

NO. 67913-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ALFONSO SENIOR,

Appellant.

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2012 MAY 18 PM 4:30  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The admission of Franisa Johnson's testimony violated ER 802.
2. The admission of Franisa Johnson's testimony violated ER 403.
3. The admission of Franisa Johnson's testimony violated the Confrontation Clauses of the Sixth Amendment and article I, section 22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. ER 802 requires the exclusion of hearsay, which is an out-of-court statement offered for the truth of the matter asserted. Although another person's statement is not hearsay if a party "adopted" it, this "adoptive admission" exemption does not apply unless the party unambiguously assented to the statement. Here, the trial court allowed Franisa Johnson to testify that she heard Robert Swaggerty say "why did you do that?" and that Alfonso Senior shook his head in response. The exchange occurred several hours after a murder, but immediately after Mr. Senior had told his son to leave the room. Did the trial court violate the rule against hearsay by admitting the testimony?

2. ER 104(a) assigns to the trial judge the responsibility for making preliminary determinations regarding the "admissibility of evidence." Both the Oregon Supreme Court and federal courts have held that the question of whether a party adopted another's statement is one for the judge under ER 104(a). This Court has held that the similar question

of whether the declarant had the authority to speak for the party is an issue for the judge under ER 104(a). In a 24-year-old case, however, this Court held that the question of whether a party adopted another's statement is one for the jury under ER 104(b). Should this Court overrule that case because the question at issue is one of admissibility and not weight, and because it is impossible for a jury to ignore the hearsay statement once the witness has testified?

3. Should this Court follow Pennsylvania's lead and abolish the "tacit admission" exemption altogether because the evidence thereby admitted is unreliable?

4. ER 403 provides for the exclusion of evidence that is substantially more prejudicial than probative. Where the meaning of Robert Swaggerty's statement and Mr. Senior's head shake were ambiguous, but the State used it to argue Mr. Senior confessed to a murder for which the identification evidence was weak, did the trial court violate ER 403 by admitting the statement and response?

5. The Sixth Amendment and article I, section 22 guarantee a defendant the right to confront his accusers. Did the trial court violate Mr. Senior's constitutional right to confront his accusers by allowing Franisa Johnson to testify about Robert Swaggerty's alleged accusation, when Robert Swaggerty never testified?

C. STATEMENT OF THE CASE

On an October night in 2010, Alfonso Senior went out to a bar with his brother, Antoine Senior, and his cousin, Robert Swaggerty. 10/10/11 RP 171. Many people were at the bar drinking, dancing, and socializing. 9/27/11 RP 38-44.

At closing time, everyone spilled into the parking lot. 10/11/11 RP 150. Mr. Senior and his companions argued briefly with another group of men, including Darrell Webster and Charles Bullock. 9/27/11 RP 44, 49-50. The argument was apparently trivial, and after assuring each other that "it was cool," both groups departed. 9/27/11 RP 67. They, along with many other people who had just left the bar, went to a nearby gas station to buy beer and food. 9/26/11 RP 29; 9/27/11 RP 67; 9/28/11 RP 149; 10/6/11 RP 154.

The socializing continued in the parking lot of the gas station, where numerous people congregated. Antoine Senior flirted with a woman named Pia Inkamp. 9/28/11 RP 151-52, 171; 10/6/11 RP 22, 27. When Darrell Webster went to talk to the same woman, he was surprised to see Antoine Senior was already doing so. 9/28/11 RP 154-55. According to Ms. Inkamp, the two men "postured," but did not argue or hit each other. 9/28/11 RP 156; 10/6/11 RP 12, 29. According to other witnesses, the two engaged in a fist fight. 10/11/11 RP 156; 10/18/11 RP

159. After a few seconds, Ms. Inkamp heard two shots and saw Mr. Webster slump to the ground. 9/28/11 RP 156; 10/6/11 RP 15. She did not see who shot Mr. Webster and neither did most people in the parking lot. 9/28/11 RP 44, 48, 166; 10/6/11 RP 34, 38, 156; 10/11/11 RP 117-19, 138, 158.

