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

STATE OF WASHINGTON,

Respondent,

v.

ISAIAH NEWTON JR.,

Appellant.

Appeal from the Superior Court of Pierce County

No. 19-1-013330

BRIEF OF RESPONDENT

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I. INTRODUCTION

The State concedes that Mr. Newton's conviction for assault in the fourth degree is based on the same force used to prove the attempted robbery in the second degree. Because there is no basis for separate punishment, the case should be remanded for resentencing.

But Mr. Newton's newly raised hearsay objection should be rejected for two reasons. First, it was not raised at trial. Pursuant to RAP 2.5(a), the new objection should not be considered because Mr. Newton cannot meet his burden to show that the alleged error was manifest. The out-of-court statement regarding the victim's wallet and identification was of no consequence because the attempted robbery charge did not require the State to show that anything was actually taken, and the item Mr. Newton was convicted of attempting to take was Ms. Robinson's purse—not her wallet or identification. As the trial court's findings and conclusions reflect, each element of the charged crime was established by eye-witness testimony, surveillance video, and Mr. Newton's admissions.

Second, even if the Court allows the new objection to the un consequential out-of-court statement, Mr. Newton's argument fails. The Sixth Amendment's confrontation clause applies to statements made to preserve testimony for later use during a trial. U.S. Const. amend. VI. It is

not implicated by a statement made immediately after an assault, by the distraught, crying victim to a non-law enforcement officer.

II. RESTATEMENT OF THE ISSUES

1. Pursuant to RAP 2.5(a), should the Court prohibit an objection to an out-of-court statement from being raised for the first time on appeal, when a manifest error is not alleged, and the statement had no consequence on the trial or the trial court's findings and conclusions?
2. If the Court allows the new issue on appeal, is an out-of-court statement, which was elicited by a non-law enforcement officer for the primary purpose of protecting the victim's safety, a non-testimonial statement that does not implicate the Sixth Amendment's confrontation clause?

III. STATEMENT OF THE CASE

A. Mr. Newton Assaulted and Robbed Ms. Richardson

In the spring of 2019, Isaiah Newton and Nekisa Richardson were in a romantic relationship that had continued off and on for six or seven years. CP 13; VRP 83-84. At one point during the relationship, the Fife Municipal Court recognized Newton and Richardson as current or former domestic and intimate partners, and issued a protection order against Ms. Richardson. CP 13; Ex. 2.

In the early morning hours of May 1, 2019, Ms. Richardson was inside BJ's Bingo in Fife, Washington. According to BJ's lead security guard, Cheryl Baker, Mr. Newton stood outside the casino and repeatedly asked the staff to go and get Ms. Richardson for him. VRP 28-29. Ms. Baker recalled that Ms. Richardson appeared upset by the requests. VRP 44-45.

After Mr. Newton had asked the staff to fetch Ms. Richardson at least four times, Ms. Baker told Ms. Richardson: “This problem, that has to be yours....go deal with him and then you can come back.” VRP 32.

According to Ms. Baker, she then watched Ms. Richardson “cash out” and step outside, carrying the purse she had with her that morning in BJs. VRP 32, 38. Ms. Baker did not recall how much cash Ms. Richardson received. VRP 32-33. Mr. Newton watched as Ms. Baker received the money. VRP 32; VRP 75.

BJ’s security cameras captured a clear image of Ms. Richardson and Mr. Newton as they stepped outside and walked off the property. VRP 33-34; VRP 60; Ex. 2. Ms. Richardson had a cigarette in one hand and her purse on her other arm. VRP 43. According to Ms. Baker and Mr. Newton (and as reflected in the surveillance video), Ms. Richardson appeared to be upset that she had been forced to leave BJs and may have pushed Mr. Newton. VRP 45, 76; Ex. 2. Mr. Newton testified that he then lost his temper. VRP 76. “I lose—I lose it,” he said, “and I assaulted her.” *Id.* As Mr. Newton testified and the video reflects, he pulled on Ms. Richardson’s purse as she pulled back. VRP 78. He pulled on the purse with enough force to drag her into the street. VRP 49-50, 79.

As Mr. Newton was pulling at Ms. Richardson’s purse, bringing her to the ground as she fought to hold onto the straps, two security guards came

out of BJs. VRP 34, 36, 79; Ex. 2. When they approached, Mr. Newton “took a walk to get his senses back” and Ms. Richardson returned to BJs. VRP 80; VRP 38.

Ms. Baker testified that Ms. Richardson returned to BJs in tears. VRP 38. She was “very upset. She was crying. She said that she had just gotten hit” and that Mr. Newton must have taken her wallet and identification. VRP 38-39. According to the Fife police officer who later responded to the scene, Ms. Richardson was still crying and red in the face. VRP 56, 69. But she did not want to participate further in the investigation. VRP 60.

B. Mr. Newton Was Convicted of Second Degree Robbery and Fourth Degree Assault

Mr. Newton was initially charged with robbery in the second degree and assault in the fourth degree. The charge was amended to attempted robbery in the second degree. CP 6-7. The amended information provides that the robbery and assault are based on the same conduct and that it would be difficult to separate proof of one charge from proof of the other. CP 7.

