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Court of Appeals  
Division III  
State of Washington

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No. 34516-5-III

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

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STATE OF WASHINGTON,

v.

RUBEN DARIO ROJAS, JR.

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**Initial Brief of Appellant**

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Appeal from Kittitas County Superior Court No. 16-1-00072-9  
The Honorable Scott R. Sparks

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## INTRODUCTION

Mr. Rojas was charged by amended information with, and convicted of Delivery of a Controlled Substance - Morphine. Moreover, the State alleged the presence of an enhancement insofar as the sale was alleged to have taken place within 1,000 feet of a school bus stop. The only information supporting this was the sparse testimony of the Ellensburg School District Transportation Director, who presented a map he created specifically for the prosecution of this case – a map which relied upon a GIS map created by the county. The map entered evidence over the objection of defense counsel, who argued that insufficient foundation had been established for its entry.

Based upon this information, the jury found by special verdict that the delivery occurred within 1,000 of a school bus stop within the City of Ellensburg. This finding enhanced Mr. Rojas' sentence by 24 months.

On appeal, this Court must determine whether sufficient evidence was adduced at trial to support the jury's special verdict, and whether Mr. Rojas' Sixth Amendment rights were violated by the absence of a county GIS official who could validate the accuracy of the map's measurements.

## ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR 1: Insufficient Evidence exists to support the jury's special verdict finding that Mr. Rojas delivered a controlled substance within 1000 feet of a school bus stop, as there is no testimony in the record which shows that the school bus stop existed at the time of the delivery. As such, special verdict must be vacated and the matter remanded to the trial court for sentencing within the standard range.

ASSIGNMENT OF ERROR 2: The State's failure to provide a county GIS system officer violated Mr. Rojas' Sixth Amendment right to confront testimonial evidence created for trial because, although the school official may testify as to the accuracy of the location of the school bus stops, he or she does not create or maintain the underlying GIS systems upon which the map relies.

## ISSUES

- 1. Whether Mr. Rojas' Sixth Amendment rights to confront his accuser were violated by the State's failure to call as a witness the applicable county employee who either created or maintained the county's GIS systems when the school district relied upon the accuracy of said maps?**
- 2. Whether sufficient evidence supports the jury's special verdict finding Mr. Rojas delivered controlled substances within 1,000 feet of a school bus stop where no testimony was adduced at trial regarding the bus stop's existence on the date the transaction occurred?**

## MATERIAL FACTS

Ruben Dario Rojas, Jr. was arrested by the Ellensburg Police Department for delivering a controlled substance – morphine – On or about January 14, 2016 through a controlled purchase using a confidential informant, Greg Mueller. He was subsequently charged by amended information with Delivery of a Controlled substance in violation of RCW 69.50.401(1), with the aggravating circumstance that it occurred within 1,000 feet of a school bus stop. Clerks' Papers (CP) at 34.

At trial, the State offered the testimony of Detective Klifford Caillier, Washington State Patrol Laboratory chemist Martin McDermot, Confidential Informant Greg Mueller, and Ellensburg School District Transportation Director Ben Mount. Mr. Mount's testimony was for purposes of demonstrating the aggravating circumstance that the delivery occurred within 1,000 feet of a school bus stop. His testimony was brief, and the pertinent portion as follows:

MS. HAMMOND: Is there a program that you use in your job that helps map school bus routes?

A: So we document our routing decisions with routing software.

Q: Does that software include the capability to determine what's within a certain parameter of a certain location?

A: Yes.

Q: So if I gave you an address you can put that into your software and determine what's within a thousand feet of that address, is that right?

A: Yes.

Q: Okay. I'm going to hand you what's been marked as State's No. 23. Do you recognize that?

A: I do.

Q: What's that?

A: So that's a map of school bus stops near 707 North Anderson Street. That circle has a radius of a thousand feet.

Q: And is that a map you prepared using that software?

A: It was.

Q: Okay.

Ms. HAMMOND: Judge –

Q: And is that the map (Inaudible – can't hear her) –

MS. HAMMOND: Move to admit State's No. 23.

THE COURT: (Inaudible) Mr. Bueshel.

MR. BUESCHEL: Objection, no foundation, Your Honor

THE COURT: Alright. Anymore questions.

