

FILED
Court of Appeals
Division III
State of Washington
2/12/2020 4:21 PM

No. 36498-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

TEDDY ROOSEVELT SIBLEY,

Appellant.

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

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

TABLE OF CONTENTS

A. ARGUMENT 1

 1. The admission of Ms. Finley’s testimonial statements
 violated Mr. Sibley’s right to confrontation..... 1

a. The issue was not waived..... 1

*b. The recording was testimonial rendering it
 inadmissible. 3*

 2. The imposition of convictions for fourth degree assault and
 second degree assault violate double jeopardy. 3

B. CONCLUSION..... 7

TABLE OF AUTHORITIES

FEDERAL CASES

Ohio v. Clark, — U.S. —, 135 S.Ct. 2173, 192 L. Ed. 2d 306
(2015)..... 1

WASHINGTON CASES

In re White, 1 Wn.App.2d 788, 407 P.3d 1173 (2017)..... 5

State v. Burns, 193 Wn.2d 190, 438 P.3d 1183 (2019) 1

State v. Scanlan, 193 Wn.2d 753, 445 P.3d 960 (2019), *cert. denied*,
No. 19-6493, 2020 WL 129776 (U.S. Jan. 13, 2020)..... 1

State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999) 4

State v. Villanueva-Gonzalez, 180 Wn.2d 975, 329 P.3d 78
(2014)..... 3, 4, 5, 6

A. ARGUMENT

1. The admission of Ms. Finley’s testimonial statements violated Mr. Sibley’s right to confrontation.

a. The issue was not waived.

Admission of statements made by a non-governmental witness whose primary purpose is testimonial violate the defendant’s right to confrontation. *Ohio v. Clark*, — U.S. —, 135 S.Ct. 2173, 192 L. Ed. 2d 306 (2015); *State v. Scanlan*, 193 Wn.2d 753, 764-65, 445 P.3d 960 (2019), *cert. denied*, No. 19-6493, 2020 WL 129776 (U.S. Jan. 13, 2020). The primary purpose of admitting the recording of Ms. Finley’s phone call to her sister-in-law was to memorialize what was happening between her and Mr. Sibley for use by the police and ultimately as testimony at Mr. Sibley’s trial.

Initially, the State contends Mr. Sibley never objected, thus he cannot challenge the violation of his right to confrontation, citing *State v. Burns*, 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019). Brief of Respondent at 17-19. The State sought admission of the recording pretrial, arguing among other things, the recording was not testimonial, thus Mr. Sibley’s right to confrontation was not violated. CP 29-30, 57-

59. The trial court posited about the issue of Mr. Sibley's right to confrontation:

What about *Crawford*. I mean, a number of these statements are by the complaining witness.

...

And to the extent that -- she's obviously recording for the purpose of memorializing what occurs -- for law enforcement, presumptively -- and there are statements on there which implicate Mr. Sibley. Why wouldn't that implicate *Crawford*.

RP 256. The State contended the recording was not testimonial, thus not a violation of Mr. Sibley's right to confrontation as announced in *Crawford*. RP 256-57. The court ultimately admitted the recording.

While Mr. Sibley did not explicitly state "right to confrontation," the issue was fully argued on confrontation grounds and the basis for the judge's ruling was sufficient for this Court to review. *See Burns*, 193 Wn.2d at 211 (an objection merely provides "judicial efficiency and clarity, and provides a basis for appellate courts to review a trial judge's decision"). To rule otherwise would be promoting formality over function.

Mr. Sibley did not waive his right to confrontation and the issue was sufficiently briefed and argued for this Court to review.

b. The recording was testimonial rendering it inadmissible.

The State places great weight on the fact the recording was made by Ms. Finley's niece, not Ms. Finley. But this argument ignores the fact Ms. Finley called her sister-in-law and placed the phone under some furniture so the phone would pick up everything that went on in the apartment. Ms. Finley was attempting to create a record of whatever occurred so that it could be turned over to the police for prosecution. Ms. Finley was unaware the phone had been disconnected since she plainly expected the entire encounter to be heard. Thus her primary purpose in making the call was as a record for the later prosecution of Mr. Sibley.

