

NO. 42096-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY HUBBARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00907-6

BRIEF OF RESPONDENT

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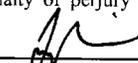
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in holding that Exhibit 1 (a certified Copy of a Clerk’s Minute Entry from a Superior Court file) was not testimonial pursuant to *Crawford v Washington* when the United States Supreme Court has consistently held, even after *Crawford*, that public records by their very nature are not testimonial and thus do not trigger the Confrontation Clause?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jeffrey Hubbard was charged by amended information filed in Kitsap County Superior Court with felony violation of a court order and driving with license revoked in the first degree. CP 12. After a trial on stipulated facts the trial court found Hubbard guilty of the charge offenses and imposed a standard range sentence. CP 29-32, 34. This appeal followed.

B. FACTS

In the present case the State alleged that in 2010 Hubbard had violated a no-contact order that had previously been issued as part of his conviction in a 2006 violation of a no-contact order case. CP 1-11; Exhibits 1-3 . The State further alleged that this violation constituted a felony due to the fact that Hubbard had two prior convictions for violating a court order. CP 1-2, 5; Exhibits 3, 6, 8.

Hubbard initially sought a jury trial on the charged offense. Prior to the presentation of evidence, the State offered a number of exhibits and the trial court heard argument from the parties on this issue. RP 16-17. The State argued that the exhibits were self-authenticating documents that were admissible pursuant to RCW 5.44.010. RP 18. On appeal, Hubbard only challenges the admission of one of the exhibits: Exhibit 1. That exhibit was a clerk's minute sheet from the Superior Court file in Kitsap County cause 06-1-00639-7. Exhibit 1, RP 18, 33.¹

At trial, the defense objected to Exhibit 1 (and the other exhibits), arguing relevance, hearsay, and the confrontation clause. RP 17-18. With respect to Exhibit 1, the defense conceded that the exhibit was a court document and that it fell under RCW 5.44.010. RP 33. The defense, however, argued that the document was testimonial pursuant to *Crawford*, and thus violated the confrontation clause. RP 33. The defense focused on the fact that Exhibit 1 itself noted that a copy of the no-contact order had been served on Hubbard in court, and the defense argued that this notation was testimonial. RP 33-34. The defense further argued that this inclusion of this notation was not just a "ministerial act" and was testimonial in nature. RP 34-35. In addition, the defense argued that there was no reason to note that the no contact order had been served other than for use in later litigation. RP

¹ Hubbard has raised no challenges to his driving with license suspended/revoked conviction.

43-44.

The trial court asked the defense for authority on this issue, and the defense cited *State v. Jasper*, 158 Wn. App. 518 (2010) where the court had found that a certified document from the Department of Licensing was improperly admitted based on *Crawford* and *Melendez-Diaz*. RP 36-37.

The State argued that the specific document at issue in *Jasper* was found to be inadmissible because it was specifically prepared in anticipation of litigation and was, therefore, testimonial pursuant to *Crawford*. RP 40-41.

Specifically, the document in *Jasper* was prepared at the request of the prosecution for use in the trial. RP 43. Exhibit 1, however, was not prepared in anticipation of litigation but rather was prepared in the regular course of the court's proceedings in the earlier case and was made to keep track of what was occurring in the courtroom on that case. RP 41-42.

The trial court ultimately found that the exhibits were admissible and overruled Hubbard's *Crawford*-based Confrontation Clause objection, finding that the exhibits, including Exhibit 1, were not testimonial. RP 57. Specifically, the trial court explained that it had reviewed the *Jasper* case in which the court was dealing with a document that was prepared in anticipation of litigation. RP 57. The trial court noted, however, that Exhibit 1 was not prepared in anticipation of litigation, and found as follows:

As I look at this document which s prepared by the court clerk, I am not finding that this document is prepared in anticipation of litigation. There are numerous indicators here as to what transpired in court. This is a document that relays the activity that occurred in court on August 21, 2006. For example, there is a reference to a six-month sentence, there is a reference to Tim Kelly as being the attorney for the defendant, there is a reference to a restitution hearing being set for November 14 of 2006 at 11 o'clock, and of course there is also the reference to a no-contact order being served on the defendant. This is a document that relays what occurred in court. I am not finding that it was prepared in anticipation of litigation.

