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DIVISION II

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No. 38666-6-II

STATE OF WASHINGTON
BY CR
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRUCE T. SAMUELA,

Appellant.

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

The Honorable Thomas J. Felnagle, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

1. Bruce Samuela's state and federal constitutional rights to confrontation were violated when the prosecution was allowed to present declarations made in a 9-1-1 audiotape which were testimonial in nature, even though Samuela was never given the opportunity to cross-examine the declarant.

2. The prosecution cannot meet the heavy burden of proving the constitutional error harmless.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Defendants have a constitutional right to confront and cross-examine the witnesses against them. As a result, when the prosecution seeks to admit statements made by a witness to a 9-1-1 operator, the defendant must be given the opportunity to confront and cross-examine the witness if the statements are "testimonial." If the witness makes such statements and is absent from trial, the admission of testimonial statements is a violation of the defendant's confrontation clause rights.

Mr. Samuela was accused of, *inter alia*, committing malicious mischief by causing damage to the tires of the victim during an incident which had happened at least a half hour before she called the 9-1-1 operator. The victim was not called as a witness for the state. Instead, the prosecution relied on the tape recording of the 9-1-1 call, which was admitted over Samuela's objection.

Did the court err and violate Samuela's confrontation clause rights in admitting the tape recording of the call where the prosecution failed to

prove that the statements were not testimonial?

2. Is reversal required where the constitutional harmless error test applies and the prosecution cannot satisfy that test because the overwhelming untainted evidence was not sufficient to support the conviction?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Bruce T. Samuela was charged by second amended information with felony harassment, third degree malicious mischief and two counts of bail jumping. CP 17-19; RCW 9A.44.090; RCW 9A.46.020(2); RCW 9A.76.170. It was alleged that the harassment and malicious mischief were “domestic violence” incidents. CP 17-19; RCW 10.99.020.

Trial was held before the Honorable Thomas J. Felnagle on November 19, 20 and 21, 2008, after which a jury acquitted Samuela of the harassment charge but found him guilty of the other offenses. CP 79-83; RP 1, 41; 2RP 1-10.¹

2. Evidence at trial

On July 22, 2007, Officer Jason Catlett of the Lakewood Police Department responded to a report of a “domestic violence, harassment type case.” RP 69-70. Jan Thomson had called the police emergency

¹The verbatim report of proceedings consists of four volumes, which will be referred to as follows:
the three chronologically paginated volumes containing the trial and sentencing as “RP;”
the volume containing the verdict as “2RP.”

telephone number, 9-1-1, and reported that she had locked herself in her car when an ex-boyfriend had “run up” on her and tried to hurt her. RP 71-72. When Officer Catlett responded to a house where Thomson was, the officer saw that three out of the four tires on a vehicle Thomson said was hers were “flattened” and it appeared that something had “stabbed the side wall” of those tires. RP 73. Thomson said the tire damage had been done by Bruce Samuela. RP 73.

Thomson did not testify. Instead, at trial, the prosecution played a tape-recorded copy of statements she made when she called 9-1-1.² In that tape, Thomson said that her ex-boyfriend “just run up on me and tried to hurt me and I locked myself in my car.” Ex. 1.³ The operator next asked where Thomson was located and Thomson gave the address. Ex. 1. The operator asked if that address was Thomson’s home and Thomson said she was at a friend’s. Ex. 1. The operator then asked if it was a house or apartment and, when Thomson said a house, the operator asked, “[a]nd where is he right now?” Ex. 1. Thomson said that “he” had “took off” and was on a bike. Ex. 1.

At that point, the operator said “OK, he tried to run into you on his bicycle and you’re - when you’re on foot,” and Thomson said “no.” Ex. 1. Thomson started saying that she was just getting ready to get into her car when the operator interrupted, declaring “so you were still on foot and he

²A supplemental designation requesting transmission of the Exhibit to this Court is being filed herewith.

³The prosecution did not provide a transcript of the tape for the trial court to review. See RP 5.

tried to hit you with his bicycle?” Ex. 1. Thomson again said no, then said that he had some type of “pole in his hand” and “he smashed my window” and “popped out” the tires. Ex. 1.

