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COURT OF APPEALS

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NO. 32112-2-II

*DM*  
IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON

WASHINGTON, DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JAMES DOUGLAS OHLSON,

Appellant.

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APPELLANT'S REPLY BRIEF

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## **I. SUMMARY**

The respondent has argued that the presentation of D.L.'s statements was not prejudicial to Mr. Ohlson. (Brief of Respondent, 10) However, the admission of the statements must have affected the trial as it was the only testimony presented from D.L. The appellant also disagrees with the assertion made by the respondent suggesting that the claimed violation of the confrontation clause was not preserved for review. (Brief of Respondent, 11-12) The respondent has also suggested that the statements made by D.L. were not testimonial. (Brief of the Respondent, 13-20) The application of the facts of this case to the test for determining whether statements are testimonial found in the case of State v. Mason, 2005 WL 880105 (2005) demonstrates that D.L.'s statements were testimonial.

## **II. ARGUMENT**

### **A. THE ADMISSION OF D.L.'S STATEMENTS WAS BOTH IN ERROR AND PREJUDICIAL TO MR. OHLSON.**

The admission of the statements of D.L. was in error as described in the brief of the appellant. The respondent has argued that the admission of the statements was not prejudicial to the defendant. (Brief of the Respondent, 10) The admission of the statements was both in error and prejudicial to the defendant.

The respondent has argued that the admission of D.L.'s statements were not prejudicial because the trial was not materially effected by the admission of the statements. The appellant disputes the argument put forth by the respondent. As presented by the respondent, an error is not prejudicial unless the outcome of the trial "would have been materially affected had the error not occurred." State v. Thomas, 150 Wn.12d 793, 871, 92 P.3d 228 (2004)

In this case, the D.L.'s statements admitted as excited utterances was the only testimony presented of D.L. D.L. did not testify at trial. The statements attributed to D.L. was the only information presented in the attempt to prove the elements of assault as to D.L. Officer Gray testified in general terms of statements made by both L.F. and D.L. (RP 91-92) The statement made by D.L. felt apprehension that physical injury could occur. The victim must be in actual fear of bodily harm to warrant a guilty finding on the charge of assault. State v. Eastmond, 129 Wn.2d 497, 503-04, 919 P.2d 577, 579-80 (1996). In the absence of the admission of the statements, the State would not have been able to provide evidence to establish that an assault had occurred against D.L.

**B. MR. OHLSON'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES WAS VIOLATED**

**1. The Court should consider this claim.**

The right to confront witness is of Constitutional magnitude which may be considered for the first time on appeal. RAP 2.5(a); State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999) Both the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution give the defendant the right to confront and cross examine witnesses. In the recent case of State. v. Price, 2005 WL 950033 (2005), Division Two of the Court of Appeals, considered a claimed violation of the confrontation clause even when the appellant did not raise the claim at trial. In this case, the respondent concedes that a violation of the confrontation clause is a constitutional error. (Brief of respondent, 13) As demonstrated by the case of State v. Price, supra, the appellant is not required to show that the error was actually prejudicial before the court may consider this issue.

The respondent has suggested that it is the burden of the appellant to demonstrate that the violation of the confrontation clause resulted in actual prejudice before the court may consider the claimed error. However, the State has the burden of establishing that a constitutional error was harmless. State v. Easter, 130 Wn. 2d, 228, 242, 922 P.2d 1285 (1996) This burden may be met if the court is convinced beyond a reasonable doubt that a jury would reach the same result without the error and the untainted evidence is

so overwhelming that it necessarily leads to a finding of guilt. State v. Easter, 130 Wn. 2d. At 242

In the case at hand, the only evidence presented from D.L. was the statement admitted in error. As previously stated, D.L. did not testify at court. The admission of the statements were likely necessary for the jury to have sufficient evidence to find Mr. Ohlson guilty of assault against D.L.. As a result, the State is unable to establish that the jury would have reached the same result without the admission of the hearsay statements. Furthermore, the other evidence presented at trial does not meet the elements of assault against D.L. The other evidence presented at trial does not necessarily lead to a finding of guilt as to D.L. The statement is necessary to establish that D.L. was in fear that bodily harm was imminent.

