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MAR 30 2012

King County Prosecutor
Appellate Unit

NO. 67414-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON ROBERTS,

Appellant.

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

The Honorable Mariane C. Spearman, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Brandon Roberts is appealing his second degree assault conviction for allegedly strangling his girlfriend, Melissa Cole, on December 29, 2010. CP 1-6, 97, 140. Although Cole did not testify at Roberts' trial, her prior statements to an emergency room nurse, doctor and social worker were admitted over Roberts' objection and used to convict him. 4RP 37-39, 57 (prosecutor's closing and rebuttal argument).

Evidence showed Cole had gone to the emergency room seven or more hours after the alleged incident – at the prompting of police officers – and after she signed paperwork indicating her statements could be used in any upcoming prosecution against Roberts.

In light of these circumstances, the trial court erred in ruling Cole's out-of-court accusations were non-testimonial on grounds they were made for the "primary purpose" of medical diagnosis or treatment. On the contrary, as argued herein, Cole's statements were testimonial, and their admission violated Roberts' constitutional right to confront his accusers.

B. ASSIGNMENT OF ERROR

Appellant Brandon Roberts was deprived of his Sixth Amendment right to confront his accusers by the court's admission of testimonial hearsay.

Issue Pertaining to Assignment of Error

Whether the court's admission of the complainant's out-of-court statements to emergency room personnel violated Roberts' right to confront, where the complainant went to the emergency room – at the detective's prompting – seven or more hours after the incident and treatment by paramedics at the scene, and after she signed documentation indicating her medical records could be used in any future prosecution against Roberts?

C. STATEMENT OF THE CASE¹

Police were dispatched to Roberts' parents' house between 10:00 and 11:00 a.m., on December 29, 2010, to investigate a possible hit-and-run accident. 2RP 19-20, 31-32. Kristie and Steven Hansen had returned to their Kenmore home that morning to find Roberts and Cole outside in the driveway with their cars, both of which appeared to have been in an accident. 3RP 71-72,

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 3/22/11; 2RP – 3/23/11; 3RP – 3/24/11; 4RP – 3/28/11; 5RP – 4/8/11; and 6RP – 6/10/11.

79, 83-84. Roberts' step-father, Steven,² had called 911 because he was afraid Roberts might try to drive off in one of the damaged vehicles. 3RP 73, 84-85.

When the police arrived, Roberts reportedly took off running. 2RP 22, 34; 3RP 73, 83. Kristie testified that while the police were chasing Roberts, Cole moved her hair aside and showed Kristie a red mark on her neck. 3RP 73. When the police returned, Kristie showed them Cole's neck. 3RP 74. Red marks and bruising were visible, according to one officer. 2RP 24.

The police found Roberts in the bushes about fifteen minutes later and took him into custody. 2RP 27-28, 34, 38-39; 3RP 31. Deputy Coffman questioned him about the cars, but Roberts denied being involved in any accident. 2RP 40. When Coffman pointed out the damage, Roberts reportedly admitted he was in an accident somewhere nearby. 2RP 40.

Coffman also asked about the injury to Cole's neck. Roberts reportedly said, "it's just a hickey." 2RP 40.

Meanwhile, Cole gave a statement to police inside the house, where she was also treated by paramedics. 2RP 43; 3RP

² First names are used to avoid confusion.

74, 85. According to Kristie, the paramedics told Cole she should go to the hospital. 3RP 81.

Cole stayed with Kristie at the house the rest of the day. 3RP 75. Later in the evening, Kristie took Cole to the emergency room, because "police told me to." 3RP 75. A detective had called earlier in the day to encourage Cole to go to the hospital. 3RP 9; 4RP 16-17.

As part of the state's case, the prosecutor played some telephone calls Roberts made from jail. One was to Cole on December 31, after he was charged. 3RP 44, 77. On the recording, Roberts is reportedly heard asking, "what's going on?" 3RP 44. Cole reportedly responded, "you choked me, you choked me really hard," to which Roberts replied, "don't say that on the phone." 3RP 44.

By the time of trial, Cole had returned to Oregon to live with her family. 3RP 76. A detective attempted to contact her for trial, but she did not return the detective's call. 4RP 18-19.