At that point, the operator continued questioning Thomson, asking for Thomson’s name, whether she was hurt, where the man went, what color the bicycle was, what his last name was and other identifying information. Ex. 1. Thomson answered each question and spelled Samuela’s last name. Ex. 1. Samuela’s age, height and build were described, as was the color of the shirt he was wearing. Ex. 1. Thomson also told the operator Samuela had “threatened my life” and that he had been driving with a “trailer on the back of his bike” which had tipped over. Ex. 1.

At one point, Thomson tried to tell the operator what Thomson claimed Samuela had said. Ex. 1. Thomson also declared that she had “messages on my phone from last night that he said he was gonna take an ax to my car and all this other stuff.” Ex. 1. She told the police operator she had “kept the messages.” Ex. 1. The operator then questioned Thomson about where Samuela lived and Thomson responded, providing Samuela’s address and information. Ex. 1. Ultimately, the operator told Thomson someone would be out to talk to her, recommending that Thomson go inside the house just in case. Ex. 1. Thomson said she thought she would do that. Ex. 1.

When he arrived and looked at the car, Officer Catlett admitted, he saw no damage to any of the car’s windows. RP 76.

Bruce Samuela testified that he had bought the car in question and

Thomson was supposed to pay him back for it but had not yet done so. RP 119-21. As a result, the car was still his. RP 119-21. On the day before the alleged incident, Thomson had come over to Samuela's home, asking to borrow money. RP 119-20. Later, when Samuela went to pay his rent, he discovered his money was missing. RP 120.

Samuela tried to call Thomson on the telephone several times about his money, but she did not answer her phone that day. RP 120. The next day, Samuela discovered that the car, which had been in his driveway, was gone. RP 120. A friend of Thomson's called Samuela and told him the car was at a nearby house, so Samuela got on his bike and they rode over. RP 122. When they got there, Thomson was putting things into the back of the car. RP 123. She saw him, slammed the trunk and jumped into the car. RP 123. Samuela yelled at her to stop and give him back his car and his money but she "took off," running over the trailer to his bike as she went. RP 124. That appeared to pop the two back tires. RP 144.

Samuela did not threaten to hurt Thomson and, after the incident, he just went home. RP 125.

3. Facts relevant to issues on appeal

Before trial, the prosecution declared that Thomson was not willing to testify against Samuela. RP 4. In fact, the prosecutor declared, the prosecution "cannot get her to come in" and she had been seen by someone hanging out with Samuela. RP 4.

As a result, the prosecutor moved to be permitted to play the 9-1-1 tape, declaring that the tape was "non-testimonial." RP 4. Samuela objected. RP 7. He argued that the tape was not admissible because the

call was made well after the incident, about 28 minutes after the alleged acts occurred. RP 6-7. Samuela stated that it was “really doubtful whether it’s excited utterance” and it was not proper to admit the tape under the confrontation clause. RP 6.

The prosecutor then argued that an “excited utterance” was admissible even if the statement was made “seven and a half hours later.” RP 8. He urged the court to listen to the tape to see if the Thomson was “under the stress of the excitement of the event” at the time of the 9-1-1 call. RP 8.

After the tape was played, the prosecutor asked the court to find the statements contained on it to be “non-testimonial,” arguing they were made “to get help” and it appeared Thomson was “scared” so that “these weren’t fabrications.” RP 10. The prosecutor also argued that a suspect always poses a threat “until he was apprehended.” RP 18.

Counsel again reminded the court that it had been about ½ hour after the alleged incident before Thomson had made the call. RP 11. He noted that the recent caselaw rejected the idea that excited utterances are “never” testimonial. RP 13. He argued that a person needed to be “in the throes of the event” in order for an excited utterance to be admitted. RP 13-14. In addition to the passage of time since the incident, he noted that there was no threat of harm at the time because Samuela was already gone, there was no “present emergency” so there was no “need for information to resolve a present emergency,” there was formality with the questioning of the 9-1-1 officer and Thomson was “very calm,” answering the questions that the operator asked. RP 14-16.

Counsel also pointed out that statements are only non-testimonial when made to police “under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,” but that they were “testimonial” when circumstances “objectively indicate that there is no such ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution.” RP 16. He argued that Thomson’s statements were “a testimonial response to the dispatcher’s questions,” because there was “no present emergent situation” and Thomson really did not seem “shook up.” RP 16-17.