It is arguable at this time that that reference to no-contact order being served on defendant is being used for purposes of litigation, but that is not the criteria of the *Jasper* case. In order for a Crawford analysis to apply, it would need to be a document prepared in anticipation of litigation. Moreover, the fact that there is a reference to no-contact order being served on the defendant, it's arguable that that could have been done in anticipation of litigation, but as I read it, the public purpose would be to ensure that the defendant is aware that he is not to have any contact with the defendant [sic], and this is a memorialization of the fact that he was served, he is now aware, and that therefore, reinforces that the victim in the case is protected to the extent anticipated and contemplated by the court.

A reference to no-contact order being served is not a reference made to anticipate litigation. In fact, when a defendant is served with a no-contact order in court, I think it's fair to anticipate that court order would be followed, and this is simply a memorialization that the defendant is now aware through the service. I don't believe that it is contemplated or anticipated that there would be a violation of the no-contact order, and therefore, memorializing for that purpose.

RP 57-58.

After the trial court made its ruling, Hubbard waived his right to a

jury trial and the matter was resolved by a bench trial on stipulated facts. CP 29-32, RP 73-77.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN HOLDING THAT EXHIBIT 1 (A CERTIFIED COPY OF A CLERK'S MINUTE ENTRY FROM A SUPERIOR COURT FILE) WAS NOT TESTIMONIAL PURSUANT TO CRAWFORD V WASHINGTON BECAUSE THE UNITED STATES SUPREME COURT HAS CONSISTENTLY HELD, EVEN AFTER CRAWFORD, THAT PUBLIC RECORDS BY THEIR VERY NATURE ARE NOT TESTIMONIAL AND THUS DO NOT TRIGGER THE CONFRONTATION CLAUSE.

Hubbard argues that the trial court erred in admitting Exhibit 1 because that document was testimonial and thus required confrontation pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). This claim is without merit because public records by their very nature are not testimonial and thus do not trigger the Confrontation Clause.

Under Washington law records and proceedings of any court are admissible in evidence if they are certified by an officer in charge of the court records and if the seal of that court is annexed. RCW 5.44.010. Extrinsic evidence of the authenticity of a certified copy of a public record is not required as a condition precedent to admissibility. *State v. Benefiel*, 131 Wn.App. 651, 654, 128 P.3d 1251 (2006); ER 902(d). Such documents are

considered self-authenticating and admissible. ER 902; *Benefiel*, 131 Wn.App. 654; *State v. Ross*, 30 Wn.App. 324, 327, 634 P.2d 887 (1981).

Nevertheless, Hubbard argues that admission of Exhibit 1 violated the Confrontation Clause of the Sixth Amendment. Hubbard further argues that Confrontation Clause jurisprudence is a “fast evolving area of the law” and essentially claims that the recent case of *State v. Dash* portends a dramatic expansion of a defendant’s Confrontation Clause rights. App.’s Br. at 6. Specifically, Hubbard appears to argue that confrontation is required anytime a statement is used against a defendant, citing *Dash*. App.’s Br. at 6. This argument, however, is not supported by *Dash* and is directly contrary to the Supreme Court’s decisions in *Crawford* and *Melendez-Diaz*.

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- 1. Pursuant to Crawford, the Confrontation Clause prohibits the admission of Testimonial statements unless the defendant is afforded his right to confrontation. The Confrontation Clause, however, does not apply to statements that are not “testimonial,” and none of the cases cited by Hubbard have in any way changed or altered this basic holding.***

The essence of Hubbard’s argument on appeal appears to be that *State v. Dash*, 163 Wn.App 63, 259 P.3d 319 (2011), somehow portends a new understanding of the Confrontation Clause in which the critical question of whether or not a statement is “testimonial” has been either eliminated or dramatically altered. This argument, however, is based on a misreading of *Dash* and is directly contradicted by the plain language of the Supreme

Court's Confrontation Clause cases.

In *Dash*, the defendant was charged with theft in the first degree based on allegations that he had stolen property from an elderly victim. *Dash*, 163 Wn.App. at ____ .² Although the *Dash* court ultimately reversed the conviction due to an instructional error (and thus did not have to address any of the defendant's remaining issues), the Court nevertheless went on to briefly address the remaining issues "in order to assist the trial court." *Dash*, 163 Wn.App. at ____ .