Of the five people who did see the man with the gun, two said the shooter wore a black shirt, while two others said the shooter wore a white shirt. 9/26/11 RP 46, 122; 10/6/11 RP 63-64; 10/10/11 RP 17; 10/12/11 RP 116; 10/18/11 RP 203. One described the shooter as short while two others described the shooter as tall. 9/26/12 RP 46; 10/12/11 RP 117, 145; 10/18/11 RP 168. One described the perpetrator as a lighter-skinned African-American while three described him as darker-skinned. 10/10/11 RP 17; 10/12/11 RP 107, 144; 10/18/11 RP 168, 203.

Alfonso Senior is a short, lighter-skinned African-American who wore a long-sleeved gold-colored "hoodie" that night. 9/27/11 RP 46; 10/10/11 RP 63, 171-73; 10/11/11 RP 15; 10/19/11 RP 64, 86. Antoine Senior and Robert Swaggerty are tall, and Mr. Swaggerty is darker-skinned. 9/27/11 RP 44-46; 10/11/11 RP 14. Antoine wore a white shirt with a colorful striped sweater or jacket, and Mr. Swaggerty wore a black shirt with a red cap. 9/27/11 RP 46, 51; 10/10/11 RP 172-73.

The State charged Alfonso Senior with the murder of Darrell Webster. CP 1, 99. Through his attorney, Mr. Senior denied having committed the crime and argued that he was the victim of mistaken identity. 10/18/11 RP 83-121, 126-30; 10/19/11 RP 33-86.

Only Amie Hudson identified Alfonso Senior as the shooter. 9/26/11 RP 87. The four other witnesses who saw the shooter did not identify Alfonso Senior as the perpetrator. 10/10/11 RP 17, 63; 10/12/11 RP 107-18, 139, 144; 10/18/11 RP 168, 203. Indeed, one of the State's own witnesses affirmatively testified that Alfonso Senior was "not the person". 10/12/11 RP 139. Ms. Hudson, who identified Alfonso Senior as the shooter, was sure the shooter wore a black shirt. 9/26/11 RP 46, 122; 10/6/11 RP 63-64. Robert Swaggerty wore a black shirt; Alfonso Senior did not. 10/10/11 RP 172-73.

The State sought to introduce evidence of a conversation between Robert Swaggerty and Alfonso Senior that occurred the morning after the homicide. The prosecutor intended to have Mr. Swaggerty's girlfriend, Franisa Johnson, testify that Mr. Swaggerty said, "why did you do that" and that Mr. Senior shook his head in response. 10/13/11 RP 54-55.

Mr. Senior objected under ER 802, ER 403, and the Confrontation Clause. 10/13/11 RP 57-63; 10/17/11 RP 26-53; 10/18/11 RP 48-51. The State argued that Mr. Swaggerty's statement and Mr. Senior's reaction to

it were admissible as an “adoptive admission.” 10/13/11 RP 60. Mr. Senior argued this was incorrect because both the statement and Mr. Senior’s reaction to it were “too vague”. 10/18/11 RP 48.

The court nevertheless allowed Ms. Johnson to repeat the out-of-court accusation, ruling it was essentially for the jury to determine, after hearing the statement, whether it was admissible. The court said:

[W]e are dealing with a response, and if it’s not an admission, which is not my determination, it’s the jury’s determination, but if it’s not an admission, or an adoption of the accusation, then, the instruction tells the jury, “Ignore it, don’t give it any weight, ignore it, you can’t use it for any purpose.”

10/18/11 RP 52-53. Following California caselaw, the court instructed the jury:

Evidence of Mr. Swaggerty’s statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the defendant in the face of it. Unless you should find that the defendant’s silence and conduct at the time indicated an admission that the statement was true, you should entirely disregard the statement.

10/18/11 RP 55, 71.

The jury convicted Alfonso Senior of second-degree murder and unlawful possession of a firearm. CP 147. He timely appeals. CP 156-65.

