

NO. 67913-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALFONSO SENIOR,

Appellant.

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

REPLY BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 704
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

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A. 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.

In his opening brief, Mr. Senior argued the admission of Franisa Johnson’s testimony was improper for several independent reasons: (1) the statement was inadmissible hearsay, not an “adoptive admission,” because both the accusation and Mr. Senior’s response were ambiguous; (2) the question of whether a party adopted a statement is a question for the judge under ER 104(a), but the trial court passed the question to the jury under ER 104(b); (3) the “tacit admission” exemption is based on an unreliable principle and should be abolished; (4) the admission of Franisa Johnson’s testimony about Robert Swaggerty’s statement violated ER 403; and (5) the admission of Franisa Johnson’s testimony about Robert Swaggerty’s statement violated the Confrontation Clause. Brief of Appellant at 7-22.

Although the State filed a 35-page brief, it devotes only two pages to responding to Mr. Senior’s argument. Brief of Respondent at 29-31. As the State fails to rebut Mr. Senior’s arguments, this Court should reverse and remand for a new trial.

The State claims Franisa Johnson’s testimony about Robert Swaggerty’s statement is not inadmissible hearsay because (1) it was an

adoptive admission that became Mr. Senior's own words and (2) adoptive admissions are not admitted for the truth of the matter asserted. Brief of Respondent at 29. The State's first argument begs the question and the second is simply incorrect.

As to the claim that the statement was not admitted for its truth, the statement at issue is "Why did you do it?". This is the same as "You did it. Why?". The reason the statement was offered was to support the State's position that Mr. Senior "did it." The State argued to the jury that the fact that Mr. Senior shook his head rather than denying culpability showed he committed the crime. 10/19/11 RP 98. It is therefore preposterous to assert that the statement was offered for anything other than its truth. The statement was hearsay.

As to the claim that the statement was not hearsay because it was an adoptive admission, this conclusory statement begs the question. In his opening brief, Mr. Senior presented several pages of argument showing that the statement at issue was not an adoptive admission and was therefore inadmissible hearsay. Brief of Appellant at 7-11. A statement is inadmissible hearsay, not an adoptive admission, unless a reasonable jury could conclude that the defendant "unambiguously assented" to the statement. Holmes v. United States, 580 A.2d 1259, 1263 (D.C. 1990).

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 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.” The State fails to address the ambiguous nature of both the question and the response. Brief of Respondent at 29-31.

In his opening brief, Mr. Senior also argued that whether a statement is an “adoptive admission” is a question for the judge under ER 104(a), but the trial court passed the question to the jury under ER 104(b). Brief of Appellant at 11-16. Mr. Senior acknowledged that this Court held to the contrary decades ago in State v. Neslund, 50 Wn. App. 531, 551-52, 749 P.2d 725 (1988). But he presented cases from other jurisdictions, commentary, and one of this Court’s more recent cases showing that the “adoptive admission” question is one for the judge under ER 104(a). See State v. Carlson, 311 Or. 201, 808 P.2d 1002 (1991); United States v. Lafferty, 387 F.Supp.2d 500, 510 (W.D. Pa. 2005); 5 K. Tegland, Washington Practice, Evidence § 104.3 at 121 (5th ed. 2007); Condon Bros., Inc. v. Simpson Timber Company, 92 Wn. App. 275, 285, 966 P.2d 355 (1998). The State fails to address this Court’s more recent decision in Condon Bros. or any of the other cases Mr. Senior cited.

Instead, the State cites Tegland in support of its position that the adoptive admission question is an ER 104(b) question. Brief of Respondent at 30. But as explained in the opening brief, Tegland believes

the question is one for the judge, and that the approach taken by the trial court in this case was improper:

[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.

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 121-22 (emphasis added).

Tegland's position is consistent with this Court's reasoning in Condon Bros., a more recent case than Neslund. In Condon Bros., this Court held "[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)." 92 Wn. App. at 285. 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. See Carlson, 311 Or. at 211.