In *Dash*, the victim gave a videotaped interview to a detective and prosecutor, and the interview was introduced at trial. *Dash*, 163 Wn.App. at ____ . As the videotaped interview was clearly testimonial pursuant to *Crawford*, there was argument regarding that issue. Rather, the issue centered on a footnote in the *Crawford* opinion that stated that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Dash*, 163 Wn.App. at ____ , citing *Crawford*, 541 U.S. at 59, n.9, 124 S.Ct. 1354. The *Dash* court noted, however, that more recent cases from the United States Supreme Court have suggested that the proper focus is not whether the statement is hearsay, but whether the statement is offered "against" the

² The Westlaw version of *State v. Dash* does not contain page numbers, thus the State is unable to provide pinpoint citations to the relevant pages from the opinion.

defendant. *Dash*, 163 Wn.App. at ___, citing *Bullcoming v. New Mexico*, — U.S. —, 131 S.Ct. 2705, 2714 n.6, 180 L.Ed.2d 610 (2011) (citing *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)); see also *Michigan v. Bryant*, — U.S. —, 131 S.Ct. 1143, 1155, 179 L.Ed.2d 93 (2011). In addition the *Dash* court cited *Melendez–Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed. 314 (2009), for the proposition that a witness need not directly accuse the defendant of wrongdoing in order to be a witness subject to cross-examination for purposes of the confrontation clause. *Dash*, 163 Wn.App. at ___, citing *Melendez–Diaz*, 129 S.Ct. at 2533.

The *Dash* court then noted that several of the victim’s statements, whether directly accusatory or not, were being offered by the State to “prov[e] one fact necessary for his conviction.” *Dash*, 163 Wn.App. at ___, citing *Melendez–Diaz*, 129 S.Ct. at 2533. The court then stated,

This is a fast-evolving area of the law. Whether *Bullcoming*, *Bryant*, and *Melendez–Diaz* signal a departure from the blanket assertion in *Crawford*'s footnote 9 (that if a statement is not offered to prove the truth of the matter asserted it is not hearsay and, thus, is not subject to confrontation) is not yet clear. Numerous cases from the lower courts and several commentators, including one of America's foremost military lawyer-jurists, have pondered the question and its implications. See generally Hon. Jack Nevin, Conviction, Confrontation, and Crawford: Gang Expert Testimony as Testimonial Hearsay, 34 SEATTLE U.L.REV. 857 (2011). We are certain that the parties will more completely litigate these issues, for the benefit of the trial court, on remand.

Dash, 163 Wn.App. at ____ .

The statements from the *Dash* case are inapplicable to the present case for several reasons. First, the language from *Dash* on the Confrontation Clause is dicta, and thus not controlling. More importantly however, the issue addressed in *Dash* is different from the issue presented in the present case. In *Dash*, the issue was whether *testimonial* statements are nevertheless admissible without confrontation as long as the statements are not offered to prove the truth of the matter asserted. Thus, the *Dash* Court's focus was on whether *Crawford's* footnote 9 (that if a statement is not offered to prove the truth of the matter asserted it is not hearsay and, thus, is not subject to confrontation) was still good law.

In the present case the trial court admitted Exhibit 1 because the exhibit was *not* testimonial. RP 57-58. *Crawford's* footnote 9 and *State v. Dash*, therefore, are inapplicable for the basic reason that they deal with only with *testimonial* statements. In short, *Dash* does not change the basic rule that the Confrontation Clause only applies to testimonial statements. Rather, *Dash* and *Crawford's* footnote 9 deal only a possible exception that some statements, while testimonial, might still be admissible without confrontation. That issue, while interesting, is irrelevant to the present case. The only issue before this Court is whether Exhibit 1 was in fact, not testimonial, as the trial court ruled.

Furthermore, the *Dash* court stated that the issues regarding Crawford's footnote 9 were “not yet clear” due to recent language in *Bullcoming*, *Bryant*, and *Melendez–Diaz*. *Dash*, 163 Wn.App. at ____ . In those more recent cases, however, the Supreme Court has continued to explain that the Confrontation Clause only bars the admission of testimonial statements and that public records are generally admissible without confrontation because such records, by their very nature, are *not* testimonial. For instance, in *Melendez–Diaz* the Supreme Court explained that

Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.