## **2. The Statements Made By D.L. Were Testimonial.**

The respondent has argued that the court should look to the holdings of courts in jurisdictions outside of Washington to determine that the statements made by D.L. were not testimonial in nature. The recent case of State v. Mason, 2005 WL 880105 (2005) sets forth a test for determining if a statement is testimonial in nature. In that case, the court described a three part test to be used in determining if a statement is testimonial. Id. These factors include:

1) whether the declarant initiated the statement; 2) the formality of the setting; 3) the declarant's purpose in making the statement.

State v. Mason, 2005 WL 880105 at 4

In that case the court determined that the statements made by the declarant were made while in peril with the purpose of getting help. For that reason the court determined that the statements were not testimonial.

Specifically the court stated as follows:

We further hold that statements made while in peril for the purpose of seeking protection, rather than for the purpose of bearing witness, are not testimonial and thus not subject to Crawford's cross-examination requirement.

Id at 4

In the case at hand, the application of the factors outlined in the Mason case to the facts in the case at hand suggests that the statements made by D.L. were testimonial. First for consideration is the fact that D.L. did not initiate contact with law enforcement. L.F. initiated contact with law enforcement by placing a call to 911. (RP 69) Officer Gray stated that D.L. and L.F. made statements to her. (RP 92)

Although the setting in which the statements were made was not formal, it was clear that the statements were in response to Officer Gray's request for information. (RP 92) At the time the statements were made D.L. was not in peril. Mr. Ohlson had left the scene before Officer Gray arrived. (RP 92). L.F. called 911 after Mr. Ohlson had left the scene. (RP 69, 92)

Officer Gray arrived at the scene five minutes after L.F. contacted 911.

(RP 90) The evidence presented suggests that Officer Gray was not conducting a formal investigation at the time she contacted D.L. and L.F.

Unlike the situation in the case of State v. Mason, supra, the declarant was not in peril at the time the statements were made. The statements were not made with the purpose of getting help but rather to describe the event to law enforcement. Mr. Ohlson had left the scene prior to the statements made by law enforcement (RP 92) The statements were made to provide law enforcement with information that any reasonable person would know would be used in a prosecution of Mr. Ohlson. For that reason, the court should consider the statements made by D.L. Consequently, the admission of those statements without the opportunity to cross examination was in violation of the confrontation clause and the principles outlined in the case of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)

Finally, the respondent argues that any violation of the confrontation clause was harmless error in this case. (Brief of respondent, 24) However, as described previously, the only testimony presented attributed to D.L. was the statements admitted in error. The State would not have been able to establish the elements of assault without the statements of D.L. The admission of the statements was not harmless error. The statements were the

only evidence presented of D.L.'s fear of physical harm which is necessary to establish that an assault occurred.

### **III. CONCLUSION**

Mr. Ohlson respectfully requests the court to reverse the convictions entered against him.

Respectfully submitted this 6 day of May, 2005.

A handwritten signature in black ink, appearing to read "Michelle Bacon Adams", written over a horizontal line.

MICHELLE BACON ADAMS  
WSBA #25200  
Attorney for Appellant

**DECLARATION OF MAILING**

I, Jeanne L. Hoskinson, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Reply Brief of Appellant in the above-captioned case hand-delivered or mailed as follows:

**Original of Reply Brief of Appellant mailed to:**

Clerk of the Court  
COURT OF APPEALS, DIVISION II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

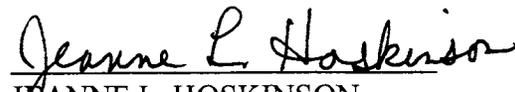
**Copy of Reply Brief of Appellant Hand-Delivered to:**

Mr. Randall Sutton  
Kitsap County Prosecuting Attorney's Office  
614 Division Street, MS-35  
Port Orchard, WA 98366

**Copy of Reply Brief of Appellant Hand-Delivered to:**

James D. Ohlson  
c/o Kitsap County Jail  
614 Division Street, MS-33  
Port Orchard, WA 98366

DATED this 6<sup>th</sup> day of May, 2005, at Port Orchard, WA.

  
JEANNE L. HOSKINSON  
Legal Assistant