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NO. 53881-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ISAIAH NEWTON JR.,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Isaiah Newton was convicted of attempted second-degree robbery and fourth-degree assault for pushing Nekisha Richardson to the ground then pulling her by holding the strap of her bag during a 30 second window of time. Because the same physical conduct at the same time was used to prove the overlapping elements of the offenses, these two convictions violate double jeopardy.

Ms. Richardson never appeared for trial. She had made several out-of-court statements to a lead security officer and to a police officer who investigated the incident. The State relied on Ms. Richardson's out-of-court statements as evidence against Mr. Newton, violating Mr. Newton's constitutional right to confront witnesses against him.

B. ASSIGNMENTS OF ERROR

1. The State relied on the same series of physical conduct, pushing and pulling, to convict Mr. Newton of attempted second-degree robbery and fourth-degree assault, violating double clauses of the United States and Washington State Constitutions.

2. The court improperly admitted out-of-court testimonial hearsay statements made by Ms. Richardson, violating Mr. Newton's constitutional right to confront witnesses against him.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Double jeopardy prohibits multiple punishments for the same offense. Mr. Newton was convicted of attempted second-degree robbery and fourth-degree assault for the same physical conduct. Did this violate double jeopardy?

2. The confrontation clause prohibits the admission of out-of-court testimonial hearsay statements. The State relied on the complaining witness' out-of-court hearsay statements to a lead security officer and to a police officer after the incident was over. Was Mr. Newton's right to confront the witness against him violated when the court admitted out-of-court statements to investigating officers when the complainant did not testify?

D. STATEMENT OF THE CASE

Despite a protection order barring Nekisha Richardson from contacting Isaiah Newton, Ms. Richardson texted and called Mr. Newton early in the morning asking him to meet her at BJ's Bingo, which is a "casino/bingo hall." RP 25, 73.¹

When Mr. Newton got to BJ's Bingo, Cheryl Baker, the lead security officer, denied him entry because he did not have a valid form of identification. RP 27. According to security protocols, valid identification is required to enter. RP 25-26. Mr. Newton asked Ms. Baker if she could go find his "wife", Ms. Richardson, in the casino. RP 28. Security paged Ms. Richardson, but she did not respond. *Id.* After waiting several minutes, Mr. Newton left the entrance area but returned within a few hours because he wanted Mr. Richardson to come outside. RP 29-30.

Eventually, security guards told Ms. Richardson to leave, or, as Mr. Newton testified, escorted him around BJ's Bingo so

¹ There was a domestic violence protection order out of Fife Municipal Court No. 7Z520674 which involved Ms. Richardson and Mr. Newton. Mr. Newton was the protected party. Ex. 3.

The trial court transcripts are contained in a single volume, referred to as "RP."

he could find Ms. Richardson. RP 32, 75. Mr. Newton then waited for Ms. Richardson outside as she asked him to do. RP 75. Ms. Richardson “cashed out” and met Mr. Newton. RP 33, 75.

When Ms. Richardson joined Mr. Newton outside the casino, she immediately began to verbally “chew” into Mr. Newton. RP 36. According to Ms. Baker, Ms. Richardson was not happy she had to leave the casino and she was “the one that had lit into [Mr. Newton] for sure.” *Id.*

The tense situation between Ms. Richardson and Mr. Newton continued as they left BJ’s Bingo property. RP 37. Mr. Newton explained he was trying to convince her to come with him but all she wanted to do was stay at BJ’s Bingo. RP 82-83. After yelling at Mr. Newton, Ms. Richardson pushed Mr. Newton and tried to punch him. RP 83. Mr. Newton’s hands were in his pockets. *Id.* A video camera from the casino recorded the incident. Ex. 2.

Mr. Newton initially backed away from Ms. Richardson’s advances but lost his temper “a little bit.” RP 77. In the ensuing physical struggle, Mr. Newton pushed Ms. Richardson to the

ground and immediately grabbed her shirt and bag, pulling her several feet across the street. RP 77; Ex. 2 (3:40:31-3:40:58).

