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NO. 32112-2-II

STATE OF WASHINGTON

BY DM IN THE COURT OF APPEALS OF THE STATE OF
DEPUTY WASHINGTON, DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAMES DOUGLAS OHLSON,

Appellant.

APPELLANT'S REPLY BRIEF

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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)

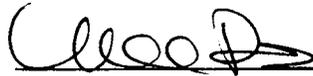
Finally, the respondent argues that any violation of the confrontation clause was harmless error in this case. (Brief of respondent, 24) However, as described previously, the only testimony presented attributed to D.L. was the statements admitted in error. The State would not have been able to establish 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.



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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

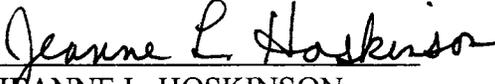
Copy of Reply Brief of Appellant Hand-Delivered to:

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 6th day of May, 2005, at Port Orchard, WA.


JEANNE L. HOSKINSON
Legal Assistant