As a result, the state proposed to elicit statements Cole made to emergency room personnel as evidence of the alleged assault. 3RP 3-7. Defense counsel objected admission of the statements would violate Roberts' right to confront:

There is a nurse here from Evergreen Hospital who encountered Ms. Roberts on December 29 in the evening. Prior to Ms. Roberts – I'm sorry, Ms. Cole, going to Evergreen, when the officers were there with her at the house, as part of the paperwork they went through, they had her sign a release of information for medical records. The release of information for the medical records contains a statement in it and I'll hand this forward. It contains a statement in it that indicates, I understand the purpose of this disclosure is to assist in criminal investigation and possible prosecution. I understand the recipient may subsequently release information to the Prosecutor's Office and all the parties. Part of the information may be disclosed to the prosecution. So she specifically signed a release of information before she went to the hospital indicating that the police could get her records and that she understood that would be used in order to prosecute Mr. Roberts. Your Honor, I think that is the definition of testimonial. So my concern is that without Ms. Cole here and an opportunity to cross-examine Ms. Cole, Mr. Roberts' right to confrontation is violated if the hospital personnel are allowed to testify as to what Ms. Cole told them.

3RP 3-4.

The court overruled the objection, however, on grounds

Cole's "primary purpose" was medical treatment:

I mean, the question is really, what is the primary reason that you are making these statements? I don't think – I think it's pretty clear she went to – if she went to the hospital to speak to the nurse, it was because of her medical issues. It wasn't – her primary purpose wasn't to get the defendant in trouble and make comments about him. So I think there is a distinction.

. . . On the Crawford³ issue I'm going to allow the testimony over your objection.

³ Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

3RP 10-11.

Evergreen Hospital emergency room nurse Kerry Groves saw Cole at about 7:00 p.m. the night of December 29. 3RP 16. Groves testified that when she asked why Cole came into the emergency room, Cole said she was choked by her boyfriend; he used his hands around her neck. RP 19. Cole complained of pain to her neck and right cheek. 3RP 20. She reported no difficulty breathing or swallowing, however, and was able to take deep breaths. 3RP 21, 24.

Cole was next seen by Dr. Neil Donner. 4RP 7. When Donner asked what had happened, Cole reported she was choked and hit in the face by her boyfriend after an argument. 4RP 8, 10. She said the choking was done with hands and that she did not lose consciousness. 4RP 8, 10, 12. She complained of pain to her neck and face. 4RP 8, 10.

Before her discharge, Cole was referred to hospital social worker Nathan Nelson. 4RP 10, 21. Cole repeated to Nelson that her boyfriend choked her. 4RP 24.

In closing, the prosecutor emphasized that even though Cole did not testify, the jury heard from her through her statements to

hospital personnel. 4RP 37-39, 57. The prosecutor also asserted that Cole “had no reason to think that these statements would be used in a court proceeding three months later.” 4RP 38.

D. ARGUMENT

THE COURT’S ADMISSION OF COLE’S OUT OF COURT ACCUSATIONS VIOLATED ROBERTS’ RIGHT TO CONFRONT.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross examine witnesses. The confrontation clause provides that the state can present testimonial statements of an absent witness only if the witness is unavailable and the defendant has had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

But the state can present nontestimonial out-of-court statements that accord with the hearsay rule and its exceptions, irrespective of the Sixth Amendment. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). This Court reviews alleged confrontation clause violations de novo. State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

In Crawford, the United States Supreme Court specifically chose not to differentiate testimonial from nontestimonial statements. 541 U.S. at 68. Even so, the Court observed:

[T]he “core class of testimonial” statements included those “pretrial statements that declarants would reasonably expect to be used prosecutorially.” The Court also seemed to quote with approval a brief that described testimonial statements as “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

State v. Mason, 160 Wn.2d 910, 918, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035, 128 S. Ct. 2430, 171 L. Ed.2d 235 (2008) (internal quotation marks omitted) (quoting Crawford, 541 U.S. at 51-52).

Under this test, and as defense counsel argued below, Cole’s statements to hospital personnel were within the “core class of testimonial” statements. 3RP 3-4. Cole went to the hospital at the detective’s urging – more than seven hours after the alleged assault – and after she had signed a release of information indicating that her medical records would be used in any future prosecution. Accordingly, the statements were made under circumstances which would lead an objective witness reasonably to

believe that the statements would be available for use at a later trial.

Despite this, the state argued, and the court agreed, that the statements were made for the “primary purpose” of medical diagnosis and treatment and therefore not testimonial. 3RP 5, 10-11. The “primary purpose” test stems from Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). See Michigan v. Bryant, ___ U.S. ___, 131 S. Ct. 1143, 1155 (2011).