Mr. Newton testified that he was trying to get Ms. Richardson to come with him; “that’s the whole reason I’m at the casino, for her to come with me.” RP 77. Recognizing that Ms. Richardson wanted to stay, Mr. Newton released her and walked away from the scene as security guards from the nearby casino approached. RP 79; Ex. 2 (3:41:02). The videotape shows the physical portion of the incident spanned 30 seconds, from 3:40:31 until 3:41:02. Ex. 2. Two large security guards gestured to Mr. Newton and watched as he walked away and left the area. Ex. 2 (3:41:13 - 3:44:23).

Ms. Richardson, on the other hand, walked back towards BJ’s Bingo where the lead security officer for the casino, Ms. Baker, questioned her. RP 38. Ms. Richardson was emotionally upset, but did not want police intervention or medical assistance. RP 38-39. She told Ms. Baker she had just been hit. RP 38. During this interaction, Ms. Baker was on the phone with tribal and Fife police. *Id.* Although the incident occurred

outside the casino, it was not on casino property, so Fife police responded. RP 38.

Even though Ms. Richardson told lead security guard Baker that she did not want police involvement, Ms. Baker told her there was “no choice,” police involvement was required, and they were on their way. RP 39. As part of Ms. Baker’s investigation, she asked Ms. Richardson for her identification. RP 39-40. Ms. Baker also explained that Ms. Richardson would not have been allowed to reenter BJ’s Bingo without a valid form of identification. RP 47-48, 51. With or without identification, Ms. Baker would have waited with Ms. Richardson for the police. RP 51. Ms. Baker explained that sometimes people refuse to give identification if they have warrants that the police would find. RP 51.

In response to the security officer’s request for her identification, Ms. Richardson said Mr. Newton must have taken her wallet and identification because she did not have it with her. RP 39. During this conversation, Ms. Richardson informed Ms. Baker that there was a protection order between her and Mr. Newton. RP 40. Ms. Baker was surprised by the no-contact

order, which Ms. Richardson had not been mentioned previously. RP 40.

Ms. Baker gave Ms. Richardson “a statement form for her to fill out” and directed her to “have it ready for when the police arrive.” RP 41. Ms. Baker completed her own incident report at the same time. RP 41.

Officer Ryan Micenko, of the Fife Police Department, arrived at BJ’s Bingo a few minutes after Ms. Baker placed the call and was directed to wait inside for the security officer. RP 54-5. Officer Micenko spoke “in depth” to Ms. Baker first, before questioning Ms. Richardson. RP 54-55. Officer Micenko testified that Ms. Richardson seemed “a little upset” but not “overly upset.” RP 56. She “had calmed down significantly.” RP 56.

During Officer Micenko’s investigation he questioned Ms. Richardson and Ms. Baker. Although Ms. Richardson did not want to cooperate, Officer Micenko was able to elicit information from her by “encourg[ing] her to cooperate.” RP 66. Officer Micenko told Ms. Richardson that he was required to do a report because it was a domestic violence incident and that he “would rather have [her] side of it or at least a side of it to write.” *Id.* He

went on to testify that “I do encourage them to at least give me some basis of what happened so when I write the record there’s something.” *Id.*

At some point during Officer Micenko’s investigation, Ms. Baker relayed that she was told by Ms. Richardson that the other person involved in the incident was Mr. Newton. RP 58.

Mr. Newton was later arrested and charged with second-degree robbery and fourth-degree assault, both with domestic violence enhancements. *See* CP 3-4 Information (April 10, 2019).

Mr. Newton filed a Knapstad motion to defeat the robbery allegation, because no property had been taken from Ms. Richardson despite her initial claim that her identification. RP 4. The prosecution responded by amending the information, changing count I from robbery in the second degree to attempted second degree robbery. RP 4-5; CP 6-7.

Before the trial started, the State claimed it could not locate Ms. Richardson and admitted she had no Washington State identification in any system. RP 9. In response, defense proposed a motion in limine to prohibit the admission of any hearsay statement made by Ms. Richardson. RP 6.

Following a bench trial, Mr. Newton was convicted of attempted second-degree robbery and fourth-degree assault as domestic violence offenses. CP 12-17.

E. ARGUMENT

1. The court violated double jeopardy when it punished Mr. Newton for attempted second-degree robbery and fourth-degree assault where the same evidence was used as the basis for each crime.