D. ARGUMENT

**A new trial should be granted because the court allowed Franisa Johnson to testify that Mr. Senior shook his head when Robert Swaggerty asked, “Why did you do that?” the morning after the murder.**

1. The admission of Franisa Johnson’s testimony about Robert Swaggerty’s statement violated the rule against hearsay.

The Rules of Evidence prohibit the admission of hearsay. ER 802. Hearsay is inadmissible because the witness repeating it has no personal knowledge of the truth of the matter asserted. See State v. Babich, 68 Wn. App. 438, 447, 842 P.2d 1053 (1993). “The theory of the hearsay rule ... is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination.” State v. Ryan, 103 Wn.2d 165, 175, 691 P.2d 197 (1984) (quoting 5 J. Wigmore, Evidence § 1420, at 251 (Chadbourn rev. 1974)).

The Rules define hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). A statement is not hearsay if it is one in which “the party has manifested an adoption or belief in its truth.” ER 801(d)(2)(ii). The trial court admitted Robert Swaggerty’s statement under this “adoptive admission” exemption, but the

ruling admitting the statement was incorrect for the reasons explained below.

- a. *The statement was inadmissible hearsay, not an adoptive admission, because both the accusation and Mr. Senior's response were ambiguous.*

Although it is possible for a party to manifest adoption of a statement by silence, silence is “inherently equivocal,” and therefore evidence of a statement and its silent response “must be received with caution.” State v. Neslund, 50 Wn. App. 531, 551, 749 P.2d 725 (1988). “Evidence of ‘tacit’ or ‘adoptive’ admissions is replete with possibilities for misunderstanding, and the cases repeatedly emphasize the need for careful control of this otherwise hearsay testimony.” Holmes v. United States, 580 A.2d 1259, 1263 (D.C. 1990) (internal citation omitted). The rule is that another person’s out-of-court declaration is inadmissible hearsay unless a reasonable jury could conclude that the defendant “unambiguously assented” to the statement. Id. (emphasis in original).

Where hearsay accusations are sought to be introduced as evidence against a defendant in a criminal proceeding on grounds that the hearsay was “adopted” by defendant as an admission of his guilt, the trial court must first determine that the asserted adoptive admission be manifested by conduct or statements which are unequivocal, positive, and definite in nature, clearly showing that in fact defendant intended to adopt the hearsay statements as his own.

Village of New Hope v. Duplessie, 231 N.W.2d 548, 553 (Minn. 1975).

Robert Swaggerty's statement was inadmissible hearsay. It was not an adoptive admission because both his statement and Mr. Senior's reaction to it were ambiguous. Mr. Swaggerty said, "why did you do that?" right after Mr. Senior sent his son outside. 10/18/11 RP 32-33, 76-77. The most natural inference, therefore, is that Mr. Swaggerty was asking Mr. Senior why he had made his son leave, not why he had shot Darrell Webster the previous evening. If he had meant the latter, he would have used the pronoun "it" rather than "that," or would have provided further temporal clarification.

Not only is the event to which Mr. Swaggerty referred ambiguous, but Mr. Senior's reaction to the statement is also ambiguous. According to Ms. Johnson, after Mr. Swaggerty said "why did you do that?", Mr. Senior said nothing and simply shook his head. The silent head shake could mean any number of things. It could mean, "I did not do anything." It could mean, "I don't know." It could mean, "I don't want to talk about it." It could mean, "It is none of your business why I made my son leave." It could mean, "My brother was the shooter but I want to protect him by keeping quiet in front of your girlfriend."

In Holmes, the defendant was charged with assault after allegedly shooting someone. Holmes, 580 A.2d at 1260. The trial court admitted into evidence a recorded conversation between the defendant and an

acquaintance. The acquaintance said, “you hit him in the head man, but he ain’t die.” The defendant responded, “Huh, he did.” The acquaintance then said, “No, he didn’t die,” and the defendant responded, “Oh, he didn’t?” Id. at 1262.

The appellate court reversed, noting, “[t]here are great possibilities of error in relying on oral utterances which are supposed to have been heard, understood, and acknowledged by the defendant.” Id. at 1263. The court held that “as a matter of law ... no reasonable jury could find that Holmes unambiguously assented to [the acquaintance’s] incriminating statements.” Id. at 1264.

