

66694-1

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COA No. 66694-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

TYSON MONTE CLARK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Leroy McCullough

REPLY BRIEF

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5B Karl B. Tegland, Washington Practice, Evidence Law and Practice (5th ed.2007). 7

A. REPLY ARGUMENT

The State's contentions in reply are without merit. In an effort to streamline the prosecution of a criminal case, the State, as it frequently and not unreasonably attempts to do, called a sole medical witness, hoping to simply rely on that witness' summary of the medical evidence in the case. In the evolving arena of confrontation analysis, the prosecution's use of such "summary" witnesses comports less and less frequently with the defendant's right to question the witnesses against him in view of the jury. In this particular case, the State's mistake in choosing which doctor was the important medical witness to call was particularly dramatic – the State failed to call the one witness, the radiologist, who reviewed the CT scan and made the critical, expert, and discretionary determination in the case of a new fracture.

Furthermore, even ignoring confrontation issues entirely, the radiologist's expert opinion was plainly not a "business record" under RCW 5.45.020. The State's attempt to analogize the radiologist's expert assessment of a CT scan to the clerical reporting of a "lab result" is untenable.

1. ADMISSION OF THE RADIOLOGIST'S EXPERT CONCLUSION VIOLATED THE CONFRONTATION CLAUSE.

The emergency room physician operated in this case as little more, in truth, than an admitting nurse. He suspected a fracture, but that expert assessment was made entirely by the radiologist – the only individual who reviewed the CT scan -- and the State failed to call him. The Respondent State of Washington ignores the facts adduced at trial which showed that the radiologist would have known that his diagnosis of a fracture, particularly in an assault case, would be available for use in a criminal prosecution. See AOB at 20-21 (citing 12/1/10RP at 18, 22-24, 94-95); State v. Hopkins, 134 Wn. App. 780, 791, 142 P.3d 1104 (2006) (statements of non-testifying nurse-practitioner that child reported sexual abuse were “testimonial” where practitioner forwarded report to law enforcement in accord with reporting law). The Respondent instead contends that in order to be testimonial, the “primary purpose” of the declarant’s statement must be to make a factual record against the accused. See BOR at 12-13. However, the “primary purpose” test has been applied in cases involving the question whether statements to police were non-testimonial because they involved a cry for help made to police or 911

operators. See, e.g., State v. Pugh, 167 Wn.2d 825, 831-32, 225 P.3d 892 (2009). In contrast, in the cases cited by appellant, the question whether the results of forensic tests and the like were testimonial, State v. Lui, 153 Wn. App. 304, 221 P.3d 948 (2009), review granted, 168 Wn.2d 1018 (2010), and State v. Jasper, 158 Wn. App. 518, 245 P.3d 228 (2010), review granted, 170 Wn.2d 1025 (2011), have asked the question whether the declarations were "made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." State v. Lui, at 317, State v. Jasper, at 527. In addition these cases have focused on the question of the critical utility of cross-examination. State v. Jasper, at 534-35.

Finally, the Respondent's argument that evidence may be admitted to show the basis for an expert's opinion without violating the confrontation clause is unavailing. See Crager v. Ohio, ___ U.S. ___, 129 S.Ct. 2856, 174 L.Ed.2d 598 (2009) (ordering remand in light Melendez-Diaz where DNA analyst was permitted to state conclusions reached by non-testifying analyst, even where testifying witness also reached independent opinion); People v. Williams, 939 N.E.2d 268 (2010), cert. granted, ___ S.Ct. ___,

2011 WL 2535081 (No. 10-8505, June 28, 2011) (granting review of case where forensic scientist's analysis of DNA sample was deemed not "hearsay" in violation of confrontation clause if admitted simply to show underlying facts and data relied upon by testifying expert); Commonwealth v. Durand, 457 Mass. 574, 585, 931 N.E.2d 950 (2010) (substitute medical examiner may not testify to autopsy). In any event, as noted in the Opening Brief, that is not what happened in the present case.

2. THE RADIOLOGIST'S EXPERT CONCLUSION WAS NOT ADMISSIBLE AS A BUSINESS RECORD

As appellant noted, the hearsay bar is of course an independent ground to find the radiologist's expert opinion inadmissible, regardless of the confrontation clause issue. AOB at 1, 23, 34.

Citing primarily the very same cases that Mr. Clark cited in his Appellant's Brief, the Respondent describes the radiologist's expert opinion, that the CT scan showed a new fracture, as a "business record." BOR at 14, 19. But the Respondent makes no effort whatever to dispute the well-delineated difference in the case law between the conclusions of non-testifying experts who reached those conclusions in the exercise of professional, discretionary judgment (such are not business records), versus a lab technician's

clerical report of the “positive or negative” results of a chemical test, or of the numerical result of a blood/alcohol test. The latter are business records.