The Washington and United States Constitutions protect individuals from multiple punishments for the same crime. *Brown v. Ohio*, 432 U.S. 161, 164, 97 S. Ct. 2221, 53 L. Ed.2d 187 (1977); *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). Article I, section 9 of the Washington Constitution provides that “[n]o person shall...be twice put in jeopardy for the same offense.” *Kelley*, 168 Wn.2d at 76. The United States Constitution provides that “[n]o person shall...be subject for the same offence twice put in jeopardy of life or limb.” U.S. Const. amend. V.

The double jeopardy clause prevents a court from imposing greater punishment than the legislature authorized or intended. *Kelley*, 168 Wn.2d at 77. Although the legislature may impose cumulative punishments for the same offense, it must

explicitly make that declaration, or it must be evident within the statutes that the legislature intended to do so. *Id.*; see *In re Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004). Where the legislature's intent is not clearly indicated, the double jeopardy clause prohibits multiple punishments for the same offense imposed in the same proceeding. *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007) (quoting *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 49, 75 P.3d 488 (2003)).

Where the legislature's intent is not clearly stated, Washington courts apply a three-part analysis to determine whether multiple convictions violate double jeopardy. *State v. Martin*, 149 Wn. App. 689, 698, 205 P.3d 931 (2009). First, courts apply the *Blockburger* test, sometimes referred to as the 'same-evidence' test. Second, where applicable, courts apply the merger doctrine. And third, courts analyze whether there was an independent purpose or effect for each offense. *In re Francis*, 170 Wn.2d 517, 523, 242 P.3d 866 (2010); *In re Burchfield*, 111 Wn. App. 892, 896-97, 46 P.3d 840 (2002).

Reviewing courts review double jeopardy claims *de novo*. Further, the analysis is conducted on a case by case basis,

premised on the facts as proven, not as generically listed in the statute. *Orange*, 152 Wn.2d at 818-19.

a. Mr. Newton's attempted second-degree robbery and fourth-degree assault convictions are the same in fact and in law.

When a defendant's criminal conduct supports charges under two criminal statutes, the court must determine, in light of legislative intent, whether the charged crimes constitute the same offense. *Kelley*, 168 Wn.2d at 77. The purpose of the *Blockburger* test is to determine whether there are two offenses or only one where the "same act or transaction constitute[s] a violation of two distinct statutory provisions. *Id.*

Under the *Blockburger* test, the charged crimes constitute the same offense when the two crimes are both same in fact and same in law. *Id.* In contrast, if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other, the offenses are not constitutionally the same. *See id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct.180, 76 L. Ed. 306 (1932)). Washington courts have occasionally found a violation of double jeopardy despite the determination that the offenses involved

clearly contained different legal elements. *Womac*, 160 Wn.2d at 652.

If, after applying the *Blockburger* test, the result is that there is only one offense, then imposing two punishments is a double jeopardy violation. *Kelley*, 168 Wn.2d at 77.

b. Mr. Newton's convictions for attempted second-degree robbery and fourth-degree assault are the same in fact because the offenses arise from the same act directed at the same victim.

Offenses are the same in fact when they arise from the same act or transaction and when the offense is based on the same act directed towards the same victim. *Womac*, 160 Wn.2d at 653; *see Martin*, 149 Wn. App. at 700. Courts look to several factors to determine whether the offenses are the same in fact: (1) who was the victim; (2) the temporal connection between the charges; and (3) the location of the offenses. *See Womac*, 160 Wn.2d 643.

In *Martin*, the court held that double jeopardy was violated when Martin was convicted of second-degree assault and attempted third-degree rape. *Martin*, 149 Wn. App. at 700. In that case, Martin broke into the victim's room where he pushed her to the ground, pinned her, and attempted to

unbutton her pants. *Id.* at 691. The court noted that although the elements of each statute were technically different, “[t]he charge [was] predicated on the same conduct: Martin’s assault with intent to rape D.S.” *Id.* at 700. Moreover, the court stated the “evidence to support the attempted third-degree rape was the same evidence used to convict him of second degree assault.” *Id.*

Similarly, the court in *Womac* held that double jeopardy was violated when *Womac* was convicted of homicide by abuse, second-degree felony murder, and assault of a child in the first-degree. *Womac*, 160 Wn.2d at 647-48. The court vacated *Womac*’s second-degree murder and assault of a child in the first-degree convictions because the “abuse constituted the same criminal conduct in that they involved the same victim and occurred at the same time and place.” *Id.* at 656 (internal quotations omitted). The court noted that *Womac* could not have “committed felony murder in the second degree without committing assault in the first degree.” *Id.*

In *Orange*, the Washington Supreme Court held that double jeopardy was violated when *Orange* was convicted of

first-degree attempted murder and first-degree assault for conduct directed towards one victim but held that double jeopardy was not violated for similar conduct directed towards a second victim. *Orange*, 152 Wn.2d at 820.