The statement and response in Mr. Senior’s case are far more ambiguous than those in Holmes: it is not even clear to what event Mr. Swaggerty’s question referred, so Mr. Senior’s head shake could not be unambiguously assenting to anything. In Holmes, both men were obviously discussing the same event, though it was unclear whether the defendant adopted the acquaintance’s statement of events. Thus, if reversal was required in that case, it is certainly required here.

Duplessie is also instructive. There, the defendant’s friend made statements in the presence of the defendant implicating him in an attempted theft. Duplessie, 231 N.W.2d at 418-19. The defendant nodded and laughed in response. Id. at 419. The trial court admitted the out-of-

court statements and the defendant's response, but the appellate court reversed, stating, "the instant case is an example of an alleged adoptive admission which is equivocal." Id. at 421. Noting that a head nod could constitute an adoptive admission under certain circumstances, the court held the meaning of the head nod under the circumstances in that case did not "meet the requisite degree of definiteness and certainty." Id. at 425 n.9.

The same is true here. As explained above, Mr. Senior's head shake "does not meet the requisite degree of definiteness and certainty," see id., especially because the out-of-court statement itself was so ambiguous. This Court should accordingly hold the trial court abused its discretion in admitting Franisa Johnson's testimony about Robert Swaggerty's statement and Mr. Senior's reaction to it.

- b. *This Court should hold that the question of whether a party adopted a statement is an issue for the judge under ER 104(a).*

In Neslund, this Court held that the question of whether a party adopted another's statement is one of conditional relevance to be determined ultimately by the jury under ER 104(b). Neslund, 50 Wn. App. at 551-52. The trial court followed Neslund, but this Court should overrule it because the "adoptive admission" question is one of

competence rather than relevance, and should therefore be determined by a judge under ER 104(a).

The Oregon Supreme Court so held in State v. Carlson, 311 Or. 201, 808 P.2d 1002 (1991). Accord United States v. Lafferty, 387 F.Supp.2d 500, 510 (W.D. Pa. 2005) (in federal prosecution, question of whether adoptive admission exists is a preliminary question of admissibility under Fed. R. Evid. 104(a)). Looking first to the wording of Oregon Evidence Code 104(1), which is the same as Washington's ER 104(a), the Court noted that the rule "assigns to the trial judge the responsibility for making preliminary determinations regarding, inter alia, the 'admissibility of evidence.'" Carlson, 311 Or. at 211. The question of whether a person intended to adopt another's statement falls within the scope of that rule because its proof concerns the admissibility of evidence, not the weight to be accorded it. Id.

Tegland agrees that:

[T]he judge determines all ... preliminary questions concerning 'the admissibility of evidence' – factual determinations necessary to decide whether a particular exception to the hearsay rule applies, whether an exception to the best evidence rule would be made, whether the State should be allowed to offer evidence of a criminal defendant's criminal history, and so forth.

5 K. Tegland, Washington Practice, Evidence § 104.3 at 121 (5<sup>th</sup> ed. 2007). For example, ten years after Neslund, this Court held that

“[w]hether a declarant is a speaking agent for purposes of ER 801(d)(2)(iii) and (iv) is a question of preliminary fact governed by ER 104(a).” Condon Bros., Inc. v. Simpson Timber Company, 92 Wn. App. 275, 285, 966 P.2d 355 (1998). This Court implied that the same should be true of adoptive admissions. See id. at 285-86 (stating “Like other such hearsay related questions of preliminary fact, it is decided by the trial judge”); id. at n. 23 (“As used here, the phrase, ‘hearsay-related questions of preliminary fact’ includes questions of fact that relate to a hearsay exemption (ER 801(d)) or a hearsay exception (ER 803-04)”).

Indeed, it would make no sense to say that ER 104(a) governs admissibility questions under ER 801(d)(2)(iii) and (iv) but that ER 104(b) governs the similar question under ER 801(d)(2)(ii). The issue in either case is whether the declarant’s statement can be imputed to the party. The same screening rule should therefore apply in either instance. That rule should be ER 104(a), not ER 104(b), because the question is one of admissibility and not of weight.

