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SUPREME COURT
STATE OF WASHINGTON

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BY SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) NO. 77507-9
)
 vs.) MOTION TO STRIKE
)
 KIM MASON,)
)
 Petitioner.)
 _____)

1. IDENTITY OF MOVING PARTY

The State of Washington, respondent, requests the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

This Court should strike those portions of the Supplemental Brief of Petitioner relating to an issue that was not raised in his Petition for Review. Specifically, the Court should strike section B, subsection 6, entitled "Statements to non-police officers" (see Petitioner's Supplemental Brief, at 17-19), and all argument relating to this issue.

3. RELEVANT FACTS

Mason was convicted of murder in the first degree with aggravating circumstances. CP 565-67, 572-78. He raised numerous claims in the Court of Appeals, including claims that statements that the murder victim, Hartanto Santoso, made to Corporal Haslip, Detectives Berberich, Malins and Roze, and victim advocate Linda Webb had been admitted at trial in violation of the Confrontation Clause. See Appellant's Opening Brief (No. 52824-6-1), at 11-16. The Court of Appeals ruled against Mason on all issues and affirmed his conviction.

In his petition to this Court, Mason sought review of all issues raised in the Court of Appeals, including the trial court's admission of Santoso's statements to Haslip, Berberich, Malins, Roze, and Webb. Mason stated the issue for review as follows:

Under Crawford v. Washington, an out-of-court statement by an absent declarant describing a completed crime to police officers or police employee victim advocates requires confrontation to satisfy the Sixth Amendment.

Petition for Review, at 1. He did not seek review of the admission of Santoso's statements to any other witnesses, as these statements had not been challenged in the Court of Appeals.

In his Supplemental Brief, Mason now challenges the trial court's admission of Santoso's statements to his treating emergency room physician, Dr. Gregory Gross. Mason asserts for the first time that these statements were testimonial, and hence inadmissible, and that the Court of Appeals erred when it "ruled that Santoso's statements to non-police officers describing his allegations of past criminal conduct posed no possible confrontation clause violation." Petitioner's Supplemental Brief, at 17.

However, the only way in which the Court of Appeals considered Santoso's statements to Dr. Gross and other witnesses was in the context of its harmless error analysis. Accordingly, the court held that the *unchallenged* evidence against Mason was overwhelming:

First, forensic evidence and Marina Madrid's testimony alone could have been sufficient to convict Mason. And second, Santoso's roommate, employer, emergency room physician, and sister all testified about Santoso's description of the January 23rd incident.

State v. Mason, 127 Wn. App. 554, 565, 126 P.3d 34 (2005). The Court of Appeals did not perform an independent analysis regarding the admissibility of any of these statements because Mason did not assign error to their admission.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the petitioner, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Motion to Strike, in STATE V. KIM MASON, Cause No. 77507-9, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

8/25/06
Date

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