In that case, Orange drove to a gas station and fired at least 11 shots. There were three victims: one victim was killed by one bullet (McClure); the second victim (Walker) was struck by a separate bullet but survived; and the third victim (Willer) was grazed by another bullet, but not struck. *Id.* at 801.

For his conduct directed towards the second victim (Walker), Orange was convicted of attempted first-degree murder and first-degree assault. *Id.* at 820. After applying the *Blockburger* test, the court held that the convictions violated double jeopardy because the crimes were the same in fact and in law. *Id.* The court noted that Orange took a substantial step when he shot Walker and in the same instance committed assault with the firearm. *Id.* The court reasoned the crimes were based on the same conduct directed at the same victim. Moreover, the evidence used to support the attempted murder charge was sufficient to prove assault. *Id.*

In the case at bar, the evidence used to convict Mr. Newton of attempted second-degree robbery and fourth-degree assault was the same. Specifically, the State relied on the physical conduct where Mr. Newton pushed Ms. Richardson to the ground and then pulled her several feet. Just as with *Martin*, *Orange*, and *Womac*, there was only one victim. All of Mr. Newton's conduct happened in a short time span with no breaks or gaps.

The State, in its amended information, acknowledged that the assault was so closely connected to the attempted robbery that it would be too difficult to separate. *See* CP 6-7.

The court agreed with the State finding the assault and attempted robbery were one in the same. *See* CP 12-7. Specifically, the court made the following findings and conclusions:

Findings of Fact

- That, while it is not clear who first initiated physical contact, it is clear the defendant physically attacked Ms. Richardson by *throwing her to the ground and grabbing on to her purse*.

CP 14 Finding of Fact IX (emphasis added).

- That the evidence is clear that the defendant was *both trying to take the purse and drag* Ms. Richardson across the road.

CP 14 Finding of Fact XI (emphasis added).

- That it is clear from the *totality of the circumstances* that the defendant intended to permanently deprive Ms. Richardson of her purse.

CP 15 Finding of Fact XIII (emphasis added).

Conclusions of Law

- That *force was used* by the defendant to attempt to obtain possession of the property.

CP 15 Conclusions of Law V (emphasis added).

- That the defendant took a *substantial step* in committing the offense of Robbery in the Second Degree by *engaging in a physical struggle* with Ms. Richardson over possession of her purse.

CP 15 Conclusions of Law VI (emphasis added).

The court found Mr. Newton guilty of attempted second-degree robbery when he took a substantial step by engaging in a physical struggle Ms. Richardson. More importantly, the court considered the totality of the circumstances and found that it was Mr. Newton's intent to rob Ms. Richardson by the use of force. Thus, finding Mr. Newton guilty of attempted second-

degree robbery by the use of force necessarily satisfied fourth-degree assault.

c. Mr. Newton's convictions are the same in law because the court found the substantial step for attempted robbery was the physical assault.

The second prong of the *Blockburger* test asks whether the charges are same in law. Here the test requires “the court to determine whether each provision requires proof of a fact which the other does not.” *Martin*, 149 Wn. App. at 699-700 (internal quotations omitted) (emphasis in original). In doing so, the court must look at the facts used to prove the statutory elements. *Id.* at 700 (“[t]he Valentine court’s reluctance to look to the facts used to prove the statutory elements exposes a misconception about the Blockburger test.”); *Orange*, 152 Wn.2d at 817. Where it is unclear from the record which specific event, or combinations of events constituted the substantial step taken by the defendant, it is unlikely the offenses are not the same in law. *State v. Esparza*, 135 Wn. App. 54, 63, 143P.3d 612 (2006).