But here, the trial court saddled the jury with the question of admissibility – instructing it to disregard the evidence if it determined it was not admissible. 10/18/11 RP 71. This is an inappropriate allocation of authority. As Tegland explained:

Occasional deviations from these general principles can be found in Washington. In a few reported cases, the trial court gave the jury instructions that, in effect, invited the jury to decide whether the requirements for the admissibility of certain evidence had been satisfied. The jury instructions then went on to say that if the jury concluded that the requirements had not been satisfied, the jury should disregard the evidence. These cases depart from the general rule, perhaps inadvertently, and do not seem to represent the current approach under Rule 104.

Tegland, § 104.3 at 122 (emphasis added).

The Oregon Supreme Court noted another “even more persuasive” reason for holding that the question is one for the judge: “If the evidence is inadmissible, i.e., the jury does not find the preliminary fact (intent to adopt, agree or approve) to exist, preventing jury contamination may prove impossible.” Carlson, 311 Or. at 213. Such contamination is inconsistent with Rule 103, which states, “In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means.” Id. at n. 12; see ER 103(c) (Washington rule has same language as Oregon rule).

Professor Norman Garland agrees:

If the decision as to the fact’s existence involves the preservation of an exclusionary rule of law, ... then the judge must be the one to decide whether the fact exists before the jury gets to hear anything about the proffered evidence. Otherwise, the jury would be tainted by consideration of the evidence governed by the exclusionary rule.

Norman M. Garland, An Essay on: Of Judges and Juries Revisited in the Context of Certain Preliminary Fact Questions Determining the Admissibility of Evidence under Federal and California Rules of Evidence, 36 Sw. U. L. Rev. 853, 855 (2008). Professor Garland reasons that the California approach, which the trial court followed in Mr. Senior's case, "undermines the operation of the exclusionary force of the hearsay rule." Id. at 856. "The jury should not be allowed to have the chance to consider the contested hearsay in deciding the existence of these preliminary facts if there is any real danger that the jury would be unable to disregard the contested hearsay." Id.

The policy of the hearsay rule prohibits statements from being considered for their truth unless certain requirements are met: here, the foundation for an adoptive admission. To allow the jury to hear the statement in order to find the basis for whether the evidence is relevant defeats the operation of the exclusionary and the purpose behind it.

Id. at 865.

In Carlson, the Oregon Supreme Court reversed where the trial court had admitted evidence that the defendant "hung his head and shook his head back and forth" after his wife accused him of "shooting up in the bedroom with all [his] stupid friends." Carlson, 311 Or. at 203. The court held this evidence was not admissible because given the ambiguity of the defendant's nonverbal reaction, there was insufficient evidence to support

a finding by a preponderance of the evidence that the defendant intended to adopt or agree with his wife's accusation. Id. at 214. The same is true here. This Court should hold that ER 104(a) applies to alleged adoptive admissions and that Franisa Johnson's hearsay testimony should not have been admitted in this case.

c. *This Court should reject the "tacit admission" rule.*

Although the above arguments resolve the issue as to Mr. Senior, this Court should consider going further and rejecting the "tacit admission" exemption altogether. Pennsylvania has done so in light of the unreliability of such evidence. Commonwealth v. Dravec, 424 Pa. 582, 227 A.2d 904 (1967). The Pennsylvania Supreme Court declared the tacit admission rule "too broad, sweeping, and elusive for precise interpretation, particularly where a man's liberty and his good name are at stake." Id. at 585.

Who determines whether a statement is one which "naturally" calls for a denial? What is natural for one person may not be natural for another. There are persons possessed of such dignity and pride that they would treat with silent contempt a dishonest accusation. Are they to be punished for refusing to dignify with a denial what they regard as wholly false and reprehensible?

Id. A law review article similarly refuted the foundation for the tacit admission exemption:

The common sense psychology behind the adoptive admission rule assumes that, when confronted with an untrue statement, a listener will speak up to refute it. This approach ignores the fact that many people, especially women and people of color, may react in a very different way – with silence or equivocation – because of their race, class, gender, ethnicity, or a combination of these factors.

Maria L. Ontiveros, Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity, 28 Sw. U. L. Rev. 337, 338-39 (1999).