MS. HAMMOND: No.

THE COURT: Can I take a look at the exhibit?

MS. HAMMOND: Sure.

THE COURT: Thank you. Okay. I'll overrule the objection. No  
20 – which –

MS. HAMMOND: 23.

THE COURT: -- 23 is admitted.

MS. HAMMOND: Thank you. May I publish to the jury?

THE COURT: Yes.

MS. HAMMOND: I'm just going to old fashion hold it up here.

Q: Mr. Mount, can you describe for the jury what we are seeing in  
this map?

A: So in the center of that circle is the address in question, 707  
North Anderson Street, and the radius of that circle is set at a  
thousand feet. So anything within that circle is within a thousand  
feet of that address.

Q: And are any school bus stops within a thousand feet of that  
address?

A: Yes, there's one school bus stop located on D Street which is  
Wild Cat Way now between 9<sup>th</sup> Ave and 10<sup>th</sup> Ave.

Q: And how is that bus stop depicted on this picture or map?

A: It had a triangle that is within the circle located with that description.

Q: Is that where my finger is right up here towards the top of the circle?

A: Yes, that's correct.

Q: Thank you. Nothing further, Judge.

THE COURT: Very good. Any questions, Mr. Bueschel?

MR. BUESCHEL: Yes, there is, Your Honor.

By Mr. Bueschel:

Q: Have you ever gone out with a tape measure and actually measured that distance?

A: No.

Q: So you don't have any real personal knowledge other than the computer program that that (inaudible -- can't hear him).

A: So the computer program uses the County GIS map which is spacially accurate.

Q: I guess that's a yes, but --

A: Yes, the map is accurate and we are careful to include things that are clearly within a thousand feet in case there is any kind of error.

So this stop is clearly either from this map or from an open source map like Google maps. It is within a thousand feet.

THE COURT: Anymore questions?

MR. BUESCHEL: No.

THE COURT Anymore?

MS. HAMMOND: No, thank you.

THE COURT: Thank you for your testimony. You're excused.

Verbatim Report of Proceedings (VRP) at 98-101. The state offered no other information regarding the distance from the address of the exchange and the purported school bus stop. *See generally*, VRP.

A jury found Mr. Rojas guilty as charged. CP at 42. The jury also found that Mr. Rojas' delivery occurred within 1,000 feet of a school bus stop. CP at 43. The court sentenced Mr. Rojas to a standard range sentence of 12 months, and imposed an additional 24 months as required by statute owing to the aggravating circumstances. CP at 47-59. Mr. Rojas timely appeals.

## ARGUMENT

1. Insufficient evidence exists to support the jury's special verdict finding that Mr. Rojas' delivered a controlled substance within 1,000 feet of a school bus stop because no testimony was elicited by the school district official as to whether the school bus stop existed at the time of the delivery

It is axiomatic that, to determine whether sufficient evidence was adduced at trial to support a conviction, this Court looks to whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn. 2d 192, 201 P.2d 1068 (1992). As such, the State's evidence is taken as true, and all reasonable inferences therefore drawn in its favor. *Id.* The State may prove its case through either direct or circumstantial evidence, which are weighed equally. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

Here, a review of the record demonstrates that even when viewing all evidence in a light most favorable to the State, the State failed to demonstrate that the bus stop existed *at the time of the offense*. The record makes plain that the State did not inquire as to the existence of the school bus stop on the date the exchange took place. Accordingly, there was no elicited testimony that would show that the school bus stop in question existed at the time of the delivery.<sup>1</sup>

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<sup>1</sup> To the extent that the State failed to inquire as to this critical fact, trial counsel's objection that the map did not have sufficient foundation ought to have been upheld given the relevance of the map becomes

Given the record's silence on this point, there is simply insufficient evidence to demonstrate that Mr. Rojas' delivered a controlled substance within 1,000 feet of a school bus stop in violation of RCW 69.60.435 on the date charged in the amended information. This Court should therefore vacate Mr. Rojas' judgment and sentence, and remand for resentencing within the standard range.

2. Mr. Rojas was deprived of his Sixth Amendment Right to confront witnesses against him when the State failed to substantiate the school bus map used against him by supplying the appropriate witness to demonstrate aggravating circumstances.

