

NO. 34954-0-II
Cowlitz Co. Cause NO. 05-1-01671-7

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER VEAL,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY [Signature]
DEPUTY

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
AMIE HUNT/ WSBA #31375
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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A. ASSIGNMENTS OF ERROR

1. ANSWERS TO ASSIGNMENTS OF ERROR

- a. The Trial Court did not violate Veal's Sixth Amendment right to confrontation when it permitted the State to use Weaver's other contemporaneous statements in rebuttal, if the defendant testified to Weaver's statements in his direct testimony.**

2. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- a. Was Weaver's cry for help to Deputy Hockett non-testimonial hearsay and thus outside the concern of the Sixth Amendment right to confront witnesses?**
- b. Did the trial court abuse its discretion when it ruled Weaver's statements to Veal were hearsay?**
- c. Did the defendant preserve the issue for appeal when he elected not to testify?**
- d. Can a defendant use the Sixth Amendment right to confront witnesses to prevent the State's admission of impeachment evidence under Evidence Rule 806 they offered only in rebuttal to the defendant's introduction of the unavailable witness' hearsay statements?**

B. STATEMENT OF THE CASE

The State generally agrees with Appellant's statement of the case with the following exceptions and additions.

Christopher Veal (“Veal”) was arrested and charged with second-degree theft, or in the alternative, with taking a motor vehicle without the owner’s permission. CP 1-2. The case proceeded to a jury trial. Prior to trial, Veal filed a Motion in Limine to, among other things, exclude the following statements:

Any statements, oral or written, made by Virginia Weaver to any of the states witnesses, specifically statements made to Tim Faldo in front of his residence, all statements made to Deputy Hockett and statements made to Daniel Silkwood, pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004).

Def. Mt in Limine, CP 4.

The court addressed Veal’s motion before seating the jury. 1RP 17-24. At the hearing, the State sought to admit statements made by Virginia Weaver (“Weaver”) to Deputy Hockett, the first officer to arrive at the scene. 1RP 9. Both parties agreed Weaver was unavailable and would not testify. 1RP 11, 18.

In its case-in-chief, the State sought only the admission that Weaver told Deputy Hockett, “Chris Veal took the truck.” 1RP 9-10. The State proffered Deputy Hockett would testify Weaver flagged him down, she appeared upset, was crying, and that she spontaneously made the statement without being questioned. 1RP 10. The State offered this statement as an excited utterance and a non-testimonial statement falling

outside of the constraints of *Crawford v. Washington*, 541 U.S. 36 (2004).
1RP 10.

Veal's attorney further outlined to the court the statements Weaver made to Deputy Hockett as contained in the police report. 1RP 22. After stating, "Chris took the truck," Weaver told Deputy Hockett she had a flat tire on her van and since Veal said he would fix it, she drove Veal to the residence where the incident occurred. 1RP 22. She told Deputy Hockett she lived at the residence with her roommate, Silkwood. 1RP 22. Additionally, Weaver said her five-year-old son was sleeping, when she was awakened by a loud pounding sound. 1RP 22. When she looked outside, she saw Veal hitting the steering column on a blue Chevy with a hammer. 1RP 22.

The trial court preliminarily ruled the State's proffered statement was admissible in the State's case-in-chief. 1RP 22. Deputy Hockett would be permitted to testify that when he first arrived on the scene, Weaver approached him and said, "Chris is stealing the truck, or he stole the truck." 1RP 22. The Court ruled this statement was admissible as an excited utterance. 1RP 22. However, it indicated that Weaver's statements relating to prior events were not admissible in the case-in-chief, although they may be admissible in rebuttal. 1RP 22.