Another law review author condemned the exemption more broadly, stating, “the principle that the innocent deny accusations is another ... fallacious generalization elevated to a binding proposition despite the lack of a valid basis for it in either empirical data or human experience.” Charles W. Gamble, The Tacit Admission Rule: Unreliable and Unconstitutional – A Doctrine Ripe for Abandonment, 14 Ga. L. Rev. 27, 33 (1979-80). Thus, “the Tacit Admission Rule in its entirety, including those applications that are constitutionally permissible, should be abandoned as based upon an unreliable principle: that the guilty remain silent when confronted with an accusation, while the innocent cry out.” Id. at 43.

The Dravec court similarly concluded that the tacit admission exemption “is founded on a wholly false premise.” Dravec, 424 Pa. at 586. “It rests on the spongy maxim, so many times proved unrealistic,

that silence gives consent.” *Id.* The court thus overruled its own earlier case adopting the exemption. *Id.* at 592. This Court should do the same, and should hold that ER 801(d)(2)(ii) applies only to express admissions.

2. The admission of Franisa Johnson’s testimony about Robert Swaggerty’s statement ER 403.

ER 403 prohibits evidence that is substantially more prejudicial than probative. Even if Franisa Johnson’s testimony about Robert Swaggerty’s statement were not prohibited by ER 802, it is inadmissible under ER 403. The statement was substantially more prejudicial than probative given the ambiguity of both the statement and response, as discussed above.

United States v. Rodriguez-Cabrera, 35 F.Supp.2d 181 (D. Puerto Rico 1999) is instructive. There, an FBI agent went to the defendant’s office and advised him he was under arrest. *Id.* at 184. The defendant said, “what is this about?” The agent replied that it was “about the money,” and the defendant nodded. *Id.*

This exchange was excluded from the defendant’s subsequent trial for various financial crimes. The court held the admission of the head nod in response to the statement that it was “about the money” would violate ER 403 because “its meaning is entirely too ambiguous.” *Id.* at 185. Although the agent understood the nod to mean that the defendant knew of

the extortion money to which he referred, there were “many equally plausible explanations for [the defendant’s] nod.” Id. “Simply put, the meaning of the nod is ambiguous and is not sufficiently reliable to be admitted into evidence as a statement by Defendant. There is no question that the prejudice that would result from admission of the nod substantially outweighs probative value.” Id. (citing Fed. R. Evid. 403).

The same is true in this case. Although the State presented a theory that Mr. Senior’s head shake meant that Mr. Senior (a) thought Robert Swaggerty was talking about the murder of Darrell Webster and (b) agreed that he committed the crime, there were many equally plausible explanations for Mr. Senior’s head shake. Again, the most plausible understanding for the whole exchange was that Mr. Swaggerty was referring to the event that had just occurred, which was Mr. Senior’s making his son go outside. And even if Mr. Swaggerty had been referring to the homicide, Mr. Senior’s response of shaking his head could mean any number of things, as explained above – including “I did not do it”. Accordingly, under ER 403, the evidence should have been excluded. Rodriguez-Cabrera, 35 F.Supp.2d at 185.

3. The admission of Franisa Johnson's testimony about Robert Swaggerty's statement violated the Confrontation Clause.

Even if Robert Swaggerty himself had testified about his out-of-court statement, the testimony would have violated ER 802 and ER 403. However, because Mr. Swaggerty's statement came in through Franisa Johnson, its admission also violated the Confrontation Clause.

The Sixth Amendment provides, "the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend VI. "The right to confront one's accusers is a concept that dates back to Roman times" Crawford v. Washington, 541 U.S. 36, 43, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The "ultimate goal" of the Confrontation Clause is "to ensure reliability of evidence," which can best be assessed "by testing in the crucible of cross-examination." Crawford, 541 U.S. at 61.

