated Prejudice.

Even if trial counsel was deficient, Downey cannot show that he was prejudiced. To prevail, Downey must show a reasonable probability that "but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. In the case of a missed evidentiary objection, Downey must show that the proposed objection would likely have been sustained and that the result of the trial would have been different if the evidence had not been admitted. Saunders, 91 Wn. App. at 578.

As explained above, Downey cannot show that a timely objection to the statements would have been sustained. Furthermore, Downey cannot show that the result of trial would have been different if Brooks's statements to Peggy had been excluded. Downey claims that Brooks's statements to Lane were insufficient to prove that Downey assaulted Brooks. In focusing on the hearsay statements, Downey ignores the significance of other admissible testimony.

All four witnesses described how upset and frightened Brooks was, supporting the conclusion that she was assaulted and was not injured by accident. Although Brooks never referred to Downey by name when talking to Lane, she did say that her boyfriend had hit her. Peggy testified that she had seen Brooks with Downey earlier in the day, taking groceries to his apartment. RP 146. In addition, Downey turned himself in to Birk, saying, "You're probably looking for me." RP 105. Even without Brooks's statements to Peggy or the police, there was no question that Downey was the boyfriend at issue.

Finally, Peggy and Birk described their reactions to the incident. When Brooks arrived at her office, Peggy locked the door for safety reasons and called 911. RP 147.

Given all of this evidence, even if the only hearsay statements that were admitted were Brooks's statements to Lane, there was still sufficient evidence to prove that Downey assaulted her.

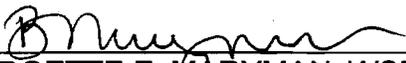
**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Downey's conviction.

DATED this 22 day of April, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
BRIDGETTE E. MARYMAN, WSBA #38720  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002