In Davis, the U.S. Supreme Court held that statements made in the course of a police investigation are nontestimonial if the primary purpose of the questioning is to allow police to assist in an ongoing emergency. 547 U.S. at 822. But statements are testimonial if the primary purpose of the questioning is to establish or prove past events potentially relevant to later criminal prosecution and circumstances objectively indicate that there is no ongoing emergency. Davis, 547 U.S. at 822.

The Davis test does not necessarily answer the question here, however: whether statements made to health care providers are, or can be, “testimonial.” Clark v. State, 199 P.3d 1203, 1208 (2009).

Indeed, Washington cases addressing whether hearsay statements to health care professionals are, or can be, testimonial have applied a three-part test developed by this Court in State v. Moses, 129 Wn. App. 718, 119 P.3d 906 (2005), accord, State v. Sandoval, 137 Wn. App. 532, 154 P.3d 271, 537 (2007) (applying test from Moses).

Moses was convicted of killing his wife, Jennifer. On appeal, Moses argued his right of confrontation was violated by the admission of statements Jennifer made to a doctor and social worker concerning a prior incident of domestic violence. Moses, 129 Wn. App. at 722-723. Several years earlier, in November 2001, Jennifer's neighbor called 911. The neighbor reported Moses had hit and kicked Jennifer. After the police arrived, over the course of a forty-minute interview, Jennifer described the assault. She was then transported to the hospital for treatment of her injuries. Jennifer told the emergency room doctor and hospital social worker that Moses hit her and kicked her in the face. The trial court admitted the statements made by Jennifer to the police, the ER doctor and the social worker as excited utterances. Moses, 129 Wn. App. at 723.

On appeal, this Court held Jennifer's statements to the police were testimonial and should not have been admitted. Moses, 129 Wn. App. at 727-28. However, this Court held the statements to the emergency room doctor and social worker were not testimonial:

This case is more similar to Fisher^[4] and Vaught.^[5] Jennifer was taken to the emergency room of the hospital shortly after the assault for serious injuries. The ER doctor, Dr. Appleton, testified that he questioned Jennifer in order to provide treatment. Dr. Appleton examined Jennifer and asked her what had happened and then ordered x-rays of Jennifer's jaw. And unlike Vigil^[6] and T.T.,^[7] the purpose of Dr. Appleton's examination was for medical diagnosis and treatment of Jennifer's significant injuries. Dr. Appleton had no role in the investigation of the assault and he was not working on behalf of or in conjunction with the police or governmental officials to develop testimony for the prosecution. There is also nothing in the record to indicate Jennifer believed or

⁴ State v. Fisher, 130 Wn. App. 1, 108 P.3d 1262 (2005) (statement by child abuse victim to doctor was not testimonial; doctor was not a government employee and there was no indication of a purpose to prepare testimony for trial).

⁵ State v. Vaught, 268 Neb. 316, 325-26, 682 N.W.2d 284 (2004) (four-year-old's identifying statements to doctor were not testimonial; only purpose of the medical exam was to provide medical treatment and there was not indication of a purpose to develop testimony for trial).

⁶ People v. Vigil, 104 P.3d 258, 265 (Colo. App. 2004) (statements of seven-year-old identifying perpetrator of sexual assault to doctor were testimonial; doctor was member of a child protection team and performed a forensic sexual abuse examination).

⁷ In re T.T., 351 Ill. App. 3d 976, 993, 287 Ill. Dec. 145, 815 N.E.2d 789 (2004) (victim's statement identifying perpetrator was testimonial because the medical examination was done six months after the assault, for the purpose of pursuing a prosecution).

had reason to believe that her statements to Dr. Appleton would be used at a subsequent trial. We conclude that Jennifer's statements to Dr. Appleton were not testimonial under Crawford.

Moses, 129 Wn. App. at 730 (emphasis added).

Division Three has since characterized the test from Moses as follows:

Witness statements to a medical doctor are not testimonial (1) where they are made for diagnosis and treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working with the State. State v. Moses, 129 Wn. App. 718, 729-730, 119 P.3d 906, review denied, 157 Wn.2d 1006, 136 P.3d 759 (2006). This includes statements of fault in domestic violence cases since the identity of an abuser may affect the witness's treatment. Id. at 729, 119 P.3d 906.

Sandoval, 137 Wn. App. at 537.