In this instance, the State alleged that Mr. Newton took a substantial step when he pushed Ms. Richardson to the ground and pulled her by the shirt and bag. CP 6-7; RP 18. Put another

way, the State alleged Mr. Newton physically assaulted Ms. Richardson when he attempted to rob her.

The court subsequently convicted Mr. Newton of fourth degree assault based on this physical conduct. Specifically, the court stated “[t]hat the attempted taking was against Nekisha Richardson’s will by the defendant’s use of immediate force, violence, or fear of injury to her.” CP 15 (Conclusions of Law IV). And that “the defendant took a substantial step in committing the offense of robbery in the Second Degree by engaging in a physical struggle with Ms. Richardson over possession of her purse.” CP 15 (Conclusions of Law VI).

The facts in this instance can be distinguished from those in *Esparza*. In that case, the defendant, Mr. Beaver, entered a jewelry store wearing a bandana and openly carrying a firearm. *Esparza*, 135 Wn. App. at 58. While aiming his firearm around the store, the jeweler emerged with his own firearm, shooting Mr. Beaver in the chest. *Id.*

The court in *Esparza* held that double jeopardy was not violated because “under the facts of [the] case it was not required for the State to prove facts sufficient to convict Beaver

of second degree assault in order for it to prove Beaver committed the offense of first degree attempted robbery.” *Id.* at 64.

The court reasoned that, unlike in *Orange*, it was unclear “what specific event or combination of events constituted the substantial step taken by Beaver toward the commission of first degree robbery.” *Id.* at 63. The court noted that “the elements of attempted robbery, including the substantial step element, were alleged only generically in the charging document and the trial court concluded only that Beaver had taken a substantial step toward commission of the robbery without stating what the step was.” *Id.* The court also noted that a number of actions “taken by Beaver [could] have constituted a substantial step toward committing first degree robbery. *Id.* at 63-64. And that there was other conduct, not constituting assault, presented at trial that would have been “sufficient to establish that Beaver took a substantial step toward the commission of first degree robbery.” *Id.* at 64.

Unlike in *Esparza*, it is clear which event constituted the substantial step in the attempted robbery. The court concluded

that Mr. Newton took a substantial step in attempting to rob Ms. Richardson when he “engag[ed] in a physical struggle with Ms. Richardson over possession of her purse.” CP 15 (Conclusions of Law VI). Moreover, the State made no allegation that Mr. Newton physical assaulted Ms. Richardson at some other point. It also did not rely on any fact other than the physical conduct of pushing and pulling Ms. Richardson that was necessary to support both charges. The necessary acts underlying both offenses occurred within a single span of 30 seconds. Ex. 2 (3:40:31 - 3:41:02).

d. The lesser offense must be vacated.

Mr. Newton’s conviction for attempted second-degree robbery and fourth-degree assault violate double jeopardy because they are predicated on the same conduct to prove the essential elements of both charges. When a double jeopardy violation occurs, the court must vacate the lesser offense. *Francis*, 170 Wn.2d at 525. This error requires dismissal of count II, fourth-degree assault, with the domestic violence enhancement.

2. Mr. Newton’s constitutional right to confront witnesses against him was violated when the trial court admitted out-of-court testimonial hearsay statements made by Ms. Richardson.

Ms. Richardson did not testify at trial. The State claimed Ms. Richardson had no Washington identification and attempts to locate her, with police help, were unsuccessful. RP 9; RP 18.

People accused of a crime have the constitutional right to confront and cross-examine witnesses against them. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004); *Michigan v. Bryant*, 562 U.S. 344, 353, 131 S. Ct. 1143, 179 L. Ed.2d 93 (2011); *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). The confrontation clause prohibits the use of testimonial out-of-court statements unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Koslowski*, 166 Wn.2d at 417; *McDaniel*, 155 Wn. App. at 846-47.

The State bears the burden on appeal to prove that a statement was nontestimonial. *Koslowski*, 166 Wn.2d at 417.

Reviewing courts apply the “primary purpose” test to determine whether a witness’ statement is testimonial or nontestimonial. *See Koslowski*, 166 Wn.2d at 418 (citing *Davis v.*

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

Under the primary purpose test, statements 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.” *Id.*

In contrast, statements are nontestimonial when they are made “under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Id.* The primary purpose test is an objective analysis. *Bryant*, 562 U.S. at 359.

a. Ms. Richardson’s hearsay statements were testimonial because there was no ongoing emergency when she was questioned after the incident.