Respondent contends State v. Ziegler, 114 Wn.2d 533, 789 P.2d 79 (1990), establishes that the radiologist’s diagnostic report is a business record because that case refers to records compiled by “X-ray technicians, laboratory and other hospital employees” as such. BOR at pp. 19-22. Yet Respondent offers no answer whatsoever to the plain point that an expert doctor’s assessment of what is shown by a CT scan is not the same as the submission of an X-ray film taken by a low-level technician. See Appellant’s Opening Brief, at pp. 28-29 (noting inapplicability of Ziegler). Certainly, Ziegler’s particular holding is unhelpful to the Respondent, because a radiologist’s expert opinion (here) is not the same as a lab technician reporting a positive chlamydia test (Ziegler).

Similarly unhelpful to the Respondent’s case is its reliance on other cases that find the routine reportage of clerical, non-discretionary tests not involving significant expert judgment to be business records, e.g., Sanders v. Commonwealth, 282 Va. 154, 166, 711 S.E.2d 213 (2011) (BOR at 15; unhelpful, because a

radiologist's expert opinion is not the same as a lab technician reporting a positive chlamydia test); State v. Sellers, 39 Wn. App. 799, 695 P.2d 1014, review denied, 103 Wn.2d 1036 (1985) (BOR at 20; unhelpful, because a radiologist's discretionary assessment is not the same as a lab technician reporting a simple blood/alcohol percentage test) (see AOB at 29, noting inapplicability of Sellers); State v. Garrett, 76 Wn. App. 719, 887 P.2d 488 (1995) (BOR at 20-21; unhelpful, because the case merely involved hearsay admission of one doctor's physical observations of a patient, rather than any expert assessment by that out of court declarant, as noted in AOB at pp. 27-28).

The foregoing cases constitute those cited in the Respondent's briefing in support of its contention that the radiologist's expert analysis of the CT scan in this case was admissible hearsay as a clerical business record; contrary to the Respondent's contention, those cases utterly fail to "believe Clark's assertion" that expert, discretionary assessments are not admissible under the business records exception to the hearsay bar. See BOR at 21.

Similarly, the State fails to distinguish Young v. Liddington, 50 Wn.2d 78, 83, 309 P.2d 761 (1957) ("evaluations . . . by

nontestifying witnesses are . . . not admissible as business records”); In re Welfare of J.M., 130 Wn. App. 912, 924, 125 P.3d 245 (2005) (ineffective assistance to not object to psychiatric diagnoses proffered as business records because they involved conclusions requiring professional judgment); State v. Hopkins, supra, 134 Wn. App. 780, 791, 142 P.3d 1104 (2006) (nurse-practitioner’s report determining that child abuse had occurred did not fit the business records exception); 5C Karl B. Tegland, Washington Practice, Evidence Law and Practice § 803.37, at 96 (5th ed.2007) (rule was not intended to allow hearsay admission of “reports reflecting the exercise of skill, judgment and discretion”).

The State contends that these cases either predate or do not mention Ziegler – a meaningless notation, since Ziegler (the chlamydia lab test) is completely helpful to the State, as it says nothing that would authorize the trial court’s hearsay admission of the expert radiologist’s professional, discretionary opinion as a business record under RCW 5.45.020.

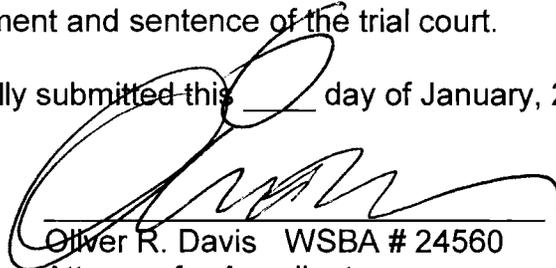
The trial court’s admission of the radiologist’s interpretation of the CT scan under the “business records” exception to the hearsay bar was an abuse of discretion. Appellant relies on his arguments in the Appellant’s Opening Brief that the error in

admitting the radiologist's expert opinion requires reversal under a constitutional or a non-constitutional harmless error standard.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, the appellant Mr. Clark respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this _____ day of January, 2012.



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DIVISION ONE**

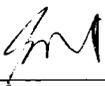
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66694-1-I
v.)	
)	
TYSON CLARK,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF JANUARY, 2012, 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:

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