As explained above and in the opening brief, because Mr. Senior's head shake was not an "adoptive admission," this Court should reverse and remand for a new trial absent the hearsay testimony. The Court need not reach Mr. Senior's alternative arguments. However, if this Court decides, contrary to Mr. Senior's arguments, that the head shake did constitute an "adoptive admission," it should nevertheless reverse because the "tacit admission" exemption results in the admission of unreliable evidence and should be abolished altogether. Brief of Appellant at 16-18 (citing Commonwealth v. Dravec, 424 Pa. 582, 227 A.2d 904 (1967); 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); Charles W.

Gamble, The Tacit Admission Rule: Unreliable and Unconstitutional – A Doctrine Ripe for Abandonment, 14 Ga. L. Rev. 27, 33 (1979-80)).

The State misunderstands the nature of independent alternative arguments. Its only response to the above argument is this:

Alfonso [Senior] next asks this Court to reject the “tacit admission” rule, even though it is unnecessary to resolve the issues in the instant case. The Court should decline the offer. See In the Matter of the Marriage of Rideout, 150 Wn.2d 337, 354, 77 P.3d 1174 (2003) (where language has no bearing on the decision, that language is dictum).

Brief of Respondent at 30. It is unnecessary to reach this issue only if this Court rules for Mr. Senior on one of the other issues raised. The State’s claim that it is unnecessary to reach this issue thus supports Mr. Senior’s primary arguments.

In his opening brief, Mr. Senior also argued that Franisa Johnson’s testimony was substantially more prejudicial than probative and therefore should have been excluded under ER 403. Brief of Appellant at 18-19. As with the other issues, the State’s response is limited to one paragraph with no analysis:

Alfonso [Senior] next asserts that, under ER 403, the trial court erred in admitting the evidence. The Court should reject this claim. After the trial court heard Johnson’s testimony and looked at the circumstances surrounding Swaggerty’s question and Alfonso’s response, the court concluded that the accusation was not vague and thus not inadmissible under ER 403. 17RP 52. Alfonso has not

demonstrated that the trial court abused its considerable discretion in admitting the evidence.

Brief of Respondent at 30-31.

The State did not address United States v. Rodriguez-Cabrera, 35 F.Supp.2d 181 (D. Puerto Rico 1999). 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.

Finally, Mr. Senior argued that the admission of Franisa Johnson's testimony about Robert Swaggerty's statement violated the confrontation clauses of the Sixth Amendment and article I, section 22. Brief of Appellant at 20-22 (citing, inter alia, Crawford v. Washington, 541 U.S. 36, 43, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). The State responds in one sentence, claiming that Neslund controls. Brief of Respondent at 31. But Neslund was decided before the Supreme Court radically altered Confrontation Clause jurisprudence in Crawford and its progeny. The issue must be revisited in light of intervening caselaw.

For example, in the context of out-of-court statements by translators, it used to be the rule that – as the State argues here – a

translation was not subject to the confrontation clause because it allegedly represented the defendant's own statement. See United States v. Nazemian, 948 F.2d 522, 525-26 (9th Cir. 1991). But courts are recognizing the need to revisit that rule in light of recent developments. See, e.g., United States v. Romo-Chavez, 681 F.3d 955, 962 n.1 (2012) (Berzon, J., concurring) ("The notion that a translator's out-of-court version of a testimonial statement need not be subject to cross-examination seems in great tension with Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) and Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011)). Because the State fails to address modern Confrontation Clause cases, its argument should be rejected.

In sum, the trial court erred in admitting Franisa Johnson's testimony that Mr. Senior shook his head in response to Robert Swaggerty's statement, "why did you do it." The error was prejudicial in light of the contradictory evidence presented regarding the fundamental question of who committed the crime. See Brief of Appellant at 22-24. Mr. Senior respectfully asks this Court to reverse and remand for a new trial absent the inadmissible hearsay.

B. CONCLUSION

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

DATED this 24th day of September, 2012.

Respectfully submitted,



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

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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF SEPTEMBER, 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:

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

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STATE OF WASHINGTON

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF SEPTEMBER, 2012.

x _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710