Whether the hearsay statements were made during an immediate emergency is one of the most important considerations as to whether or not the statement was testimonial or nontestimonial. *Bryant*, 562 U.S. at 361 (“the existence of an ongoing emergency at the time of any encounter between an individual and the police is among the most

important circumstances informing the primary purpose of an interrogation.”).

There was no ongoing emergency when Ms. Richardson told Ms. Baker that she *had* been hit and that her wallet *was* stolen. Neither statement was a cry for help nor a description of event transpiring at the moment of the statement. *Davis*, 547 U.S. at 832 (finding statements by victim to police during their investigation were testimonial because they were “neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation…”).

In the companion case of *Davis*, *Hammon v. Indiana*, Ms. Hammon was a party to a domestic violence dispute. When police arrived on scene, Ms. Hammon was on the porch and appeared somewhat frightened but stated to police that “nothing was the matter.” *Davis*, 547 U.S. at 831. Ms. Hammon invited the officers inside her home to talk. Once inside, the officers separated Ms. and Mr. Hammon. During the police investigation, the officer elicited statements as to what had happened rather than what was happening. *Id.* The Supreme Court noted that the sole purpose of the “interrogation was to

investigate a possible crime.” *Id.* The court held that Ms. Hammon’s statements were testimonial. *See id.*

Here, just as in *Davis*, Ms. Baker and Officer Micenko elicited statements from Ms. Richardson describing past events, not a cry for help. The physical assault had ended and both parties went their separate ways. Ms. Richardson was in BJ’s Bingo when she made her written and verbal statements to lead security officer Ms. Baker and Officer Micenko. Mr. Newton left the scene right after incident, as security guards intervened and separated them. RP 41; *see* Ex. 2. Moreover, the statements were made several minutes after the incident occurred.

b. The primary purpose of Ms. Richardson’s statements to lead security officer Ms. Baker and Fife police officer Micenko were not to address or resolve an emergency.

A basic objective of the Confrontation Clause is to prevent “the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial,” when the statements are made out-of-court. *Bryant*, 562 U.S. at 358.

Objectively viewed, Ms. Richardson’s hearsay statements were elicited to be used in future prosecution proceedings and

Mr. Newton did not have an opportunity to cross-examine Ms. Richardson's. *Id.* at 367.

In *Bryant*, the Supreme Court stated that “statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.” *Id.* And “if the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus is not within the scope of the Clause.” *Id.* at 358. Furthermore, courts should look to all of the relevant circumstances to determine whether the statement is testimonial. *Id.* at 369.

Ms. Richardson was aware that her statements were being officially recorded and given to the police. She expressly stated to Ms. Baker, the lead security guard, that she did not want police involvement, but Ms. Baker, as lead security officer, told her she had “no choice” and police involvement was necessary. RP 38-39. Ms. Baker not only provided Ms. Richardson with her own statement form to fill out for the police, but she also filled out her own incident form on behalf of

the casino. RP 38-9; RP 41. Both forms were for the police when they arrived. *Id.*

Mr. Newton had left the scene immediately after the incident and several security guards watched to be sure he was gone. Ex. 2 (3:41:02 - 3:44:23). While Ms. Richardson was crying at the outset, she was simply “agitated” during the conversation where she claimed her wallet and identification had been taken by Mr. Newton and there was a protection order in place. RP 40. Being “agitated” does not meet the prosecution’s burden of proving the statements were given as a cry for help, as required to avoid the testimonial nature of post-incident allegations to investigating officers. *Davis*, 547 U.S. at 831; *Koslowski*, 166 Wn.2d at 417, 419.

Although it is unclear what exact questions Ms. Baker asked, the elicited statements were used to prosecute Mr. Newton. *Bryant*, 562 U.S. at 358-59 (“Even where such an interrogation is conducted with all good faith, introduction of the resulting statements at trial can be unfair to the accused if they are untested by cross-examination.”). Ms. Richardson’s out-of-court statements were used in two ways. First, they were used

to assert that Mr. Newton was the person who assaulted Ms. Richardson. Ms. Baker testified Ms. Richardson told her that she was hit by Mr. Newton. RP 38. And the police further identified Mr. Newton based on Ms. Richardson's post-incident claim that there was an order prohibiting her from contacting him. RP 40, 56. This information was critical to proving the essential element that Mr. Newton was the person who argued with Ms. Richardson. Although Mr. Newton testified, this occurred only after the prosecution relied on Ms. Richardson's out-of-court's statements in its chase-in-chief.