RCW 69.60.435(1)(b) mandates a sentence enhancement for anyone who is found to have delivered a controlled substance [w]ithin one thousand feet of a school bus route stop designated by the school district.”

Moreover, that statute provides that, to meet its burden, the State must provide “a map produced or reproduced by any municipality, school district [or] county [...] for the purpose of

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questionable, and to the extent the trial court overruled the objection, it abused its discretion. Such error could not be harmless in light of the dearth of additional information regarding distance, and as such, if for no other reason this Court should vacate the judgment and sentence.

depicting the location and boundaries of the area [...] within one thousand feet of any property used for a [...] school bus stop.” RCW 69.60.435(5).

Finally, this map “shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas,” if “the municipality [or] school district [...] has adopted a resolution or ordinance approving the map.” *Id.*

However, in the absence of a resolution or ordinance approving the map, the statute expressly provides that its requirements “shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved by the governing body of a municipality [or] school district [...] if the map or diagram is otherwise admissible under court rule.” *Id.*

Since its adoption, cases arising under this statute have required scrutiny owing largely to Confrontation Clause concerns. These concerns are grounded in the Sixth Amendment to the United State Constitution, which provides that “[I]n all criminal prosecutions, the accused shall enjoy the right [...] to be confronted

with the witnesses against him.” This right “applies to witnesses against the accused [...] those who bear testimony.”

Testimony has been defined as a “solemn declaration or affirmation made for purposes of establishing or probing some fact.” *State v. Jasper*, 174 Wn.2d 96, 109, 271 P.3d 876 (2012) (quoting *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). *Crawford* further provides that “testimonial” hearsay may not be admitted at trial unless the proponent of the evidence shows (1) the declarant is unavailable to testify; and (2) the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68.

While *Crawford* did not create an exhaustive list of what constitutes “testimonial” evidence, the United States Supreme Court has subsequently clarified that “documents which are specifically prepared for use in a criminal proceeding are testimonial statements.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11, 129 S. Ct. 2527, 1741 L. Ed. 2d 314 (2009).

Indeed, this Court has previously considered the confrontation clause analysis as applied to the question of whether maps generated for purposes of criminal proceedings under RCW

69.60.435 constitute testimonial statements requiring Sixth Amendment protections. This court answered in the affirmative.

In *State v. Pearson*, 180 Wn. App. 576, 321 P.3d 1285 (2014) *review denied*, 181 Wn.2d 1021 (2014) the defendant was accused of delivery of a controlled substance. The state also alleged that the delivery had occurred within 1,000 feet of a school bus stop. *Id.* at 578.

At trial, the State had the county's director of Geographic Information Systems (GIS) testify that his department maintained a digital, legal map for the county and all its departments. He further testified that designated areas can be imposed over aerial photos for the public record. *Id.*

The director then testified that, for purposes of the trial, he prepared a map from the GIS digital information using the street address where the delivery was alleged to have occurred as well as information provided by the school district regarding bus stop locations. *Id.* at 579. The map was admitted into evidence without objection. *Id.*

When discussing the jury instructions, counsel objected to the use of a special verdict form for the delivery enhancement on the basis that the GIS director did not testify as to the location of any of

the bus stops on the map created for the purposes of the proceedings. *Id.* When asked, counsel also objected to the fact that no one from the school district testified as to the bus stop locations.

After questioning the state, the trial court gave a special verdict instruction. *Id.* After deliberation, the jury found Mr. Pearson guilty of delivery, and likewise found that the delivery had occurred within 1,000 feet of a school bus stop. *Id.* at 580. However, the trial court vacated the special verdict, stating that it was not satisfied that the state had met its foundation requirements “on a lot of levels.” *Id.* The trial court then sentenced Mr. Pearson to a standard range sentence. *Id.* The State appealed.

On appeal, this Court determined that the specially-created map was not “otherwise admissible” as contemplated by RCW 69.60.435 because it was plainly testimonial in nature. *Id.* at 582. As such, this Court concluded that Sixth Amendment considerations applied to the GIS-generated map utilized information provided by the school district officials. Since there was no school official for Mr. Pearson to cross-examine, and since there was no showing by the State that the relevant official was unavailable, the trial court properly overturned the jury’s special verdict. *Id.* at 582.