Veal's attorney objected to the use of Weaver's statements in rebuttal on the grounds it constituted a violation of his Sixth Amendment right to confront witnesses under *Crawford*. 1RP 22-23 Although both parties agreed Weaver did not have permission to sell Veal the truck, Veal's defense in the case was a good faith claim of ownership. 1RP 17 Veal intended to testify Weaver told him "it was her vehicle" and she sold it to him. 1RP 17. He offered Weaver's statement to establish his state of mind, and to show the effect on him as the hearer. 1RP 23, 56-67. Veal argued the statement was not offered for the truth of the matter asserted and thus was not hearsay. 1RP 23-24, 56-67.

After much argument, the trial court determined Veal's proffered testimony was hearsay, but ultimately ruled it was admissible. 1RP 61. The court said, "[Veal] can testify to the conversation that [Weaver] says it's my vehicle and I'll sell it to you." 1RP 61. However, the court indicated concern that if Veal were to testify to Weaver's alleged statements to him, then Weaver's other statements--including statements to Deputy Hockett--which were inconsistent "ought also to be admissible" because they were "spontaneous and under the influence of the event." 1RP 24.

The court reasoned Veal's proffered testimony was hearsay, and if Veal were to introduce the subject at trial by testifying to the hearsay, then

the State may introduce Weaver's spontaneous statements to Deputy Hocket in rebuttal as an "offer of proof she never said it, that he's fabricating." 1RP 65, 67, 73. The court stressed the statements by Weaver to police were reliable because they were spontaneous. 1RP 67. In contrast, the court concluded statements Weaver made to Silkwood the day after the event did not have the same guarantee of reliability and thus were not admissible as rebuttal evidence. 1RP 67.

In response to Veal's objection under *Crawford*, the court made a distinction between introducing Weaver's statements to the deputy in the State's case-in-chief, from use of Weaver's statement for impeachment once Veal brought Weaver's other hearsay statement into evidence. 1RP 73. The court said, "[w]hen your client starts introducing hearsay, then I think the State is entitled to respond with relevant testimony addressing the probability that in fact, what your client says is true or not true." 1RP 73. "Your client is the one who is introducing hearsay and my ruling is the State has an opportunity to respond if they have any reliable testimony." 1RP 73.

The court concluded the statements were barred by *Crawford* if offered in the State's case-in-chief, but Veal's introduction of Weaver's hearsay statement opened the door for impeachment. 1RP 74. The trial court did not think Veal's Sixth Amendment right to confront witnesses

under *Crawford* applied in this circumstance when Veal himself introduced the unavailable witness's statement. 1RP 73-76, 2RP 183.

The case was tried to a jury and Veal was found guilty of taking a motor vehicle without permission. 2RP 280. Veal chose not to testify at trial "because of the court's ruling regarding the *Crawford* issue." 2RP 238.

C. ARGUMENT

1. THE ADMISSION OF STATEMENTS MADE BY AN UNAVAILABLE WITNESS WAS PROPER AS THE STATEMENTS WERE NOT IN VIOLATION OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AS THEY WERE A NON-TESTIMONIAL CRY FOR HELP.

The Sixth Amendment confrontation clause provides: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. U.S. Const. Amend. VI.

Crawford v. Washington 541 U.S. 3, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), instructs that the core concern of the confrontation clause is the admission of testimonial statements when the declarant is unavailable to testify and the defendant has not had a prior opportunity to cross-examine the declarant. *See State v. Davis*, 154 Wa.2d 291, 299, 111 P.3d 844, 848, (2005) *citing Crawford v. Washington*, 541 U.S. 3, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). While *Crawford* declined to spell out a

comprehensive definition of “testimonial,” it did say that not all hearsay statements implicate the Sixth Amendment. *See id.* at 299, 301. At least one important factor in determining if a statement is “testimonial” is the manner or mode of its making. *See id.* at 300.