Melendez–Diaz, 129 S.Ct. at 2539-40. The Court in that case ultimately held that an analyst's certificate was not admissible absent confrontation because the certificate was testimonial and was “prepared specifically for use at petitioner's trial.” *Melendez–Diaz*, 129 S.Ct. at 2540. Nevertheless, the Supreme Court noted that,

A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant.

Melendez–Diaz, 129 S.Ct. at 2539.

Similarly, in *Bullcoming* the Supreme Court held that a laboratory

report certifying that the defendant's blood alcohol level was above the legal limit was held to be testimonial and thus not admissible absent confrontation. *Bullcoming*, 131 S.Ct. at 2709-10. In so holding, the Supreme Court held that an analyst's certificate prepared in connection with a criminal investigation or prosecution was testimonial. *Bullcoming*, 131 S.Ct. at 2713-14. The Court (citing to its previous decision in *Melendez Diaz*), noted, however, that to be testimonial the statement must have been created with a "primary purpose" of establishing past events at a later trial, and that,

Elaborating on the purpose for which a "testimonial report" is created, we observed in *Melendez-Diaz* that business and public records "are generally admissible absent confrontation ... because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.

Bullcoming, 131 S.Ct. at 2714, n. 6, quoting *Melendez-Diaz*, 129 S.Ct. at 2539-40. Thus *Bullcoming*, as *Melendez-Diaz* did before it, stands for the proposition that testimonial statements are not admissible absent confrontation, and that the certificate in that case was testimonial as it was specifically prepared for use in the trial. Nevertheless, the Court reaffirmed its holding that public records, by their very nature, are not testimonial and thus do not require confrontation.

Furthermore, in *Michigan v. Bryant*, the Court yet again reaffirmed that the initial inquiry must be whether the statement at issue was made with a “primary purpose” of creating an out-of-court substitute for trial testimony.

Bryant, 131 S.Ct. at 1155. The Court, therefore, explained that,

In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.

Bryant, 131 S.Ct. at 1155. In addition, the *Bryant* Court went on to cite *Melendez-Diaz* and *Crawford* for their holdings that many statements that would qualify under traditional hearsay exceptions are by their very nature not “testimonial” because those statements were made for a purpose other than use in a prosecution. *Bryant*, 131 S.Ct. at 1157 n.9. Specifically, the *Bryant* Court cited to the specific language in *Melendez-Diaz* and *Crawford* :

[S]ee also *Melendez–Diaz v. Massachusetts*, 557 U.S. ———, ———129 S.Ct., at 2539–2540 (“Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial”); . . . *Crawford*, 541 U.S., at 56, 124 S.Ct. 1354 (“Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy”).

Bryant, 131 S.Ct. at 1157 n.9.

In all of these cases the Supreme Court clearly stated that public

records, by their very nature, are not testimonial and thus do not require confrontation. There is nothing in any of these cases that in any way suggests that critical question is no longer whether or not the statement at issue was testimonial. Rather, these cases all agree that the Confrontation clause is only triggered by *testimonial* statements and that public records thus do not trigger confrontation because they are *not* testimonial by their very nature

In the present case, Hubbard argues that *Dash* is somehow applicable to the present case and that Confrontation Clause jurisprudence is a “fast evolving area of the law” and that the recent cases suggest that confrontation is required anytime a statement is used against a defendant. App.’s Br. at 6. This argument, however, misconstrues the language in *Dash*. First, *Dash* clearly dealt with *testimonial* statements. The present case, however, deals with a statement that was *not* testimonial. Furthermore, in *Dash*, the Court of Appeals specifically stated that it was relying on *Bullcoming*, *Bryant*, and *Melendez-Diaz*. In each of those case, the Supreme Court clearly explained that public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.

Thus, *Bullcoming*, *Bryant*, and *Melendez-Diaz* all support the trial

court's holding in the present case that Exhibit 1, a certified court record, was admissible without confrontation because the record was not testimonial. Nothing in *Dash*, *Crawford*, *Bullcoming*, *Bryant*, and *Melendez-Diaz* in anyway supports Hubbard's claim that a non-testimonial statement or document is inadmissible absent confrontation if the statement is used against a defendant. Rather, the cited cases require confrontation for testimonial statements, and may require confrontation for testimonial statement even though those statements are not used to prove the truth of the matter asserted.