In ruling, the judge first looked at the rule for admission of an “excited utterance,” stating that Thomson was reporting a “startling event.” RP 20. The court also thought it was relevant to “timing” that Thomson had said Samuela “just ran up on me,” although the court conceded that what Thomson had said could also have meant Samuela had “only” run up on her, not that it had just happened. RP 20-21. The court thought it was safe to “assume it happened no longer than about 30 minutes” before Thomson had called 9-1-1 so it was “reasonably recent.” RP 21.

In addition, the court thought the statements related to the event or condition and, although it was clear Thomson was not “screaming or crying” there was “a degree of stress in her voice” and she described herself as “shook up.” RP 22.

Regarding the need to resolve a present emergency, the court said it was not required that the perpetrator “still be on the scene” if there was

“the threat of the person lingering.” RP 22. The court thought Thomson did not “seem to be calling up to file a police report.” RP 22. Indeed, the court thought, it was significant that Thomson had called 9-1-1 instead of calling a police station, because that indicated some urgency. RP 23. While there was a “question and answer” dynamic to the 9-1-1 call, the court thought the questions were “mostly clarifying and oftentimes cutting off Ms. Thomson” so that it was “not like the 911 operator is going through a formal question-and-answer session or trying to take a formalized statement.” RP 23. The court concluded that the statements on the tape were admissible as an “excited utterance” because the recency of the “startling event” and “the fact that she’s still speaking spontaneously as a result of the event.” RP 23. The court also thought the statements were admissible under the confrontation clause “because it’s not interrogation,” its “purpose is primarily to meet the emergency as opposed to make a report.” RP 24.

In closing argument, the prosecutor told the jury that the evidence of Samuela’s guilt was on the 9-1-1 tape and that the jurors would “be able to hear [it] again.” RP 155. He relied on what the 9-1-1 tape said about the elements of the harassment and malicious mischief crimes. RP 155-56. In rebuttal closing argument, the prosecutor reminded the jurors that they had talked in voir dire about why “victims of domestic violence do not show up or would not want to show up” at trial. RP 169. He said the jurors were allowed to consider those reasons and decide “amongst yourselves why a victim may not have been here.” RP 169. The prosecutor then said that Thomson “was here. She was here, and she gave

testimony in this tape. Okay, this is evidence. You can consider it.” RP 169. The prosecutor also told the jurors they could find Thomson “to be a credible witness” even though she had not been at trial. RP 170.

D. ARGUMENT

THE TRIAL COURT ERRED AND VIOLATED SAMUELA’S RIGHTS TO CONFRONTATION BY ADMITTING THE TAPE RECORDING OF THE 9-1-1 CALL MADE BY THE ABSENT WITNESS, AND THE PROSECUTION CANNOT SATISFY THE HEAVY BURDEN OF PROVING THE CONSTITUTIONAL ERROR HARMLESS

Both the state and federal constitutions provide defendants with the right to confront and cross-examine the witnesses against them. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); Art. I, § 22; Sixth Amend. In Crawford, the U.S. Supreme Court reversed a long line of cases involving confrontation, primarily defined by Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled by Crawford, supra, which had held that it was not a violation of the right to confrontation to admit hearsay statements of an unavailable witness at trial, provided those statements bore adequate indicia of reliability. Crawford, 541 U.S. at 62. The Crawford Court reversed this holding and instead found that a defendant’s right to confrontation mandates that the defendant have the opportunity to subject testimony to “the crucible of cross-examination” in order to ensure the reliability of that evidence. 541 U.S. at 61, 68-69. As a result, when out-of-court statements by an unavailable witness are “testimonial” in nature, they must be excluded from trial unless the defendant is given the opportunity to confront and cross-examine the declarant. Crawford, 541 U.S. at 54-55.