In *State v. Davis* the Washington Supreme Court addressed whether statements made to a 911 operator fell under the Sixth Amendment. *See Davis*, 154 Wa.2d 291. In *Davis*, a jury convicted the defendant of felony violation of a domestic no-contact order. *See id.* at 297. Evidence at trial included a recording of a 911 call, testimony of two officers who responded to the scene, and a certified copy of the no-contact order. *See id.* At 296-97. When the officers responded to the scene they observed fresh injuries to the victim on her face and forearm. *See id.* The only evidence linking the injuries to the defendant was the 911 tape. *See id.*

The Court of Appeals first reviewed the trial court’s admission of 911 statement, holding the 911 call was properly admitted into evidence under the excited utterance exception to the hearsay rule. The Appeals Court did not consider Davis’ confrontation clause arguments on the grounds the statements were already admissible as excited utterances. *See id.* at 297. The defendant appealed and the Washington Supreme Court accepted review, rejecting the Court of Appeals sole evidentiary analysis.

The Court held that emergency 911 calls should be assessed on a case-by-case basis and that statements made should be individually evaluated for admissibility in light of the confrontation clause. *See id.*

The factors presented in *Davis* were: the victim was crying as she spoke with the 911 operator, the victim rejected an ambulance, and there were more than one conversation with the operator as the 911 operator called the victim back after the line was disconnected. *See id.* at 302-03. The Court refused to find the victim's rejection of an aid car, nor the 911 operator's call back after a hang-up call, negated the non-testimonial nature of her statements. *See id.*

In its analysis to determine if the 911 call was testimonial, the Court stated:

[g]enerally, an emergency 911 call is not of the same nature as an in-custody interrogation by police...Moreover, the purpose of the call is generally not to "bear witness." The call must be scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness.

A 911 call is typically initiated by the victim, not the police. Even though an emergency 911 call may assist police in investigation or assist the State in prosecution, where the call is not undertaken for those purposes, it does not resemble the specific type of out-of-court statement with which the Sixth Amendment is concerned.

Id. at 301. The Court further said:

[i]n most cases, one who calls 911, for emergency help is not “bearing witness,” whereas calls made to the police simply to report a crime may conceivably be considered testimonial. It is necessary to look at the circumstances of the 911 call in each case to determine whether the declarant knowingly provided the functional equivalent of testimony to a government agent.

Id. at 302.

Under the facts of *Davis*, it was observed that the victim called 911 because of an immediate danger. *See id.* at 303. There was no evidence that she sought to bear witness in contemplation of a legal proceeding. *See id.* The information essential to the prosecution of the *Davis* case was the victim’s initial identification of Davis as her assailant. *See id.* The Washington Supreme Court concluded that the portion of the victim’s call that identified Davis as her assailant was non-testimonial and properly admitted, because the circumstances were such that the 911 call arose out of an ongoing emergency situation. *See id.* at 303-04.

The United States Supreme Court upheld the Washington Supreme Court in *Davis v. Washington*, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), on the grounds the facts of the case established the 911 caller was not acting as a witness or calling for the purpose of testifying, but was calling for help. *See Davis v. Washington*, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The Court found that 911 calls are ordinarily designed to describe current

circumstances requiring police assistance. *See Davis v. Washington*, 126 S.Ct. 2266, 2276, 165 L.Ed.2d 224 (2006). As such, if the facts of a call for help objectively indicate, “that the elicited statements were necessary to be able to resolve the present emergency,” rather than simply to learn what happened in the past, the statements are non-testimonial. *Id.* The Court also found the operator’s efforts to learn the identity of the assailant did not make the statement’s testimonial, because it was essential officers knew any possible safety issues surrounding the suspect. *See id.* The Court distinguished the facts of *Davis* from those in *Crawford*, finding the victim’s statements in *Davis* were frantic answers which made an “environment that was not tranquil.” *Id.* at 2277. The Court also pointed out the difference in the nature between the formal interviews in *Crawford* and the informal interview in *Davis*. *See id.* at 2276-77.

Similarly, in this case, the same analysis should instruct this court in it’s evaluation of whether the hearsay statement by Virginia Weaver was properly admitted under the excited utterance exception to hearsay and as non-testimonial hearsay. The State proffered several of Ms. Weaver’s statements for admission. 1RP 9-10. However, the defendant only raises the statements Ms. Weaver made to Deputy Hockett on appeal. *See Df. Brf.* at 16.

