

34174-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES KUNEKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY

The Honorable Randall Krog
The Honorable Brian Altman

REPLY BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. REPLY ARGUMENT

1. Hearsay and confrontation clause.

When witness Heather Pyles repeatedly testified that forensic scientist *Wendy Cashawbara* did the testing, and where the trial court *so found*, supervisor Pyles' testimony regarding Cashawbara's assertions regarding the presence of semen, and regarding DNA results, was pure hearsay, and no hearsay exception was proffered. RP 304, 309 (Pyles, testifying that Wendy Cashawbara was "the analyst that performed the DNA analysis in this case"); see Opening Brief, at pp. 10-11, 13-15; see RP 312 (trial court finding that the testifying witness, Pyles, "did not do the testing."); ER 801(c); ER 802; ER 803.

On a constitutional level, Mr. Kuneki's confrontation clause rights violated when Heather Pyles testified to (a) the presence of semen determined by, and (b) the DNA profile results reached by, a non-testifying analyst (Wendy Cashawbara), requiring reversal as argued herein and in the Opening Brief.

The trial court's most detailed ruling, other than overruling Mr. Kuneki's hearsay and confrontation clause objections, ruled that

Pyles could testify because she was responding to a colleague's report:

She agrees she did not do the testing so she's responding as an expert in this field to a report [a] colleague of hers produced.

RP 312. Pyles then stated that she had “reviewed the data and independently came to the same conclusion as Wendy did,” but counsel again objected, because it clearly remained the case that Pyles had not done any of the testing. RP 312.

The Respondent, in its brief, sees advantage in adopting the trial court's quoted reasoning from RP 312 above, and also argues that Pyles' statement that she “independently” came to the same conclusion as Cashawbara did, shows that there was no confrontation violation. BOR, at pp. 5, 9.

But the court's findings and reasoning show why there was a confrontation violation. Pyles did not do the testing, and her testimony was merely a series of remarks, comments and responses to a report of testing and DNA results performed *by a colleague – Cashawbara*. The court's language sounds something like an analysis under ER 703 / ER 705 regarding a testifying expert's reliance on

the predicate work of others, and the Respondent’s briefing also attempts to squeeze the present circumstances into that box, but the witness did not even attempt to testify in such a manner – instead, she testified straightforwardly that Cashawbara was the analyst who reached the test results that she, Pyles, was now telling the jury about. The trial court’s full ruling, above, makes clear exactly that – Pyles was commenting on someone else’s expert work. RP 512. Pyles’ testimony at trial was testimonial hearsay in violation of the Sixth Amendment.

As argued in Mr. Kuneki’s Opening Brief, each and every one of the statements Ms. Pyles made throughout her testimony regarding how *Cashawbara* did the semen and DNA testing, and regarding what she, Pyles, did and did *not* do, preclude a reading of the record that would rely, untenably, on one generic late-in-the-day statement by Pyles, elicited only after the defense’s vigorous, numerous, and well-taken objections, to the effect that Pyles’ “independently” reviewed the data. A substantive look at Pyle’s testimony as a whole indicates she never did anything except repeat the scientific findings of another, violating the Sixth Amendment.

The expert who bore witness against Mr. Kuneki was the absent Cashawbara. See Williams v. Illinois, ___ U.S. ___, 132 S.Ct. 2221, 2229-31, 183 L.Ed.2d 89 (2012) (DNA analyst testified to her own expert comparison of DNA profiles and was therefore the witness who bore testimony against the accused, versus some absent analyst).

The Respondent, in the guise of stating a legal issue, misrepresents the record when it writes that “the question is whether the prosecution must call the forensic scientist [Cashawbara] who *participated* in the DNA testing process.” (Emphasis added.) BOR, at p. 8. Respondent also describes Cashawbara a being akin to one who “assist[ed]” Pyles in *Pyles*’ analytical testing, and urges that Pyles relied solely on her own expert analysis in testifying. BOR, at pp. 8, 10.

But Cashawbara did not “participate” with anyone in the testing process, rather, Cashawbara did the testing. It is Pyles who did not do the testing, it is Pyles did not *participate in* the testing, and it was Pyles who solely repeated *Cashawbara*’s expert analysis when testifying. In the Opening Brief, appellant addressed each of

the statements upon which the Respondent now strains to place significance. Pyles, a supervisor, later reviewed Cashawbara's work (after Cashawbara took a new job) as part of a mere technical review, to determine if her testing process had followed standard operating procedure for WSPCL, and then even later, re-calculated the FBI's population numbers that give a statistical probability of how many people in the nation might have the same DNA match that Cashawbara determined was present between the scientific samples. AOB, at pp.16-19 and note 6; see BOR, at pp 4-5. As argued in the Opening Brief and herein, it is plain from Pyles' repeated admissions, and her entire testimony, that she, Pyles, did not do the testing. And indeed, the trial court so found. RP 312.

In sum, the State must prove that the challenged evidence was merely non-testimonial. State v. Lui, 179 Wn.2d 457, 476, 315 P.3d 493 (2014). Here, a fair assessment of the entire record below refutes the Respondent's description of DNA analyst Cashawbara as a mere unnecessary "laboratory technician" and of Heather Pyles as "the person who has made the final [DNA] comparison that is used against the defendant." BOR, at p. 9. Those descriptions are the

opposite of what the record shows. The Sixth Amendment was violated under the Washington Supreme Court's and the United State's Supreme Court's case law.

2. The State has not contended that any hearsay error was harmless, nor has the State attempted to meet its burden of showing that any Confrontation clause error was harmless beyond a reasonable doubt.

Mr. Kuneki has argued that the error in admitting Pyles' hearsay testimony regarding the presence of semen in Mr. Maine's anus, and the DNA results as to that semen, which evidence also violated the Confrontation Clause, requires reversal. The significance of those testimonies in the present case, as they were remarked upon by both the trial court and the deputy prosecutor below, demands reversal if this Court finds error, notwithstanding the fact that Mr. Kuneki's defense was consent. Mr. Kuneki has so argued, Opening Brief, at pp. 8-9, 20-24, relying on the evidentiary error standard, and the Sixth Amendment constitutional error standard. See State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (hearsay error); State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986) (confrontation error).

The Respondent has argued only that there was no error in the first instance; Mr. Kuneki maintains herein that there was error on both fronts, in the setting of this criminal case. The State has offered no argument of harmlessness under either the non-constitutional, nor even under the constitutional error test. See Chapman v. California, 386 U.S. 18, 21-22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (a constitutional error is harmless if it is “unimportant and insignificant” in the setting of a particular case). Importantly, it is the State that bears the burden of proving harmlessness of a constitutional error. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); Guloy, 104 Wn.2d at 425. The Respondent has not attempted to meet that burden.

B. CONCLUSION

Based on the foregoing and on his Appellant’s Opening Brief, Mr. Kuneki asks that this Court of Appeals reverse his judgment and sentence.

Respectfully submitted this 3rd day of April, 2017.

s/ OLIVER R. DAVIS
Washington State Bar Number 24560
Washington Appellate Project

1511 Third Avenue, Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
e-mail: oliver@washapp.org

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CHARLES KUNEKI,)	
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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

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