Thus, under Crawford, to determine if evidence was admitted in violation of a defendant's rights to confrontation, the question is not whether hearsay was admitted based upon a "firmly rooted" exception to the prohibition against hearsay at trial, nor is it whether the hearsay was declared under circumstances indicating it was "reliable." See, State v. Mason, 160 Wn.2d 910, 918, 162 P.3d 396 (2007), cert. denied, ___ U.S. ___, 128 S. Ct. 2430, 171 L. Ed. 2d 235 (2008), overruled in part and on other grounds by, Giles v. California, ___ U.S. ___, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008); e.g., State v. Thomas, 150 Wn.2d 821, 855-56, 83 P.3d 970 (2004), overruled sub silentio by Crawford, supra. Instead, the question is now whether the out-of-court statement of a witness who is unavailable at trial is "testimonial" in nature. Crawford, 541 U.S. at 54-55. If so, it must be excluded unless the defendant has had the opportunity to cross-examine the witness, because to do otherwise would violate the defendant's right to confrontation. Id.

In this case, Samuela's right to confrontation was violated, because the statements Thomson made on the 9-1-1 tape were testimonial and Samuela was not given the opportunity to confront and cross-examine her. Further, because the prosecution cannot meet the heavy burden of proving this constitutional error harmless, reversal is required.

As a threshold matter, although this issue involves the admission of evidence, this Court applies a *de novo* standard of review because the question is whether admission of that evidence violated the defendant's confrontation clause rights. Mason, 160 Wn.2d at 922; State v. James, 138 Wn. App. 628, 638, 158 P.3d 102 (2007). Further, the prosecution

bears the burden of proving that statements were *not* testimonial. State v. Koslowski, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009).

Applying those standards, here, the prosecution cannot meet that burden, because Thomson's statements on the 9-1-1 tape were "testimonial." While the U.S. Supreme Court has not provided "an exhaustive classification" of what statements will be considered "testimonial" for confrontation clause purposes, it has declared:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

In Davis, the U.S. Supreme Court first noted that the average 9-1-1 call was not made to establish past facts or identify a perpetrator but rather to get assistance with an ongoing situation requiring police assistance.

Davis, 547 U.S. at 827. The Court rejected, however, the idea that all 9-1-1 calls met that standard. Instead, each call had to be examined on a case-by-case basis. Id.

In the Davis case, the declarant called 9-1-1 but hung up before speaking. State v. Davis, 154 Wn.2d 291, 295, 111 P.3d 844 (2005), affirmed in part sub nom Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). When the 9-1-1 operator called back, the declarant was hysterical and crying, saying "[h]e's here jumpin' on me

again.” Id. She then answered questions about who it was she was saying was hurting her, how he had done so and that he had left a few moments earlier. Officers responded within 4 minutes and noted that the declarant was still very upset and had what appeared to be “fresh injuries.” 154 Wn.2d at 296. She was also acting “frantic” in trying to get her children and belongings together to leave because she was afraid the assailant was coming back. Id.

The U.S. Supreme Court found that the initial part of the phone call involved statements which were made for the purposes of getting assistance. Davis, 547 U.S. at 828. Once the perpetrator had left and the operator started on with a “battery of questions,” it became more like the interrogation of Crawford and thus was “testimonial.” Davis, 547 U.S. at 828.

Davis also involved a second case in which the Court had granted certiorari on the same issue. Davis, 547 U.S. at 829-30. In that case, the police were called about an incident at a home. Id. When police arrived, the victim was on the front porch “somewhat frightened” and the perpetrator was still in their house. Id. The victim told officers he had caused damage to the furnace and the officers saw broken glass and flames. 547 U.S. at 829-30. The report of what had happened was clearly “testimonial” despite the recency of the incident, the Court held, because the victim was recounting what *had* happened, not what *was* happening. 547 U.S. at 829-30.

Our Supreme Court recently applied Crawford in light of Davis and its definition of when statements are “testimonial.” In Koslowski,

supra, at trial, police officers were allowed to testify about statements made to them by the victim when they responded to a 9-1-1 call. 166 Wn.2d at 412. The victim died before trial and the prosecution had the statements to police admitted as “excited utterances,” arguing that the admission of the statements under that hearsay exception satisfied confrontation clause requirements under Ohio v. Roberts, supra. Koslowski, 166 Wn.2d at 412. After the court of appeals had affirmed, Davis was decided and the case remanded by the Supreme Court in light of that case. Koslowski, 166 Wn.2d at 413. The court of appeals again affirmed, holding that the statements were not testimonial and, even if they were, the error was harmless. Id.