In this case, the trial court considered the manner and mode of the making of the statements at issue here. 1RP 22. The State's proffered testimony and the testimony during trial were, that as the police approached her residence, Ms. Weaver flagged the officer down, appeared upset and was crying, and said to Deputy Hockett, "Chris took the truck." 1RP 10, 2RP 185-88.¹ The trial court held the statement was admissible as an excited utterance and was a call for help which was non-testimonial. 1RP 22, 65.

Under the facts and reasoning of *Davis*, Ms. Weaver's statement that "Chris took the truck" is a call for help and non-testimonial. Even though *Davis* revolved around a 911 call and much of the decisions are given to the nature of 911 calls as calls for help, the circumstances in the present case are akin to a 911 call for help. Ms. Weaver made the statements while she was frantic and was waving down the officer for assistance. 2RP 185-88. Additionally, her intent to use the officers for assistance is evident by her earlier statements to Tim Falbo to call the police because the defendant was stealing the truck. 1RP 130-34. Moreover, she did not give the statement in response to any questions

¹ The State never sought to introduce evidence in its case-in-chief, that Ms. Weaver made additional statements to Deputy Hockett after she told him "Chris took her truck." 1RP 21-22. It was only after the defense sought the introduction of her alleged statements to the defendant that she sold him the truck, that the State sought the introduction of the this evidence on rebuttal. 1RP 10, 20-21, 23.

from the officer, and there was testimony the officer responded within minutes to the 911 call from Mr. Falbo, indicating the immediacy for action. 2RP 185. Given the circumstances in this case, Ms. Weaver's statement was non-testimonial and did not violate the Sixth Amendment right to confront witnesses.

2. THE TRIAL COURT'S RULING ALLOWING THE STATE TO PRESENT WEAVER'S CONTEMPORANEOUS STATEMENTS AS REHABILITATION EVIDENCE IN REBUTTAL DID NOT VIOLATE THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

a. THE DEFENDANT FAILED TO PRESERVE THE ISSUE CONCERNING THE ADMISSIBILITY OF EVIDENCE, WHEN THE DEFENDANT OPTED NOT TO TESTIFY.

To raise and preserve for review a claim of improper impeachment a defendant must testify. *See Luce v. U.S.*, 469 U.S. 38, 43, 105 S.Ct. 460 (1984). In *Luce v. U.S.*, the district court ruled the government could impeach the defendant with a prior drug conviction were the defendant to take the stand and deny any prior involvement with drugs. *See id.* at 39-40. The defendant did not testify at trial, was found guilty, and appealed the District court's *in limine* ruling. *See id.* The Supreme Court reviewed the case and held the defendant's lack of testimony handicapped the court's ability to make a decision for three reasons. *See id.* at 41. First, the Court found that without knowing the precise nature of the defendant's

testimony, it could not weigh the probative value of a prior conviction against the prejudicial effect under Rule 609(a)(1).² *See id.* Secondly, the Court stated:

When the defendant does not testify, the reviewing court also has no way of knowing whether the Government would have sought to impeach with the prior conviction. If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means, a prosecutor might elect not to use an arguably inadmissible prior conviction.

Because an accused's decision whether to testify seldom turns on the resolution of one factor, a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify. In support of his motion a defendant might make a commitment to testify if his motion is granted; but such a commitment is virtually risk free because of the difficulty of enforcing it.

Id. at 42. Lastly, the Court held even if the first two handicaps could be overcome, the Court was still hampered by the question of whether in light of the record as a whole, the impact of any erroneous impeachment was harmless error. *See id.* Without the defendant's testimony, a ruling as to harmless error was impossible. *See id.* Moreover, the Court stated its ruling was to "discourage making such motions solely to plant reversible error in the event of a conviction." *Id.*

² The court also found that a defendant's proffer of testimony was of no use, because the defendant's actual testimony could differ from the proffer. *See Luce v. U.S.*, 469 U.S. 38, 41.