Article I, section 22 of the Washington Constitution states, "the accused shall have the right ... to meet the witnesses against him face to face." Const. art. I, § 22. This provision is even more protective than its federal counterpart. State v. Pugh, 167 Wn.2d 825, 832, 225 P.3d 892 (2009) (article I, section 22 right to confront witnesses "face to face" broader than Sixth Amendment); see also State v. Martin, 171 Wn.2d 521, 528, 252 P.3d 872 (2011) (article I, section 22 provides greater protection than Sixth Amendment against accusations that defendant tailored

testimony to trial evidence); State v. Rafay, 167 Wn.2d 644, 650, 222 P.3d 86 (2009) (article I, section 22, unlike Sixth Amendment, provides right to self-representation on appeal).

The admission of Robert Swaggerty's statement through Franisa Johnson violated the Sixth Amendment and article I, section 22 because Mr. Senior was unable to cross-examine his alleged accuser, Mr. Swaggerty. This inability to confront one's accuser is the classic problem the Confrontation Clause seeks to remedy. See Crawford, 541 U.S. at 43.

The State may argue that there is no confrontation problem because Mr. Senior "adopted" Mr. Swaggerty's statement and has no right to confront himself. See Lafferty, 387 F.Supp.2d at 510-11. But this begs the question. Mr. Senior must have the opportunity to cross-examine Mr. Swaggerty in order for the judge or jury to be able to determine whether Mr. Senior made an adoptive admission in the first place. It is unclear what Mr. Swaggerty's statement meant given the ambiguous context, and cross-examining him would help shed light on the meaning of the statement and the meaning of Mr. Senior's response. Given the weak evidence of identification in this case, Mr. Swaggerty's accusation was an extremely damaging piece of evidence – yet it was the one statement for which Mr. Senior was denied the right to confrontation. It is especially troubling that Mr. Senior was denied the right to confront Mr. Swaggerty

given that many of the witnesses' descriptions of the shooter match Swaggerty, not Mr. Senior. For this reason, too, this Court should reverse and remand for a new trial.

4. The remedy is reversal and remand for a new trial.

Constitutional errors require reversal unless the State proves beyond a reasonable doubt the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). As to evidentiary errors, reversal is required if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010).

Under either standard, reversal is required here for the improper admission of Robert Swaggerty's out-of-court accusation. The identification evidence in this case was weak. The State's own witnesses contradicted each other regarding the fundamental question of who committed the crime.

Although Amie Hudson testified that Alfonso Senior was the shooter, Levonte Smith testified that Alfonso Senior was not the shooter. 9/26/11 RP 87; 10/12/11 RP 139.

Two of the witnesses who saw the shooter described him as tall, but Alfonso Senior is short, while his brother and cousin are tall. 10/11/11 RP 14-15; 10/12/11 RP 117, 145; 10/18/11 RP 168.

Ms. Hudson testified that the shooter wore a black shirt and two other witnesses testified that the shooter wore a white shirt. 9/26/11 RP 46, 122; 10/6/11 RP 63-64; 10/10/11 RP 17; 10/12/11 RP 116; 10/18/11 RP 203. Alfonso Senior wore a gold-colored "hoodie" that evening, while his cousin wore a black shirt and his brother wore a white shirt with a striped multi-colored jacket. 9/27/11 RP 46, 51; 10/10/11 RP 172-73; 10/19/11 RP 64, 86

One witness testified that the shooter was light-skinned but three others testified that the shooter was dark-skinned. 10/10/11 RP 17; 10/12/11 RP 107, 144; 10/18/11 RP 168, 203. Alfonso Senior is a light-complexioned African-American, while his cousin Robert Swaggerty is dark-skinned. 9/27/11 RP 44-46.

Given this extremely weak and contradictory evidence regarding the identity of the shooter, the erroneous admission of Franisa Johnson's

hearsay testimony cannot be considered harmless. This Court should reverse the convictions and remand for a new trial.

E. CONCLUSION

For the reasons set forth above, Mr. Senior respectfully requests that this Court reverse his convictions and remand for a new trial.

DATED this 18th day of May, 2012.

Respectfully submitted,



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Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67913-9-I
v.	)	
	)	
ALFONSO SENIOR, JR.,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18<sup>TH</sup> DAY OF MAY, 2012, I CAUSED THE ORIGINAL **OPENING 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ALFONSO SENIOR, JR. 341154 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 18<sup>TH</sup> DAY OF MAY, 2012.

X \_\_\_\_\_  


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