The recording of Ms. Finley's call was testimonial and should not have been admitted at Mr. Sibley's trial. Mr. Sibley's convictions must be reversed.

2. The imposition of convictions for fourth degree assault and second degree assault violate double jeopardy.

The State concedes that the assaults took place in the same place. But under its analysis of the factors enunciated in *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 329 P.3d 78 (2014), the State contends the incidents were separate and imposition of convictions for

each did not violate double jeopardy. Brief of Respondent at 32-35. A critical analysis of the *Villanueva-Gonzalez* factors shows the exact opposite; that Mr. Sibley's conduct constituted a single assault.

Multiple convictions for assault that arise out of a single course of conduct violate double jeopardy. *Villanueva-Gonzalez*, 180 Wn.2d at 984-85. Multiple assaultive acts involving the same parties and occurring in a short time frame are considered a single assault. *Id.* at 985. This "helps to avoid the risk of a defendant being 'convicted for every punch thrown in a fistfight.'" *Id.*, quoting *State v. Tili*, 139 Wn.2d 107, 116, 985 P.2d 365 (1999).

In attempting to determine whether multiple assaults constitute a single assault, courts must look at:

The length of time over which the assaultive acts took place,

Whether the assaultive acts took place in the same location,

The defendant's intent or motivation for the different assaultive acts,

Whether the acts were uninterrupted or whether there were any intervening acts or events, and

Whether there was an opportunity for the defendant to reconsider his or her actions.

Villanueva-Gonzalez, 180 Wn.2d at 985. “[No] one factor is dispositive, and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors.” *Id.*

The State argues that the assaults occurred “over a relatively long period of time[.]” Brief of Respondent 33. In fact, the assaults took place over a short period of time, approximately 15-30 minutes. Instructive on this issue is Division One’s decision in *In re White*, 1 Wn.App.2d 788, 407 P.3d 1173 (2017).

In *White*, the Court found multiple assaults to be a single count of assault:

[T]he facts in this case show that White pointed a gun at Stevens and said he was going to kill her. He then threw her to the floor, beat her, and repeatedly told her she was going to die. Consistent with his threats to kill Stevens, White then began to strangle her. At least throughout the part of the incident that resulted in the convictions challenged in this PRP, it is evident that White’s intent and motivation did not change. He intended to assault Stevens and the episode as a whole was motivated by the disagreement over where N.W. would live.

1 Wn.App.2d at 795. The Court concluded that “[t]he record shows one continuous struggle from the time White pointed a gun at Stevens to throwing her on the floor and beating her to the time he began to strangle her.” *Id.* at 796.

Here, similar to *Villanueva-Gonzalez* and *White*, Mr. Sibley's assaultive conduct constituted a single assault. The assaults were in the same place and over a short period time. The fact Mr. Sibley's changed his method of assault does not necessarily mean separate assaults resulted. In both *White* and *Villanueva-Gonzalez*, the defendants changed the manner of assault yet the court found a single count of assault. Lastly, Mr. Sibley's motivation was the same; he intended to assault Ms. Finley because he wanted to be able to see his children.

The trial court erred in imposing multiple assault convictions and refusing to find the assaults constituted a single assault. This Court should reverse Mr. Sibley's sentence and remand for the trial court to strike the fourth degree assaults as violative of double jeopardy.

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Sibley asks this Court to reverse his convictions and remand for a new trial. Alternatively, Mr. Sibley asks the Court to reverse his sentence and remand for resentencing.

DATED this 12th day of February 2020.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

Washington Appellate Project – 91052

1511 Third Avenue, Suite 610

Seattle, WA. 98101

(206) 587-2711

tom@washapp.org

Attorneys for Appellant

WASHINGTON APPELLATE PROJECT

February 12, 2020 - 4:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36498-4
Appellate Court Case Title: State of Washington v. Teddy Roosevelt Sibley
Superior Court Case Number: 18-1-00017-3

The following documents have been uploaded:

- 364984_Briefs_20200212162105D3552071_0165.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.021220-02.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- kiburke@co.ferry.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Thomas Michael Kummerow - Email: tom@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200212162105D3552071