In short, the critical question remains whether the statement is testimonial. In *Dash*, *Crawford*, *Bullcoming*, and *Melendez-Diaz* the statement at issue was found to be testimonial, thus confrontation was required. In *Bryant*, the statement at issue was found to not be testimonial, thus the statement was admissible without confrontation. *Bryant*, 131 S.Ct. at 1167. In every case, however, the clear issue was whether the statement was testimonial.

In the present appeal, Hubbard also appears to argue that *Dash* somehow changes the traditional "primary purpose" test used to determine if a statement is or is not testimonial. App.'s Br. at 6-7. Nothing in the language of *Dash*, or in the cases cited in that opinion, in any way suggest that the "primary purpose" test is no longer the law. To the contrary, all of the cases cited in *Dash* reaffirm the primary purpose test. See *Bryant*, 131

S.Ct. at 1157 n.9; *Bullcoming*, 131 S.Ct. at 2714, n. 6; *Melendez-Diaz*, 129 S.Ct. at 2539-40.³

2. ***The trial court did not err in finding that Exhibit 1 was not testimonial because the primary purpose of the document was not to establish or prove some fact at a trial. Rather, the trial court correctly found that Exhibit 1 was created for the primary purpose of recording and memorializing the court's activities.***

Hubbard offers no other argument other than his misreading of *Dash* to support the claim that the “primary purpose” test (used to determine whether a statement is testimonial) has somehow been modified. Hubbard’s claim based on *Dash* is without merit, the proper analysis remains the “primary purpose” test. As the Supreme Court has explained,

³ In the trial court below Hubbard cited *State v. Jasper*, 158 Wn.App. 518, 245 P.3d 288 (2010) to argue that the Exhibit was inadmissible. On appeal, however, Hubbard makes no mention of *Jasper* other than a citation without explanation. App.’s Br. at 6. *Jasper*, in fact, does not support Hubbard’s present argument because in *Jasper* the court specifically cited the language discussed above from *Melendez-Diaz* that business and public records remain admissible without confrontation because they are created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial. *Jasper*, 158 Wn.App. at 528, citing *Melendez-Diaz*, 129 S.Ct. at 2539–40.

Thus, “[a] clerk could by affidavit authenticate or provide a copy of an otherwise admissible record.” *Melendez-Diaz*, 129 S.Ct. at 2539. Conversely, what a clerk could not do, without an opportunity for confrontation by the defendant, was “what the analysts did here: create a record for the sole purpose of providing evidence against a defendant.” *Melendez-Diaz*, 129 S.Ct. at 2539.

Jasper, 158 Wn. App. At 528-29. In addition, the *Jasper* court explained that if a records clerk merely certified that the agency records attached to the affidavit were true and correct copies of records possessed by the [agency] then, “Without question, such a statement would be of the type approved by *Melendez-Diaz*.” *Jasper*, 158 Wn.App. at 531. In the present case, of course, Exhibit 1 existed in the court file independently of Hubbard’s prosecution in the present case. Thus, even under *Jasper*, the document was admissible since it was a regularly kept record in a previous case and was not created merely for the use in the present case.

Business and public records “are generally admissible absent confrontation ... because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.

Bullcoming, 131 S.Ct. at 2714, n. 6, quoting *Melendez–Diaz*, 129 S.Ct. at 2539-40.

Thus, pursuant to the holdings of the United States Supreme Court, the trial court in the present case correctly held that the Exhibit was not testimonial, as it was created for the administration of the court's affairs and not for the purpose of establishing or proving some fact at trial. A previous Washington Appellate decision also supports the trial court's holding.

For instance in *State v. Benefiel*, 131 Wn.App. 651, 128 P.3d 1251 (2006), the Washington Court of Appeals has previously held that a court document, specifically a judgment and sentence, was not testimonial and was thus admissible without confrontation. In *Benefiel*, the defendant was charged with escape from community custody after he failed to check in with his CCO following a conviction for assault. At trial, the State offered the judgment and sentence from the assault case, but the defendant objected arguing that the document was inadmissible pursuant to *Crawford. Benefiel*,

131 Wn.App. at 653-54. The trial court overruled the objection and the Court of Appeals affirmed, holding that,

Here, the judgment and sentence is not testimonial. It is not a statement made for the purpose of establishing some fact and it does not constitute a statement the declarant would reasonably believe would be used by the prosecutor in a later trial.