The Court in *Luce* was clear to make a distinction between issues surrounding a question of evidence and those involving constitutional dimensions. *See id.* at 43. In cases involving evidentiary questions, the defendant would have to testify. *See id.*

This distinction was followed in *State v. Mezquia*, 129 Wa.App. 118, 118 P.3d 178 (2005). In *Mezquia*, the defendant was charged with first degree felony murder for the rape and strangulation of a woman. *See State v. Mezquia*, 129 Wa.App. 118, 121. The defendant was identified as the perpetrator when DNA found on the woman matched the defendant's profile in the national DNA database. *See id.* at 122. At trial, one of the defendant's defenses was that another person committed the murder. *See id.* at 126-127. The State indicated should the defendant seek to introduce other person evidence, it would offer Rule 404b evidence the defendant assaulted a different woman six months prior to the murder. *See id.* The defense asked that court for an advisory opinion as to the admissibility of the 404b evidence. *See id.* The trial court ruled the evidence was admissible in the State's rebuttal only if the defense raised the issue of identity. *See id.* at 127. Based upon the ruling, the defendant abstained from introducing evidence as to the other person defense. *See id.* The Court of Appeals ruled since the issue was evidentiary and not of

constitutional magnitude, the defendant failed to preserve their issue when they opted not to testify. *See id.* at 131.

The defense alleges the use of rebuttal evidence in the present case violated the defendant's Sixth Amendment right of confrontation. However, the State argues the court's ruling was an evidentiary ruling under Evidence Rule 806 for introducing prior consistent statements. *See infra.* pp. 15-26. Should the court find the trial court's ruling was an evidentiary ruling, the defendant failed to preserve the matter for appeal and the appeal should be denied.

b. The trial court properly concluded Veal's Sixth Amendment right to confront witnesses would not be violated by the introduction of Weaver's statements to Deputy Hockett because they were offered in rebuttal of hearsay evidence Veal himself introduced into evidence.

i. The statement "Weaver sold him the truck" proffered by the defendant was hearsay.

The defense argues its proffered testimony that Weaver sold him the truck was not hearsay as it was not offered for the truth of the matter asserted, but to show the defendant's state of mind. *See* Def. Brf. at 18. However, the trial court ruled the testimony was hearsay, although admissible hearsay. 1RP 73.³

³ The trial court did not cite the rule under which it found the testimony admissible.

A trial court has broad discretion in deciding to admit evidence. *See State v. Stubsjoen*, 48 Wash.App. 139, 147, 738 P.2d 306 (1987). An appellate court will not overturn a trial court's decision absent an abuse of that discretion. *See id.* Abuse of discretion occurs when a decision is manifestly unreasonable and the appellant has the burden of proving an abuse of discretion. *See State v. Hentz*, 32 Wash.App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wash.2d 538 (1983), *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

In this case, it was not an abuse of discretion for the court to admit Weaver's statement to Veal as hearsay. The proffered statement was: "its my vehicle and I'll sell it to you."⁴ 1RP 61. The State made no objection to the admission of the statement on any basis. Veal argued the statement should be admissible to show state of mind, an exception to the hearsay rule. 1RP 23, 67, *See* WA ER 803(a)(3)(2006). However, it was well within the bounds of the court's discretion to admit the statement for a

⁴ It should be noted that Veal's proposed testimony is not admissible as a prior inconsistent statement of Weaver's under ER 801(d)(1) because Weaver did not "testify" as a witness. Weaver's only statement admitted in the State's case in chief was the statement: "Chris took my truck." 2RP 188. Deputy Hockett testified to this statement as an excited utterance and as an exception to *Crawford*.