Mr. Newton waived his jury right and a bench trial was held on July 16, 2019. CP 12. During the trial, Ms. Richardson was not available to testify. The State and the police office were unsuccessful in their attempts to locate her and their efforts were complicated by the fact that

she is homeless and does not appear to have any state-issued identification. VRP 18.

Before the trial began, defense counsel made a motion in limine to bar admission of any hearsay testimony regarding out-of-court statements made by Ms. Richardson. VRP 6. Rather than making a blanket determination, the trial court ruled that it would address hearsay objections at the time such statements were offered during the trial. VRP 7. As the trial proceeded, the defense did not make any objections to admission of hearsay statements. However, the State did. During cross examination of the responding police officer, defense counsel asked whether Ms. Richardson told the police officer that her wallet was stolen. VRP 69-70. The State's hearsay objection was sustained. *Id.*

During the short trial, the State relied on the eye-witness testimony Ms. Baker, the lead security officer for BJ's; surveillance video of the assault and attempted robbery that was recorded on BJ's security camera; and the Fife police officer who responded to the scene and watched the surveillance video. In addition, Mr. Newton testified and admitted that he assaulted Ms. Richardson. VRP 76. Although Mr. Newton denied taking anything from Ms. Richardson, he admitted that he saw Ms. Richardson "cash out" before leaving BJ's and that during the assault he pulled on Ms.

Richardson's purse strap—with enough force to drag her into the street.
VRP 75, 78.

Mr. Newton was convicted of both charges. CP 16. The trial court's findings of fact rely on the testimony of the witnesses and the surveillance video. CP 12-15. There are no findings based on the witnesses' recitation of hearsay statements from Ms. Richardson. *See id.* The trial court found that the attempted robbery involved Ms. Richardson's purse. *Id.*

Mr. Newton was given a standard range sentence of 47.25 months for his conviction on attempted robbery in the second degree, with a domestic violence enhancement. CP 24-34. He was given a suspended, concurrent sentence of 364 days for his conviction on assault in the fourth degree, with a domestic violence enhancement. CP 36-37.

This timely direct appeal followed.

IV. ARGUMENT

A. **The State Concedes that the Assault Should Merge with the Attempted Robbery in the Second Degree**

The State concedes that the assault conviction is based on the same use of force that supports the second degree robbery conviction. Under the facts presented in this case, there is no basis for separately punishing the offenses. Therefore, the case should be remanded for resentencing.

B. The Confrontation Clause Was Not Violated

Mr. Newton's confrontation clause argument fails for two reasons. First, he waived the right to appeal because he did not make the objection at trial. He has not met his burden to show that he has raised a manifest error, of consequence in the trial, which may be appealed despite the failure to object during trial. Second, even if the newly raised issue is allowed to proceed, the out-of-court statement was not testimonial, and therefore the confrontation clause was not implicated.

1. RAP 2.5(a)(3) precludes Mr. Newton from raising this claim for the first time on appeal

Mr. Newton did not object to hearsay statements during his trial. As a result, RAP 2.5(a) provides that he has waived his right to raise this issue on appeal. RAP 2.5(a). The state Supreme Court has explained that “[a]lthough this rule insulates some errors from review, it encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on appeal, and it promotes the important policies of economy and finality.” *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

RAP 2.5(a)(3) provides an exception from the general rule if the defendant meets his burden to show that the unpreserved issue (1) is of a constitutional magnitude, and if so (2) the appellant demonstrates that the alleged error is manifest. *Kalebaugh*, 183 Wn.2d at 584. Only if a defendant

proves an error that is both constitutional and manifest does the burden shift to the State to show harmless error. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

Mr. Newton cannot meet this test and makes no effort to do so. Although the alleged error implicates the Sixth Amendment's Confrontation Clause, and therefore raises an issue of constitutional magnitude, the asserted error was not manifest.¹ Demonstrating that the asserted error was manifest requires Mr. Newton to "show actual prejudice, i.e., there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (internal citation omitted); *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992) (even when the alleged error affects the defendant's confrontation clause right, the alleged error must be "evident, unmistakable, or indisputable" to be raised for the first time on appeal).

Here, there were no consequences to the trial because none of the judge's findings or conclusions were based on hearsay statements. Mr. Newton contends that hearsay obtained during the testimony of Ms. Baker and the police officer was used (1) to show that Mr. Newton is the person

¹ The Sixth Amendment, which is binding on the States through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." U.S. Const. amend. VI, XIV.

who assaulted Ms. Baker and (2) to establish that her wallet was stolen or that an attempt was made to steal her wallet. App. Br. at 26-27, 30. As the record and trial court order plainly demonstrate, both assertions are incorrect.