Benefiel, 131 Wn.App. at 656, *citing Crawford*, 541 U.S. at 53.

Similarly, this Court recently addressed the interplay between business or public records and the Confrontation Clause in *State v. Fleming*, 155 Wn.App. 489, 228 P.3d 804 (2010). In *Fleming* the issue was whether certain business records were admissible without confrontation. This Court explained that the Confrontation Clause “prohibits the admission of *testimonial* hearsay statements in a criminal case without an opportunity for cross-examination.” *Fleming*, 155 Wn.App. at 501 (emphasis in original). Additionally, this Court noted that under *Crawford*, business records are generally not testimonial hearsay. *Fleming*, 155 Wn.App. at 501, *citing, State v. Kirkpatrick*, 160 Wash.2d 873, 882, 161 P.3d 990 (2007) (“The Supreme Court has not provided a comprehensive definition of ‘testimonial.’ However, the Court did state in *Crawford* that business records are ‘by their nature not testimonial.’”) (*quoting Crawford*, 541 U.S. at 56, 124 S.Ct. 1354).

Although the State is aware of no post-*Crawford* Washington case

that has specifically addressed the Confrontation Clause and court records other than a judgment and sentence (such as a clerk's minutes or docket entry), at least one other court has addressed the issue. For instance, in *Commonwealth v. Weeks*, 927 N.E.2d 1023 (Mass.App. Ct. 2010), the Appeals Court of Massachusetts held that "certified docket sheets" were not testimonial and therefore did not require confrontation. *Weeks*, 927 N.E.2d at 1028. In *Weeks* the court explained that court records are "created to establish the fact of adjudication, so as to promote accountability to the public regarding official proceedings and public knowledge of the outcomes of those proceedings." *Weeks*, 927 N.E.2d at 1027. The court also noted that "in light of the fact that they are not created for the purpose of any pending litigation, it would not reasonably be anticipated that they would be used against an accused." *Weeks*, 927 N.E.2d at 1028.

The trial court's holding in the present case mirrored the Massachusetts court's holding in *Weeks*, as the trial court below stated that the clerk's minutes were prepared to relay "what happens in court," and that the reference to the no-contact order was part of this, since the notation served the "the public purpose" of memorializing that the defendant was aware that he is not to have any contact with the victim. RP 57-58. The court went on to explain that such a notation, for instance, allows a victim to know that the order has been issued and served and that it is therefore in

place to protect the victim to the extent anticipated and contemplated by the court. RP 57-58. Furthermore, as with essentially any court document it is always possible that the record could be used in a later case, the “primary purpose” of the record is not to create a record for some future litigation. In addition, the trial court explained that the clerk’s minutes’ notation that the order had been served was not created in anticipation of future litigation. Rather, as the *Weeks* case also noted, as there was not new pending litigation at the time the order was served, there was no reason to anticipate future litigation. RP 57-58.

In short, the trial court did not err in admitting Exhibit 1, as the document was not testimonial. This conclusion is based on the fact that the “primary purpose” of the document was to record the court’s actions, including the fact that the no-contact order was served on Hubbard. Furthermore, as the trial court and other have noted, a court’s routine record keeping process in which the court memorializes its own activities serves the important public purpose of providing accountability and public knowledge of the outcomes the court’s proceedings. Although future litigation is always a possibility with any public record or business record, the primary purpose of the court’s record keeping in the present case was not due to anticipation of future litigation. Given all of these facts, the trial court did not err in determining that Exhibit 1 was not testimonial.

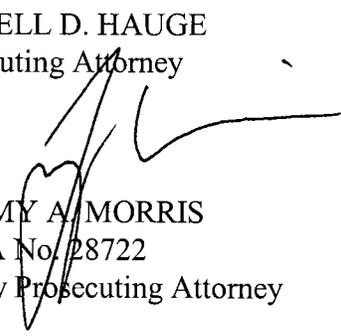
IV. CONCLUSION

For the foregoing reasons, Hubbard's conviction and sentence should be affirmed.

DATED October 24, 2011.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



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DOCUMENT1

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Transmittal Letter

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Court of Appeals Case Number: 42096-1

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

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