Veal's testimony is also not admissible under ER 806, applying the same rational discussed below, because Weaver's credibility is not an issue at that stage. It is only with the admission of Weaver's statement to Veal that ER 806 "opens the door" for her rehabilitation using her other statements to Hockett. At that point, her credibility is at issue, but not before. Evidence Rule 806 applies when (1) a hearsay statement or a statement defined in rule 801(d)(2)(iii), (iv), or (v) has been admitted into evidence, and (2) the credibility of the declarant is attacked. *See* ER 806 (2006).

broader purpose, or to consider the statements as relevant only if they were true.

In *State v. Stubsjoen*, 48 Wa.App. 139, 738 P.2d 306 (1987), the defendant was charged with second-degree kidnapping for taking a baby from a car. *See State v. Stubsjoen*, 48 Wa.App. 139, 141, 738 P.2d 306 (1987). The defendant offered evidence that approximately an hour and a half after she left the car with the baby, she called a friend and asked for help. *See id.* at 143. The trial court excluded the evidence as self-serving and hearsay. *See id.* The Court of Appeals upheld the trial court's ruling finding the defendant's state of mind one and a half hours later was irrelevant and the statements would only be relevant if they were true. *See id.* at 146-47. As such, the court denied the proffer of a state-of-mind exception, finding the statements were offered to prove the truth of the matter asserted. *See id.* at 147.

Here, Weaver's alleged statement to Veal was only relevant if in fact she said it, or in other words, if it was true. Mr. Veal was charged with theft in the second degree or in the alternative taking a motor vehicle without the owner's permission. CP at 1-2. Each charge requires the State prove the defendant either wrongfully obtained the vehicle with the intent to deprive or intentionally took or drove away the vehicle without permission. *See* RCW 9a.56.020(1)(a), 9a.56.040(1)(c), 9a.56.075(1)(2).

The defendant's statement that Weaver offered to sell him her truck was offered to negate any evidence as to his intent in taking the vehicle. Hence, it was only relevant if the jury believed Weaver said the statement to the defendant. The relevance of the statement was crucial and as such it was offered for the truth and was therefore hearsay. The court's denial of the state-of-mind exception was not an abuse of discretion and the allowance of the hearsay was not cross-appealed.

ii. Weaver's statements were admissible under Evidence Rule 806 to attack or support the credibility of a declarant.

Having determined Veal's testimony would contain hearsay statements, the court further properly concluded that admission of those statements would "open the door" for the State to offer evidence to support Weaver's statement made to Deputy Hockett that Veal stole the truck. Washington Evidence Rule 806 allows for admission of evidence to support an unavailable declarant's credibility just as if he or she were a witness once the declarant's credibility has been attacked with hearsay statements admitted into evidence. *See* WA ER 806 (2006). Evidence Rule 806 states:

"When a hearsay statement...has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with

the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain."

Id. This rule allows the State to rehabilitate Weaver with consistent statements made to Deputy Hockett. As explained by Professor Tegland: "[T]he general principle is simple: When a hearsay statement is admitted into evidence, the declarant is treated as a witness. The declarant's credibility is subject to impeach and support, just as if he or she had testified." Karl B. Tegland, *Washington Practice: Courtroom Handbook on Evidence*, 438, author's comments (1) (2005).

This is the distinction the trial court made when addressing Veal's argument. Under ER 806, Veal gave up his objection based on an inability to cross-examine Weaver once he chose to attack her credibility with hearsay. At that point, the State was entitled to support Weaver's credibility "by any evidence which would be admissible for those purposes [as] *if [Weaver] had testified as a witness.*" ER 806 (emphasis added).

In this case, Weaver's statements to Hockett were admissible as prior consistent statements under ER 801(d)(1) and ER 806 to corroborate her statement admitted in the State's case in chief that Veal stole the truck. *See State v. Bourgeois*, 133 Wash.2d 389, 945 P.2d 1120 (1997)

(Corroborating evidence on a challenged issue is admissible when a witness' credibility has been attacked by the opposing party.)

