

COURT OF APPEALS  
DIVISION II

09 JUN -5 PM 12:03

No. 36984-2-II

STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DONNELL WAYNE PRICE,

Appellant.

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

The Honorable Frederick W. Fleming

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ARGUMENT

1. THE COURT'S ACT OF EXCLUDING A MEMBER OF THE PUBLIC FROM THE COURTROOM CONSTITUTED A CLOSURE OF THE COURTROOM IN VIOLATION OF MR. PRICE'S RIGHT TO A PUBLIC TRIAL

Donnell Price contended in his opening brief that the trial court's exclusion of a member of the public prior to individual questioning of a potential juror constituted an impermissible closure of the courtroom in light of the failure of the court to engage in an analysis of the factors enumerated in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), prior to the closure. In response, the State contends the court's actions did not amount to a closure of the courtroom since the court did not *order* a closure.

Respondent's brief at 11-12. In addition, the State contends the court's actions comported with recent Washington caselaw on this issue. *Id.* at 12-15. In light of the trial court's act of excluding a member of the public from the courtroom prior to questioning plus this Court's recent decision in *State v. Heath*, \_\_\_ Wn.App. \_\_\_, 206 P.3d 712 (2009), this Court should reject the State's arguments and reverse Mr. Price's conviction.

Whether or not the trial court *ordered* the courtroom closed was the subject of this Court's decision in *Heath, supra*. In *Heath*,

the court asked members of the *venire* during *voir dire* if anyone wished to be questioned individually in chambers. 206 P.3d at 714. None of the jurors sought the in chambers interviews. When one potential juror responded affirmatively to the court's question regarding bias or prejudice, the court decided *sua sponte* to interview the juror in chambers with counsel. *Id.* Neither party objected and the court did not engage in the *Bone-Club* analysis. *Id.* The court had also conducted several pretrial motions in chambers without ordering the hearing to be "closed" and without engaging in the *Bone-Club* analysis. *Id.* at 713-14.

Relying on its prior decision in *State v. Erickson*, 146 Wn.App. 200, 189 P.3d 245 (2008), this Court found the trial court's actions indicated an intent to exclude the public from the proceedings, thus effectively closing the courtroom:

The State argues that the trial court was not required to engage in a *Bone-Club* analysis because neither party moved to close the hearings, thereby triggering the need for such an analysis. This argument fails because a trial court's *sua sponte* decision to close public hearings triggers the need for a *Bone-Club* analysis.

*Heath*, 206 P.3d at 715-16.

Here, the trial court's *sua sponte* act of excluding a member of the public prior to individual questioning of a potential juror

rendered the courtroom closed despite the court's failure to enter an *order* closing the courtroom. Mr. Price's right to a public trial was violated. He is entitled to reversal of his conviction without the need to show prejudice from the court's act. *Heath*, 206 P.3d at 716; *Erickson*, 146 Wn.App. at 211.

2. THE COURT ERRED IN ADMITTING MS. CARTER'S NOTE AS A DYING DECLARATION

a. The State failed to establish the note was made at a time when Ms. Carter reasonably believed she was facing imminent death. Mr. Price argued the note purportedly written by Ms. Carter did not meet the foundational requirements to qualify as a dying declaration under ER 804(b)(2).<sup>1</sup> The State counters that the note coupled with the 911 calls made by Ms. Carter on the morning in question supported the argument that she wrote the note believing her death was imminent. Respondent's brief at 18-19. The State's argument should be rejected.

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<sup>1</sup> ER 804(b)(2) states:

(2) *Statement Under Belief of Impending Death.* In a trial for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

The State's argument is erroneous because it starts from an erroneous premise; that the note was written on the morning Ms. Carter died. As argued in the Brief of Appellant, it is impossible to determine with any certainty when the note was written. Although it contains the notation "9/2" or "9/3," there is nothing to state with any confidence the note was written on either of those days or some other date. Thus, it is impossible to determine if it was written at a time when Ms. Carter reasonably believed she might die, whether she reasonably believed she was going to die at all, or was merely upset at Mr. Price during their early morning argument. The fact of the 911 calls adds nothing because, if the note was not made on the morning she died, the calls do nothing to show her fear of imminent death when she wrote the note. The note did not qualify as a dying declaration and the court erred in finding it such.

b. Ms. Carter's note was testimonial. The State contends in its response that Ms. Carter's note's admission did not violate Mr. Price's confrontations rights under the Sixth Amendment because it was not testimonial. The State's argument is misplaced.

In *Crawford v. Washington*, the United States Supreme Court emphasized that historically, the Confrontation Clause referred to those who "bear testimony" against an accused. 541

U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Court did articulate several formulations of the core class of testimonial statements, which included “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[.]” *Id.* 51-52. “A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to authorities or not.” Richard D. Friedman, *Confrontation*, 86 Geo.L.J. 1011, 1042-43 (1998), *also cited as authority in Cromer v. United States*, 389 F.3d 662, 673-74 (6<sup>th</sup> Cir. 2004). Professor Friedman urged this broad definition because it “is necessary to ensure the adjudicative system does not effectively invite witnesses to testify in informal ways that avoid confrontation.” Friedman, *Confrontation*, 86 Geo.L.J. at 1043.