Just as Cole's statements were testimonial under the "objective witness" test from Crawford, her statements were testimonial under this Court's three-part test formulated in Moses. Unlike Jennifer, Cole had every reason to expect her statements to hospital personnel would be used at trial. She signed a release of information explicitly informing her of such. See Moses, 129 Wn. App. at 727 (statements to police testimonial in part because Jennifer acknowledged the likelihood that her statements could be

used in prosecuting Moses). Moreover, unlike Jennifer, Cole went to the hospital – at the detective’s urging – more than seven hours after the alleged assault. Accordingly, unlike Moses, this case is just like Vigil and T.T., in that there was an indication of a purpose to develop testimony for trial. Under this Court’s precedent, the trial court’s admission of Cole’s statements violated Roberts’ right to confront.

As the state may point out, however, Moses was a pre-Davis case, and pre-Michigan v. Bryant, which reinforced the “primary purpose” test. Michigan v. Bryant, ___ U.S. ___, 131 S. Ct. 1143, 1155 (2011); State v. Beadle, 173 Wn.2d 97, 109, 265 P.3d 863 (2011). Research uncovered no Washington case directly on point addressing statements to health care professionals and applying the “primary purpose” test.

However, one state court to consider the issue remarked: “there is no easy correlation between (1) admissibility of hearsay under the confrontation clause and (2) admissibility of hearsay under the exception for statements made for the purpose of medical diagnosis or treatment. See e.g. Clark v. State, 199 P.3d 1203, 1209-1213 (2009).

As the Clark court noted, before Davis was decided, the courts often applied the “objective witness” formulation found in Crawford to determine admissibility. Clark, 199 P.3d at 1208 (citing *inter alia*, Vigil and Moses, *supra*). While the Clark court recognized this formulation as useful, it also noted that it could lead to results inconsistent with Davis:

The facts and the holding of Davis illustrate this point. It may be reasonable for a person to assume that, if they report a crime to 911 operators, their statements will be recorded and available for use in a future criminal prosecution. Nevertheless, the Court in Davis held that the crime victim’s statements to the 911 operator were not “testimonial” – largely because of the circumstances in which they were given (an ongoing emergency), and the purpose for which they were given (to obtain police assistance to meet that emergency).

Clark, 199 P.3d at 1209 (emphasis in original).

Next, the Clark court noted that – perhaps anticipating Davis – other courts focused on whether the primary purpose of the interview was medical diagnosis and treatment, in which case the statement was not testimonial, or whether it was investigating a crime and developing testimony for trial, in which case the statement was testimonial. Clark, 199 P.3d at 1209 (citing Vaught, *supra*). As the Clark court noted, this emphasis is inconsistent with Crawford:

This approach may seem attractive at first glance, because it simplifies a judge's task. Under this approach, in most instances, the judge would simply ascertain whether the challenged evidence was admissible under the hearsay rules governing statements made for the purpose of medical diagnosis or treatment, and then the confrontation issue would be resolved too.

But Crawford and Davis are premised on the idea that a defendant's right of confrontation is distinct from the policies that underlie the hearsay rules.

Clark, 199 P.3d at 1210.

Ultimately, the Alaskan court found persuasive the Sixth Amendment analysis applied by the California Supreme Court in People v. Cage, 40 Cal. 4th 965, 56 Cal. Rptr. 3d 789, 155 P.3d 205 (2007), cert. denied, 128 S. Ct. 612, 169 L. Ed. 2d 395 (2007). Cage was convicted of slashing her teenage son's face with a shard of glass. Following the attack, the son was taken by ambulance to the hospital for treatment. While waiting to be seen by the doctor, he was interviewed by a police officer and he described the attack to the officer. A little later, the son was evaluated by emergency room physicians and then taken to a surgeon specializing in head and neck injuries. When the surgeon asked him what happened, the son described how his mother had cut him with a piece of glass. Clark, 199 P.3d at 1210-11.

Cage's son did not testify at trial, but his statement to the surgeon was admitted over Cage's objection. On appeal, Cage argued admission of the statement was testimonial and should have been excluded. Clark, at 1211. As the Clark court summarized, the California court disagreed, applying a Davis analysis:

[When the victim's conversation with the surgeon took place, the victim] needed immediate acute treatment for a five- or six-inch laceration on the side of his face and neck. As [the surgeon] explained, his sole object in asking [the victim] "what happened" was to determine ... the exact nature of the wound, and thus the correct mode of treatment. The question was neutral in form, and though [the victim] responded by identifying [Cage] as his assailant, [the surgeon] did not pursue that avenue further. Objectively viewed, the primary purpose of the [surgeon's] question, and the [victim's] answer, was not to establish or prove past facts for possible [prosecutorial] use, but [rather] to help [the surgeon] deal with the immediate medical situation[.] It was thus akin to the 911 operator's emergency questioning of [the victim] in Davis. Cage, 56 Cal.Rptr.3d 789, 155 P.3d at 218.