The relevant facts relating to the out-of-court declarations were that the officers had responded to a 9-1-1 call reporting a robbery about 2 minutes after they were called. 166 Wn.2d at 414. The victim had been robbed and had freed her hands and called 9-1-1 just after the robbers had left. 166 Wn.2d at 415. When they arrived, the officers saw the victim still on the phone with the 9-1-1 operator. The victim was “extremely emotional and very upset,” started telling officers “what was going on right away,” showed them white wire ties on the floor that she said were used on her and also where she had been forced to lie on the floor. 166 Wn.2d at 414. The officers were trying to get as much information as possible as quickly as possible to “give to the other officers in the field.” Id.

On review, our Supreme Court first noted that it was applying the *de novo* of review and holding the state to the burden of proving that the

statements were “nontestimonial.” 166 Wn.2d at 418-19. The Court then noted that, while not all police interrogation “yields testimonial statements,” the Davis Court had rejected the idea that all “initial inquiries” by police at a crime scene were nontestimonial. Koslowski, 166 Wn.2d at 419. Instead, where statements are “neither a cry for help nor provision of information that will enable officers immediately to end a threatening situation,” the statements would be testimonial. 166 Wn.2d at 421, quoting, Davis, 547 U.S. at 832. The Court then noted that Davis had set forth four factors on this issue:

four factors. . . help determine whether the primary purpose of police interrogation is to enable police assistance to meet an ongoing emergency or instead to establish or prove past events: (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? . . . (2) Would a “reasonable listener” conclude that the speaker was facing an ongoing emergency that required help? . . . (3) What was the nature of what was asked and answered? . . . (4) What was the level of formality of the interrogation?

Koslowski, 166 Wn.2d at 419.

Applying those factors to Koslowski’s case, the state Supreme Court held that the statements made to the officers just after the incident were testimonial. First, the declarant was “describing events that had already occurred,” and nothing in her statements or the circumstances indicated that the men might return for any reason. 166 Wn.2d at 419-22. Further, she had freed herself from the ties and, even though the time since the incident was “evidently short,” she was still “describing past events.” 166 Wn.2d at 422.

Second, the statements were made after police had arrived and she

thus faced no further threat, especially because she had already freed herself from the ties. 166 Wn.2d at 424.

Third, the statements were elicited in order to learn what had happened in the past. 166 Wn.2d at 425. The statements were not a “cry for help” in the face of an ongoing emergency, nor did they provide information for officers to “immediately. . .end a threatening situation” - it was already over. 166 Wn.2d at 426.

Finally, the Court stated, while the declarant’s “emotional state” may have rendered the interrogation less formal than a taped statement at a police station, it was still formal in that it was a question and answer with police. 166 Wn.2d at 428.

In reaching its conclusion, the Court rejected the state’s theory that the statements were “nontestimonial” because the declarant was “seeking help and protection from the police” and “gave the officers information to apprehend an armed suspect.” Koslowski, 166 Wn.2d at 421-22. Despite the prosecution’s claim that the “mere fact that the suspects were at large” and officers were trying to find them was sufficient to show the statements were not testimonial, that was not enough. 166 Wn.2d at 427. Davis had rejected the idea that all statements remain nontestimonial when the perpetrator has fled the scene but is still “at large,” our Supreme Court noted. 166 Wn.2d at 427, citing, Davis, 457 U.S. at 832. Further, this made sense, because, “[i]f merely obtaining information to assist officers in the field renders the statements testimonial, then virtually any hearsay statements made by crime victims in response to police questioning would be admissible” as not being testimonial. Koslowski, 166 Wn.2d at 427.

Put simply, the Koslowski Court found, the prosecution had not met its burden of proving the statements were “nontestimonial” because it had not “established that the circumstances objectively indicate the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency.” 166 Wn.2d at 431. Even where the victim of a crime is “fearful and seeks police existence” that is not enough to establish that there is an “ongoing emergency.” 166 Wn.2d at 433. Indeed, the Court noted, in “domestic violence” situations, a victim may remain upset “long after the emergency situation has been resolved,” because of the relationships involved.