In the event Veal attacked Weaver's credibility with a hearsay statement she allegedly made to him, Weaver as the declarant would then be regarded as a witness subject to rehabilitation under ER 806. *See* WA ER 806. In this circumstance, she is treated just as if she had testified. Her credibility may be supported by any evidence that would have been admissible for those purposes as if she had testified as a witness. *See* WA ER 806 (2006). In other words, the State can introduce prior consistent statements to support Weaver's credibility, which was attacked by hearsay, notwithstanding Veal's right to cross-examine witnesses. Because Veal does not have a cross-examination right in this circumstance, the trial court properly concluded that Veal's Sixth Amendment right to confrontation under *Crawford* did not apply to bar the testimony.

Prior consistent statements under ER 801(d)(1) are admissible as non-hearsay. Granted, ER 801(d)(1) requires that "[t]he declarant testif[y] at trial...and [be] subject to cross-examination concerning the statement." However, ER 806 provides an exception as discussed above. In this circumstance, Weaver is treated as a testifying witness under the rule. ER 806 allows Weaver's statement to come in as a prior consistent statement

even though she is unavailable, once her credibility is attacked with hearsay. Therefore, based on this analysis, the trial court properly concluded that the statements were admissible to support Weaver's credibility.

iii. Weaver's statements to Deputy Hockett were admissible as rebuttal of hearsay evidence Veal himself introduced into evidence.

The primary issue in this case is whether Veal can prevent Weaver's rehabilitation under ER 806 based in his Sixth Amendment right to confront adverse witnesses pursuant to *Crawford*. An appellate court will review alleged violations of the confrontation clause de novo. See *State v. Larry*, 108 Wash.App. 894, 901-02, 34 P.3d 241 (2001).

The State submits *Crawford* does not apply in this circumstance because Veal has no right to object to Weaver's rehabilitation under ER 806. Also, *Crawford* does not apply because the statement would come in as non-hearsay under ER 801(d)(1) and ER 806 as a prior consistent statement.

Cross-examination is the essence of the right to confrontation under *Crawford*. However, once attacked by Veal, Weaver's credibility is subject to rehabilitation as a "witness" (Veal's witness) under ER 806 "as if he or she had testified." She is no longer considered an out-of-court

declarant for this limited purpose. That is an important distinction in considering Veal's right to confrontation under *Crawford*.

The Sixth Amendment right to confront witnesses does not give the defendant an absolute right of cross-examination. The right may be reasonably limited consistent with due process. See 13 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice and Procedure*, sec. 3409 (3rd ed.2004). For instance, a defendant's statements made to police initiated interrogation and in violation of the Sixth Amendment right to counsel are still admissible for impeachment, notwithstanding the right to confront witnesses. Cf, *Michigan v. Harvey*, 494 U.S. 344 (1990) In *Michigan v. Harvey*, the Supreme Court held, the shield provided by [6th Amendment right to counsel should not] be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.*

In this case, the right to confrontation is limited by admission of Weaver's statement for the purpose of supporting her credibility under ER 806. Here, Veal sought to admit a statement that would have attacked Weaver's credibility. Veal's testimony would have attacked her credibility because it contradicted her statement to Deputy Hockett that "he stole my truck," which was admitted in the State's case-in-chief. Because he attacked her credibility, the State is entitled to support it by a prior

consistent statement just as if she were a testifying witness. *See* ER 806. Thus, by operation of the rule, Veal no longer has a right to object to admission of Weaver's rehabilitating statements on the basis that he is being denied a right to confront her as a witness for purposes of cross-examination.

It would follow then that Veal cannot assert his Sixth Amendment right under *Crawford* to prevent Weaver's rehabilitation as a witness. Similar to a defendant's right to counsel, the Sixth Amendment right to confront witnesses cannot be used by a defendant to prevent impeachment—or in this case rehabilitation—of hearsay statements he introduces into evidence. *See generally, U.S. v. Nobles*, 422 U.S. 225, 241, 95 S.Ct. 2160 (1975). In *Nobles*, the Court held the Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id.* at.