Second, the statements were used to assert that Mr. Newton attempted to steal Ms. Richardson's wallet. RP 39. According to Ms. Baker, when she asked Ms. Richardson for her identification, as per BJ's Bingo policy, Ms. Richardson stated that Mr. Newton must have stolen it because she did not have any. RP 39. Without a valid form of identification, Ms. Richardson would not have been able to re-enter the casino, and should not have been allowed inside in the first place. RP 48. However, the State later informed the court that Ms. Richardson had no identification whatsoever in Washington State. RP 9.

The State relied on Ms. Richardson's false allegations as the basis to initially charge Mr. Newton with second-degree robbery. CP 3, 4. Upon reviewing video surveillance, shortly before trial, the State struck the robbery charge from count 1 but it instead charged Mr. Newton with attempted second-degree robbery. RP 4-5. However, Ms. Richardson's initial false allegation that Mr. Newton stole her property tainted the investigation and prosecution. Instead of viewing the incident as an assault or physical dispute between Mr. Newton and Ms. Richardson, the prosecution and court construed the interaction as an effort to take property from Ms. Richardson, which was premised on Ms. Richardson's initial false claim to the security officer investigating what happened.

Ms. Baker originally reported the incident as a possible domestic dispute, because that was what appeared to occur. RP 42. Officer Micenko testified that he was responding to a "physical domestic," as the incident was reported to be such a dispute. RP 54. Ms. Richardson's false, post-incident allegation to authorities that Mr. Newton had stolen her wallet was only elicited when officials were investigating the completed

altercation and arose only because Ms. Richardson needed to explain her lack of identification. Even though this uncontroverted out-of-court statement was false, it tainted the case and affected the outcome.

c. Introduction of Ms. Richardson's out-of-court hearsay statements were prejudicial and not harmless.

Ms. Richardson's out-of-court testimonial statements at trial were not harmless. Under the *Chapman* harmless error analysis, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012), citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Courts consider a wide variety of factors to determine whether the error was harmless, including whether the testimony was cumulative and "the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points." *State v. Wilcoxon*, 185 Wn.2d 324, 336, 337 P.3d 224 (2016).

Here, the State also relied on the out-of-court testimonial statements to establish that Ms. Richardson and Mr. Newton were the people involved in the incident, and that Mr. Newton was trying to take Ms. Richardson's property. The other evidence, aside from Ms. Richardson's post-incident statements to security personnel and police, showed an argument followed by a physical altercation between two adults. RP 54. It was not until Ms. Baker asked Ms. Richardson's for her identification that Ms. Richardson claimed Mr. Newton had stolen her identification because she no longer had it. However, this claim turned out to be false yet it affected the court's assessment of the interaction between Mr. Newton and Ms. Richardson. *See* RP 9.

The testimony about Ms. Richardson's statements after the incident cannot be proven harmless beyond a reasonable doubt. Her statements proved the names of the parties, the "domestic violence" nature of the incident, and gave context to security footage that Mr. Newton could not meaningfully challenge, other than denying its accuracy and explaining he was not trying to steal anything, as he testified.

Without Ms. Richardson, Mr. Newton's could not challenge her credibility and trustworthiness. The harmful effect of the prosecution's reliance on her statements to security guards and police affected the outcome of the trial.

F. CONCLUSION

In conclusion, this court should dismiss Mr. Newton's fourth-degree assault conviction because it constitutes punishment for the same offense as attempted robbery and violates double jeopardy. Furthermore, this court should overturn Mr. Newton's attempted second-degree robbery conviction because he was unable to confront the witness against him.

DATED this 26th day of February 2020.

Respectfully submitted,

s/ Kyle Berti

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Rule 9 Intern

s/ Nancy P. Collins

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 53881-4-II
v.)	
)	
ISAAH NEWTON, JR.,)	
)	
Appellant.)	

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