Further, the Court pointed out, “emotional state has little relevance to the question [of] whether the individual’s statements are testimonial.” 166 Wn.2d at 424. Instead, it is only relevant if it shows, “for example, the presence of a continuing danger” or results in an “informal, unstructured police interrogation.” 166 Wn.2d at 425. Despite the declarant’s being very upset, there was no evidence indicating there was an ongoing emergency requiring help, such as a real physical threat. Id. Because the assailants had fled the scene and there was no evidence they might return or posed further danger to anyone else, the emergency had “passed” and the primary purpose of the police interrogation “was to establish past events potentially relevant to later criminal prosecution.” 166 Wn.2d at 432.

Here, just as in Koslowski, there was no ongoing emergency. Samuela had left even before Thomson made the 9-1-1 call. Indeed, he had left nearly a half an hour earlier - far less than the few minutes in

Koslowski.

Further, the statements were describing what had already happened in the past. Rather than being a “cry for help” in the face of an ongoing emergency, they were a report by a victim of an incident which had already occurred. Indeed, Thomson’s understanding of the potential future prosecutorial use of her report was made clear by her declarations about the phone messages she said Samuela had left - messages she had deliberately saved, presumably in order to provide them for use against Samuela at some future point in time.

In addition, while the call did not involve formal police interrogation in an interview room, it clearly involved the kind of “question-and-answer” Koslowski found to be sufficiently formal for the purposes of determining whether statements were “testimonial.” See Koslowski, 166 Wn.2d at 428. The call was not the spontaneous declarations of a victim seeking help during an emergency - it was a report of an incident which had already occurred, with the police operator asking specific questions in order to elicit certain information which a reasonable person would know would be used in future prosecution.

Notably, even before Koslowski was decided, this Court had already reached a similar conclusion in a case where the call is very similar to the one here. In State v. Powers, 124 Wn. App. 92, 99 P.3d 1262 (2004), the defendant was charged with violating a domestic violence protection order and the trial court admitted a 9-1-1 tape in which the victim reported the defendant had been at her home in violation of a no-contact order. 124 Wn. App. at 94. The trial court had admitted the call

as an excited utterance. 124 Wn.2d at 99. In holding that the call was admitted in violation of the defendant's confrontation clause rights, this Court noted that the call was not part of the criminal incident or a request for help in an ongoing emergency. 124 Wn. App. at 101-102. In a footnote, the Court detailed a portion of the call, in which the operator did just what was done here - questioned the declarant in order to get details about what had occurred. 124 Wn. App. at 102 n. 4. That detail is similar to here, with some of the same questions ("Heavy, slim, medium build?" and "Color of shirt or jacket") as asked in this case. Id. This Court looked at the call and found that the call was made for the purpose of reporting the incident in order to assist in the defendant's "apprehension and prosecution," rather than for the declarant to "protect herself . . . from his return." 124 Wn. App. at 102-103; see also, State v. Moses, 129 Wn. App. 718, 119 P.3d 906 (2005).

Under Koslowski and Powers, the prosecution failed to satisfy its burden of proving that the 9-1-1 call in this case - made 30 minutes after the incident, after Samuela had left and not come back - was nontestimonial. The trial court erred in holding otherwise.

The prosecution cannot prove this constitutional error harmless. To meet that burden, it would have to show that the untainted evidence was so overwhelming that it necessarily led to a conclusion of guilt, even absent the improper evidence. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); Koslowski, 166 Wn.2d at 431-32.

The prosecution cannot make that showing here. The standard for the "overwhelming untainted evidence" to prove guilt is far different than

the standard applied on review when the question of sufficiency of the evidence is raised. See State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002). For the latter test, it is sufficient if *any* reasonable fact-finder could have found the essential elements of the crime were proven. 113 Wn. App. at 797-98. For the former, it is only sufficient if *every* reasonable fact-finder *would have* found guilt, absent the error. See State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). In other words, the state must prove that the error had no effect on the verdict, something it cannot do here. The only evidence that Samuela was the alleged perpetrator - or that the incident happened as Thomson claimed and Samuela was thus guilty - was the 9-1-1 tape. Absent that tape, the conviction for malicious harassment could not stand. The admission of the evidence, in violation of Samuela's confrontation clause rights, was not harmless under the constitutional harmless error standard. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 2nd day of September, 2009.

Respectfully submitted,



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CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,
Tacoma, WA. 98402;

TO: Bruce Samuela, DOC 680386, WSP, 1313 N. 13th Ave., Walla
Walla, WA. 99362.

DATED this 21st day of September, 2009.


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