In addition, *Crawford* does not apply because the statement would come in as non-hearsay under ER 801(d)(1) and ER 806 as a prior consistent statement. The *Crawford* court expressly held that the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

Crawford v. Washington, 541 U.S. 36, 59 n.9, 124 S.Ct. 1354 (2004), citing *Tennessee v. Street*, 471 U.S. 409, 411 (1985). The same rule would apply to the statements in this case since they are not hearsay under ER 801(d)(1).

Therefore, the trial court properly concluded that Weaver's statements to Hockett, which were not admitted in the State's case-in-chief, could nevertheless be admitted in rebuttal in the event Veal were to testify to statements Weaver made to him, which the court concluded were hearsay.

iv. If the trial court improperly admitted hearsay in violation of the Sixth Amendment, the error was harmless.

Next, even if the trial court's ruling was improper under *Crawford*, any error that would have resulted from admission of the statements would have been harmless. A violation of the confrontation clause is subject to harmless error analysis. See *State v. Davis*, 154 Wash.2d 291, 304, 111 P.3d 844 (2005), citing, *Deleware v. Van Arsdall*, 475 U.S. 673, 684 (1986), and *State v. Smith*, 148 Wash.2d 122, 138-39, 59 P.3d 74 (2002). Washington courts have adopted an "overwhelming untainted evidence" test as the standard for harmless error. *State v. Palomo*, 113 Wash.2d 780, 799, 783 P.2d 575 (1989). Under this test, the court looks only at the

untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilty. *Id.*

Here, the evidence overwhelmingly leads to a finding of guilt. The only issue effected by admission of Weaver's statements to Hockett would have been the issue of Weaver's credibility regarding ownership of the truck, and her statement that "he stole the truck." These issues were overwhelmingly established by Silkwood's uncontested testimony that he owned the truck and did not give Veal permission to use it; and by Weaver's statement to Hockett that he stole the truck. The trial court did not exclude Weaver's statement to Veal that: "it's my vehicle and I'll sell it to you." 1RP 61. The assigned error is admission of rebuttal evidence. If admitted, this evidence would have been cumulative and would have done little to effect the overwhelming conclusion of guilt.

For all the foregoing reasons, the trial court properly concluded that Veal's Sixth Amendment right to confront witnesses would not be violated if Weaver's statements to Hockett were admitted as evidence in rebuttal of hearsay evidence Veal himself introduced. The trial court properly ruled that Weaver's statements to Veal were hearsay. The trial court also properly concluded that, if the statements were admitted, the State would then have a right to introduce Weaver's other spontaneous statements to Hockett to corroborate and support her credibility. Because

the statements would come in under ER 806 and as a prior consistent statement under ER 801(d)(1), the statements are not barred by Veal's right to confrontation under *Crawford*. Thus, the trial court did not err in its evidentiary ruling before trial.

D. CONCLUSION

This court should affirm the defendant's conviction and deny the appeal on the grounds the defendant's Sixth Amendment rights were not violated.

Respectfully submitted this 20 day of February, 2007.

SUSAN I. BAUR
Prosecuting Attorney

By 
AMIE HUNT / WSBA #31375
Deputy Prosecuting Attorney
Representing Respondent

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

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|----------------------|---|--------------------|
| STATE OF WASHINGTON, |) | NO. 34954-0-II |
| |) | Cowlitz County No. |
| Appellant, |) | 05-1-01671-7 |
| |) | |
| vs. |) | CERTIFICATE OF |
| |) | MAILING |
| CHRISTOPHER VEAL, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

BY _____
DEPUTY

STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

I, Audrey J. Gilliam, certify and declare:

That on the 20 day of February, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

| | |
|-------------------------|----------------------|
| Court of Appeals | CATHERINE E. GLINSKI |
| 950 Broadway, Suite 300 | Attorney at Law |
| Tacoma, WA 98402 | P. O. Box 761 |
| | Manchester, WA 98353 |

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 20 day of February, 2007.


Audrey J. Gilliam