This test turns on whether a *reasonable person* would believe his or her statements would be used at a later trial. *Crawford*, 541 U.S. at 51-52. Here, Ms. Carter’s note was plainly testimonial. Although addressed to her daughter, the note clearly implicated Mr. Price in her murder. The note was designed to aid in the investigation of her death should she be murdered by Mr. Price. Ms. Carter had to reasonably believe that the note directly accusing

Mr. Price of shooting her would be used by the police in investigating her death and later at a trial. Since Mr. Price was denied the opportunity to cross-examine Ms. Carter, the note should have been excluded. *Crawford*, 541 U.S. at 68-69.

The State's reliance on the Washington Supreme Court's decision in *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006) is misplaced because *Shafer* ignored the *reasonable person* test of *Crawford*. The *Shafer* Court found as a matter of law that "it defies logic to think that T.C., as a three-year-old child, or any reasonable three-year-old child, would have an expectation that her statements about alleged sexual abuse could be used for prosecutorial purposes." *Shafer*, 156 Wn.2d at 390 n.8. But as Justice Sanders in dissent said so pithily,

[A] 'reasonable person' cannot have the *subjective* expectations of a three year old child . . . An "objective" test that considers subjective characteristics is no objective test at all.

*Shafer*, 156 Wn.2d at 400 (Sanders J, dissenting)(emphasis in original).

The note was plainly testimonial and this Court should so find.

c. The error in admitting the note as a dying declaration was not harmless.<sup>2</sup> Mr. Price argued the court violated his Sixth Amendment right to confrontation when it admitted Ms. Carter's note. Under this test, an error admitting hearsay evidence in violation of the Confrontation Clause is not harmless error unless the State can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The State ignores the fact the issue arises from an error of constitutional magnitude and instead analyzes the error under a non-constitutional harmless error standard. Respondent's brief at 25-26. Plainly this is the wrong standard.

Further, as argued in the Brief of Appellant, the issue for the jury to decide here was whether Mr. Price was guilty of premeditating the death of Ms. Carter or whether her death was the result of an accident or horrible mistake. The note written before her death was powerful evidence that she did not die as the result of a mistake or accident but because Mr. Price had either by his

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<sup>2</sup> The State essentially concedes the court erroneously found Mr. Price had forfeited his right to confrontation when it utilized the wrong standard in light of the decisions in *Giles v. California*, 554 U.S. \_\_\_\_, 128 S. Ct. 2678, 2686-88, 171 L.Ed.2d 488 (2008), and *State v. Mason*, 160 Wn.2d 910, 926-927, 162 P.3d 396 (2007). Respondent's brief at 26-27. The State essentially argues it did not matter since the error was harmless. *Id.*

words or actions indicated he would kill her. All of the other evidence cited by the State in its response merely indicated only that Mr. Price was responsible for Ms. Carter's death, but was neutral on premeditation. Thus, admission of the note was not harmless in light of the importance of the note to the proof of premeditation.

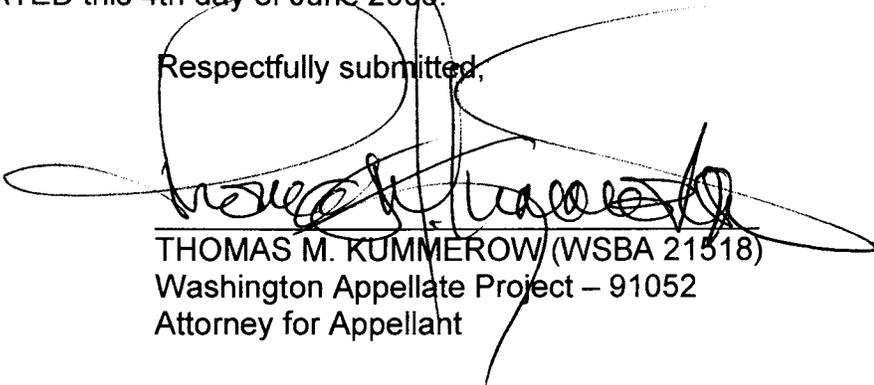
This Court must reverse Mr. Price's conviction and remand for a new trial.

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant and the instant reply, Mr. Price submits this Court must reverse his convictions and remand for a new trial.

DATED this 4th day of June 2009.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)  
Washington Appellate Project – 91052  
Attorney for Appellant

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 DIVISION TWO  
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 STATE OF WASHINGTON  
 DEPT. OF JUSTICE  
 BY \_\_\_\_\_  
 DEPUTY

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |                   |                                     |
|--|-------------------|-------------------------------------|
| [X] THOMAS ROBERTS<br>PIERCE COUNTY PROSECUTING ATTORNEY<br>930 TACOMA AVENUE S, ROOM 946<br>TACOMA, WA 98402-2171   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] DONNELL PRICE<br>710977<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13 <sup>TH</sup> AVE<br>WALLA WALLA, WA 99362 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF JUNE, 2009.

x \_\_\_\_\_ 

**Washington Appellate Project**  
 701 Melbourne Tower  
 1511 Third Avenue  
 Seattle, Washington 98101  
 ☎(206) 587-2711