The California court further noted that "there [was] no evidence that [the surgeon] was acting in conjunction with law enforcement, or that his question about the cause of [the victim's] injury had any evidence-gathering aim.... The question and answer occurred in a private conversation between a patient and his doctor, by which both [the patient and the doctor] presumably sought only to ensure [the patient's] proper treatment."

Clark, 199 P.3d at 1211-12.

Seemingly important to the California court in its analysis was the patient's *emergent* need for treatment. Also important was the lack of any indication of a purpose other than to ensure treatment. Thus, the California test appears very similar to this Court's formulation in Moses.

And unlike the circumstances of Moses or Cage, Cole did not have an emergent need for treatment and there was an indication of a purpose other than to ensure treatment. Accordingly, even under the "primary purpose" test – as applied in California – Cole's statements were testimonial.⁸

Significantly, in applying the "primary purpose" test as enunciated by the California court, the Clark court found it significant that the out-of-court declarant/complainant (who did not testify and whose statements to medical personnel were used to

⁸ As the state may point out, the United States Supreme Court has more recently intimated that statements made for the purpose of medical diagnosis and treatment may be nontestimonial by nature. See Bryant, 131 S. Ct., at 1157, n. 9 (listing "Statements for Purposes of Medical Diagnosis or Treatment" under Federal Rule of Evidence 803(4) as an example of statements that are "by their nature, made for a purpose other than use in a prosecution"); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 2533 n.2, 174 L.Ed.2d 314 (2009) ("[M]edical reports created for treatment purposes ... would not be testimonial under our decision today"). As the Clark court recognized, however, such a bald assertion would run contrary to Crawford. Moreover, statements to health care professionals were not at issue in those cases and the court's suggestion that such would be nontestimonial is, therefore, dicta.

convict Clark of assault) testified at an evidentiary hearing that she came to the emergency room because, during the assault, she heard something break in her face, and she was worried that her face would be deformed. Clark, 199 P.3d at 1212.

In an earlier appeal of Clark's case, the Alaskan court found the record insufficiently developed to determine whether the declarant's statements were testimonial, and accordingly, remanded for an evidentiary hearing to inquire into the nature and purpose of the declarant/complainant's statements to emergency room personnel. Clark, 199 P.3d at 1206.

In contrast, the record here shows Cole's statements are testimonial. Cole went to the emergency room at the detective's urging, after she signed a release informing her that her statements would be used in any subsequent prosecution of Roberts.

Assuming this Court finds the record lacking, however, it should remand for an evidentiary hearing on the issue as did the Alaskan court. Clark, 199 P.3d at 1206. As defense counsel noted below, the record does not disclose Cole's purpose in going to the emergency room. 3RP 10 ("without Ms. Cole here to tell us what her primary purpose was in going to the hospital we won't know").

Assuming arguendo this Court agrees Cole's statements were testimonial, reversal of Roberts' conviction is required. "Confrontation Clause errors [are] subject to Chapman harmless-error analysis." Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Chapman v. California, 386 U.S. 18, 21–22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Under this standard, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24, 87 S.Ct. 824;

The state cannot make that showing here. Cole's statements comprised the state's main evidence against Roberts. Indeed, the prosecutor emphasized this evidence in closing. See e.g. State v. Jasper, __ Wn.2d __, __ P.3d __, 2012 WL 862196, *12 (state unable to prove harmless beyond a reasonable doubt where prosecutor emphasized inadmissible evidence in closing argument).

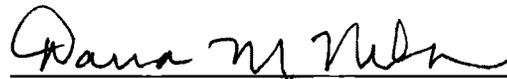
E. CONCLUSION

Because Cole's testimonial hearsay was the state's key evidence against Roberts, and because its admission violated Roberts' right to confront, this Court should reverse his conviction.

Dated this 30th day of March, 2012

Respectfully submitted

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 67414-5-II
)	
BRANDON ROBERTS,)	
)	
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 30TH DAY OF MARCH 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRANDON ROBERTS
C/O KRISTIE & STEVE HANSON
7206 NE 190TH STREET
KENMORE, WA 98028

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MARCH 2012.

x *Patrick Mayovsky*