In reaching its determination, this Court appears to have ascertained that there are essentially two distinct systems, each of which require validation. The first is the GIS system which creates the basic map upon which the county relied in measuring distances and creating an official record utilizing the pertinent digital technology. This was testified to by Mr. Martin, the county GIS director.

The second is evidence provided by an appropriate school district official regarding the *placement* of the bus stops for purposes of validating their location. It was this absence which created the violation of Mr. Pearson's rights to confront the witness against him.

Here, as in *Pearson*, the proffered map was testimonial evidence offered without sufficient witness authentication. As such, this court's determination ought to follow the same logic, and this find that Mr. Rojas was denied his Sixth Amendment rights at trial.<sup>2</sup>

At trial, the State called Ben Mount, the Ellensburg School District Transportation Director to testify regarding those elements necessary for the bus stop enhancement. VRP at 98-101.

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<sup>2</sup> While Mr. Rojas did not challenge the constitutionality of the missing testimony at trial, constitutional challenges may be raised for the first time on appeal. *State v. O'Connor*, 87 Wn. App. 119, 123, 940 P.2d 675 (1997).

It is manifest from the testimony of Mr. Mount that he relied upon the accuracy of the software that he works with to state with certainty that the location of the bus stop was within 1,000 feet of the address where the delivery was purported to have taken place. *Id.* at 99. Moreover, on cross examination, Mr. Mount admitted that the software relies upon the County GIS Map to make its measurements. *Id.* at 101. As such, the map utilized in this case is akin to that in *Pearson* insofar as it requires *both* testimony regarding the accuracy of the GIS map coordinates upon which the school district bases its determinations *and* testimony regarding the location of school bus stops imposed upon that map by the school district's routing software. Mr. Mount was unable to competently testify as to both.

Certainly Mr. Mount was competent to testify as to his belief that the system he uses is accurate, and he may certainly testify that the school district locates its bus stops at the stated locations. However, Mr. Mount was not competent to testify as to the accuracy of the underlying GIS system. He even admitted his ignorance as to how the map was created, expressing doubt as to the sources of the map used by the district's software. *Id.* at 101.

When the Court permitted the map to be used as evidence, Mr. Rojas was denied his Sixth Amendment right to cross examine the individual or department responsible for the *actual measurements* on the map which was relied upon by the state.<sup>3</sup>

While case law shows that the defendant has the right under the Sixth Amendment to confront the school district official to establish the existence of the stop purported to be shown on a map, it ought also to show that a defendant has the right to cross examine the county official typically responsible for the measurement and creation of the map upon which the school district bases its locations and accordingly, its distances.

Accordingly, this case presents the Court with an opportunity to clarify the existing case law by protecting defendants who do not have the ability to cross-examine the individual responsible for creating the actual map upon which school districts

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<sup>3</sup> That this error was not harmless is borne out by the cross examination which occurred in this case. Indeed, under cross-examination, Mr. Mount admitted that he had no personal knowledge of the distance, and that the school department map was based upon the county GIS system. He went on to state that he did not know upon what basis the map was created – either from Google maps or the GIS map. VRP at 101. The absence of this knowledge highlights the necessity of having a county GIS official also present to testify as to the underlying map’s accuracy since that is the office which creates the map in the first instance.

apparently superimpose their stops using software. This Court should therefore determine that Mr. Rojas' constitutional rights to confront his accuser were violated in this case, and grant the appropriate relief.

## CONCLUSION

Insufficient evidence exists to support the jury's special verdict regarding delivery of a controlled substance within 1,000 feet of a school bus stop. Further, Mr. Rojas was denied his Sixth Amendment right to confront the witness against him when the state failed to proffer the appropriate witness to authenticate the distances on the school district's map, which uses county GIS systems. Because of these errors, this Court ought to vacate Mr. Rojas' sentence, and remand for resentencing within the standard range. Alternatively, this Court should remand for a new trial.

Respectfully submitted this 28<sup>th</sup> day of November, 2016 by:

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I personally caused this INITIAL BRIEF OF APPELLANT to be delivered to the following individual(s) via U.S Postal Mail first class, postage prepaid, addressed as follows:

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