First, the evidence necessary to show that Mr. Newton was properly identified as the person who assaulted Ms. Robinson and tried to pull her purse from her is contained in uncontested eye-witness testimony and surveillance video. Both Ms. Baker and Mr. Newton testified that he could see that Ms. Robinson “cashed out” before leaving BJs with her purse. VRP 32, 38, 75. The surveillance video clearly recorded Mr. Newton’s attack on Ms. Robertson. Ex. 2. And most importantly, Mr. Newton admitted that he assaulted Ms. Robertson and pulled on her purse. VRP 76. Although Ms. Baker testified that Ms. Robinson told her that Mr. Newton attacked and robbed her, the State did not need that testimony admitted in order to prove its case, and the trial court decision did not rely on it. *See* VRP 38-39. Ms. Baker’s eye-witness testimony, the video, and Mr. Newton’s admission provided overwhelming evidence of the elements of attempted robbery in the second degree: That he took a substantial step toward the commission of robbery in the second degree, and that he used force to attempt to take the purse from Ms. Robertson’s person. RCW 9A.56.190, .210; RCW 9A.28.020(1).

Second, contrary to Mr. Newton's argument, out-of-court statements were not "used to assert that Mr. Newton attempted to steal Ms. Richardson's wallet. App. Br. at 27. To the contrary, any statement regarding the wallet is irrelevant to the charge of *attempted* robbery, which does not require any showing that property was actually taken. The trial judge specifically addressed this point when defense counsel attempted to elicit the police officer's testimony regarding Ms. Baker's out-of-court statements regarding the wallet. *See* VRP 69-70. When the State objected to the call for hearsay testimony, the trial judge asked the defense: "How does that [statement regarding the wallet] help me in deciding whether or not he was trying to take her satchel from her? How is that relevant?" VRP 69. The trial court then sustained the State's objection. VRP 70.

The trial court order further illustrates that information regarding the wallet was inconsequential. The court's findings state that Mr. Newton attempted to take Ms. Robertson's purse. CP 14. Based on those findings, the trial court concluded that the defendant "attempted to take personal property (a purse)" from Ms. Richardson. CP 15.

Because the asserted error had no practical or identifiable consequences in the trial, Mr. Newton has failed to meet his burden to show a manifest error. *Gordon*, 172 Wn.2d at 676; *O'Hara*, 167 Wn.2d 91, 98.

Therefore, RAP 2.5(a) bars Mr. Newton from raising this new objection on appeal.

2. Admission of the statement to Ms. Baker did not violate the confrontation clause

Even if this Court were to allow Mr. Newton to raise the issue for the first time on appeal, Mr. Newton's confrontation clause claim fails because the confrontation clause is not implicated by non-testimonial statements. Ms. Robertson's statement to Ms. Baker was not testimonial because it was not made for the primary purpose of making an out-of-court substitute for trial testimony. *State v. Scanlan*, 193 Wn.2d 753, 761, 445 P.3d 960 (2019), *cert. denied*, 140 S. Ct. 834, 205 L. Ed. 2d 483 (2020).

As the United States Supreme Court has recognized, there are many reasons why a statement might not be made for the primary purpose of creating out-of-court statements for use at trial. This includes, but is not limited to, a statement made during an ongoing emergency or to relay information to a non-law enforcement officer. *Ohio v. Clark*, 576 U.S. 237, 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (2015). For example, in *Clark*, a child told his preschool teacher that his bruises were caused by his mother's boyfriend. *Id.* at 2177. Although there was not an immediate emergency, the teacher's questioning of the child was meant to protect him from future attacks. *Id.* at 2181. The statement was nontestimonial, even though the

preschool teacher was a “mandatory reporter,” required to by law to report suspected abuse to law enforcement.

As in *Clark*, Ms. Robinson’s statements were not intended to create testimony for use at trial. Ms. Baker spoke with Ms. Robinson when she returned to BJs, and appeared “very upset. She was crying. She said that she had just gotten hit” and that Mr. Newton must have taken her wallet and identification. CP 38-39. Like the preschool teacher in *Clark*, Ms. Baker acted to protect Ms. Robinson by calling the police. Ms. Robinson’s informal statement that she had been attacked is not comparable to the sort of formal interrogation performed for the primary purpose of preserving testimony for a later prosecution. Statements given to Ms. Baker are “significantly less likely to be testimonial than statements given to law enforcement officers” because unlike a police officer, Ms. Baker is not responsible for gathering statements and evidence for a later criminal prosecution. *Clark*, 135 S. Ct. at 2182.

In sum, because the out-of-court statement was not testimonial, it did not violate the confrontation clause.

V. CONCLUSION

The confrontation clause claim should be rejected. Because an objection to the testimony was not made at trial, Mr. Newton has the burden to demonstrate that the alleged error was manifest. He cannot meet this

burden because the out-of-court statement had no consequence. Every element of the attempted robbery was established by the eye-witness observations of Ms. Baker, the surveillance video, and Mr. Newton's admission that he assaulted Ms. Robinson and pulled on her purse.

Even if the out-of-court statement had been relevant to the trial court's findings or conclusions (and it was not) it was a non-testimonial statement that did not implicate the confrontation clause.

RESPECTFULLY SUBMITTED this 27th day of May, 2020.

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