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Division II
State of Washington
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NO. 53881-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ISAAH NEWTON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. The prosecution properly concedes the double jeopardy violation.

The prosecution accurately agrees Mr. Newton's convictions for attempted robbery in the second degree as well as the underlying assault in the fourth degree violate double jeopardy. Mr. Newton's assault conviction should be reversed and vacated as a result of the double jeopardy violation.

2. The State's reliance on a non-testifying witness's out-of-court statements to officials violates the state and federal confrontation clauses and undermines Mr. Newton's conviction for attempted robbery.

Mr. Newton was convicted of attempted robbery in the second degree with a domestic violence finding. CP 16. The purported victim, Ms. Richardson did not testify. RP 6. In order to prove the charge of attempted robbery, the prosecution relied on Ms. Richardson's post-incident statements to the lead security officer and a police officer while they were investigating this incident and making their official investigatory reports. Mr. Newton testified he was pulling Ms. Richardson to make her come with him, and "[m]y intention was never to take her purse." RP 79. But Ms. Richardson's claims to the authorities at

the time of the incident, including that Mr. Newton must have taken her belongings without permission when he was pulling her across the street, formed the basis of the State's case.

Ms. Richardson's post-incident statements to the lead security officer and responding police officer were testimonial. At the time Ms. Richardson was questioned by the authorities, she faced potential criminal prosecution by simply engaging in in-person contact with Mr. Newton, since *she* was barred from contacting him by a court order. RP 65; Ex. 3. Even if she was not charged with that offense, she faced that risk when she was questioned by authorities. *Id.* She understood the lead security officer and police officer were gathering information about the incident to make an official record. RP 39.

In response to the lead security officer's efforts to gather information for this official record and requesting her identification for this purpose, Ms. Richardson claimed Mr. Newton must have taken her property including her identification. RP 39. The security officer told her she had to "tell all of that stuff to the police when they got there." RP 40. While waiting for the police, she directed Ms. Richardson to "fill

out a statement form,” further signaling the formal investigatory and prosecutorial nature of the interaction. RP 41.

This questioning from the head of security prompted Ms. Richardson to claim Mr. Newton must have taken her wallet, which was not true but which formed the basis of the initial robbery charge and the later amended attempted robbery allegation. *See* CP 1 (declaration of probable cause charging Mr. Newton with robbery, stating complainant’s allegation “the defendant was able to take her wallet that contained her identification and social security card during the assault”).

The flimsiness of the prosecution’s evidence without the complainant appearing in court is illustrated by the limited and tenuous evidence identifying the complainant herself. The principle witness, lead security officer Cheryl Baker, did not know the name of “the lady” she spoke to before and after this incident. This woman had no state-issued identification card. The State’s response brief repeatedly refers to her as “Ms. Robinson,” even though the allegations called her “Ms. Richardson.”

The complainant's identity was important both to establish the alleged attempted robbery against her as well as the relationship necessary for the domestic violence enhancement. Yet without her testimony, the State relied on information gained by authorities when gathering evidence from questioning her after the incident. This type of post-incident inquiry by police and security officers working closely with police falls within the core class of testimonial evidence that is inadmissible absent the opportunity to confront and cross-examine the declarant. *See Davis v. Washington*, 547 U.S. 813, 822, 832, 126 S. Ct. 2266, 165 L. Ed.2d 224 (2006).

The prosecution asserts this issue is not a manifest constitutional error. But Mr. Newton objected to "any admission of statements by her absent the right to confront her." RP 6. He most certainly did not waive his right to confront the complaining witness. *Id.* On the contrary, he alerted the court and prosecution that he was asserting this fundamental right to confrontation. *Id.*

The prosecution acknowledged "this probably wasn't a completed taking" contrary to Ms. Richardson's initial claim her

property had been stolen, and amended the charge from robbery to attempted robbery. RP 4; CP 1. But without Ms. Richardson's testimony, the prosecution used her allegations of property having been taken to show Mr. Newton must have been trying to take her property.

Mr. Newton's inability to cross-examine the person whose purse he was accused of trying to take undermined his ability to have his version of events credited. The videotape of the incident has no audio. The security guard did not hear anything said during the incident. RP 41. Had Ms. Richardson testified, Mr. Newton could have established he was not trying to get her to go to a hotel with him, and had no intent to steal her purse. RP 78-79, 80. He could have elicited the content of their conversation before he pulled her across the street. He would have been able to corroborate his testimony that he was trying to get Ms. Richardson to leave, rather than trying to take any of her belongings as the State and court speculated from this silent videotape, without the benefit of hearing the actual conversation. RP 78-79.

The harmful effect of a confrontation clause error requires

the court to assume “the damaging potential of cross-examination was fully realized,” and weigh the importance of the missing witness’s testimony to the case. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L.Ed.2d 674 (1986).

It is manifestly apparent that the absence of the central complainant left Mr. Newton unable to have his version of events credited and led the court to rely on her initial complaints that Mr. Newton took, or tried to take, her property. Without her testimony, the court simply speculated from the videotape that it was possible Mr. Newton was trying to take her purse, as she had initially claimed. The prosecution bears the burden of proving a violation of the right to confrontation was harmless beyond a reasonable doubt. *State v. Wilcoxon*, 185 Wn.2d 324, 335, 373 P.3d 224 (2016) (citing *Chapman v. California*, 386 U.S. 18, 22-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) & *Van Arsdall*, 475 U.S. at 684). This test demands the prosecution establish, beyond a reasonable doubt, “that the error complained of did not contribute to the verdict obtained.” *Id.*, citing *Chapman*, 386 U.S. at 24.

Without Ms. Richardson's testimonial statements, the prosecution could only show an assault occurred, but not an attempted robbery. Eliciting Ms. Richardson's allegations that Mr. Newton must have taken her belongings was the premise of the charge of attempted robbery and central to the State's case. It is manifest constitutional error, was objected to by Mr. Newton, and due to its prejudicial effect, reversal of the attempted robbery conviction is required.

B. CONCLUSION.

The Court should vacate the assault allegation as a violation of double jeopardy and hold Mr. Newton was denied his constitutional right to confront the witness against him, undermining his conviction for attempted robbery.

DATED this 23rd day of July 2020.

Respectfully submitted,



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ISAAH NEWTON,)	
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