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NO. 20927-0-III

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

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STATE OF WASHINGTON,  
RESPONDENT,  
V.  
OCTAVIO GONZALES FLORES  
APPELLANT.

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STATE'S RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

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1. ADMISSION OF CO-CONSPIRATOR STATEMENTS IS NOT BARRED BY CRAWFORD.....	1
2. ADMISSION OF STATEMENTS FROM DEFENDANT'S WIFE WERE HARMLESS ERROR IN LIGHT OF OVERWHELMING EVIDENCE .....	4
3. THE EXCEPTIONAL SENTENCE IMPOSED WAS BASED ON FACTS FOUND BY THE JURY.....	6
a. Appellant Incorrectly Identified the Counts in Which the Trial Court Imposed Consecutive Sentences .....	6
b. The Jury Verdict Provided Sufficient Facts to Support an Exceptional Sentence Under RCW 9.94A.535 (2).	7
4. CONCLUSION .....	10

Cases

*Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) ..... 8, 9

*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) ..... 1, 2

*Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) ..... 4

*Harrington v. California*, 395 U.S. 250, 251-52, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) ..... 4

*Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) ..... 1

*State v. Davis*, 154 Wn.2d 291, 304; 111 P.3d 844 (2005) ..... 4, 5

*State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (citing *Harrington*, 395 U.S. at 251-52) ..... 4

*State v. Hughes*, 154 Wn.2d 118, 134, 110 P.3d 192, (2005) ..... 9

*State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003) ..... 9

*State v. McDaniel*, 83 Wn. App. 179, 187-188, 920 P.2d 1218 (1996) ..... 4

## ARGUMENT

### 1. ADMISSION OF CO-CONSPIRATOR STATEMENTS IS NOT BARRED BY CRAWFORD

The central question under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) was whether a statement was “testimonial” for purposes of the Confrontation Clause. Although the Court acknowledged that its definition of “testimonial” was not exhaustive, *Crawford*, 541 U.S. at 68 n. 10, it did provide some guidance on the subject. First, the Court focused on narrow historical definitions of the words “witness” and “bear testimony.” “Testimony,” in this narrow Confrontation Clause sense, is limited to “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51 (italics added).

*Crawford*, indicated that non-testimonial statements are not within the core concern of the Confrontation Clause, and thus, they are not covered by the new rule. Instead, non-testimonial statements remain subject to the reliability test of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). In assessing whether a statement is “testimonial,” the knowledge or intent of the declarant is key; the identity

or the role of the listener is secondary. Therefore, a defendant may not hang his hat on the fact that the statement was made to a police officer. The relevant question is not “to whom was it made,” but “was it testimonial.”

Firmly-rooted exceptions to the hearsay rules generally will not fall within the scope of this new rule, because most firmly-rooted hearsay exceptions concern statements made for some purpose other than litigation. Such firmly-rooted exceptions are “by their very nature ... not testimonial.” *Crawford*, 541 U.S. at 56. For instance, business records are admitted because they are prepared for a legitimate, routine purpose, not simply to prepare for litigation. *Crawford*, 541 U.S. at 56; *5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE* § 803.33 – 803.45 (4th ed.1999).

Another example of a non-testimonial statement explicitly referenced by the Court is a statement made to further a conspiracy. Statements made to further a conspiracy are simply defined as non-testimonial and non-hearsay because the statements are not made to build a case for trial; the statements are made to further the conspiracy. *Crawford*, 541 U.S. at 56; *5B KARL B. TEGLAND, WASHINGTON*

*PRACTICE: EVIDENCE* § 801.58 – 801.66 (4th ed.1999). Thus, statements made to an Informant are admissible without confrontation because the statements are not “testimonial” --the declarant was promoting a conspiracy rather than making a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” The statement is admissible notwithstanding the fact that it was made to an agent of law enforcement. *Crawford*, 541 U.S. at 58 (citing *Bourjaily v. United States*, 483 U.S. 171, 181-84, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)).

The statements made by Sandra Flores to the informant Mr. Hutton were admissible under ER 801(d) (2), which states:

Admission by party-opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Statements meeting the requirements of ER 801(d) are not hearsay. The trial court found the statements were made in the furtherance of a conspiracy to deliver controlled substances. RP 167-175.

Additionally, the statements made during the transaction for controlled substances, describing what was actually occurring, were admissible under ER 803(a)(1) – Present Sense Impression.

**2. ADMISSION OF STATEMENTS FROM DEFENDANT'S WIFE WERE HARMLESS ERROR IN LIGHT OF OVERWHELMING EVIDENCE**

Violation of a defendant's rights under the Confrontation Clause is constitutional error. *State v. McDaniel*, 83 Wn. App. 179, 187-188, 920 P.2d 1218 (1996) (citing *Harrington v. California*, 395 U.S. 250, 251-52, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969)). It is well established that constitutional errors, including violations of a defendant's rights under the Confrontation Clause, may be harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (citing *Harrington*, 395 U.S. at 251-52); *State v. Davis*, 154 Wn.2d 291, 304; 111 P.3d 844 (2005).

The correct inquiry is whether, assuming that the damaging potential of the testimony were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The reviewing court must look at the untainted evidence to

determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Davis*, 154 Wn.2d at 304.

Even without Sandra Flores' statements to police and at the forfeiture hearing, the evidence in the present case was overwhelming against the defendant.

Not only was the defendant involved in controlled transactions conducted by the drug Task Force, the transactions constituting counts III, IV, V, VI, VII, VIII, were monitored and recorded using body wires placed on the informant. The transactions in count VIII were also video recorded using aerial surveillance and a video camera on the informant's vehicle. RP 238-239.

The defendant was found in possession of cocaine and in possession of recorded Task Force money when he was placed under arrest on September 25. RP 368-371.

The defendant testified he was married to Sandra Flores and that he lived at the Waddell Orchard cabin during the time period of the transactions with his wife and his 13 year old stepdaughter. RP 653-654.

In addition, the defendant testified to seeing the informant, Mr.

Hutton, at the defendant's residence and at locations away from his residence on several occasions, and more importantly, admitted that his voice could be heard on the body wire recordings. RP 661-666, 714.

Even excluding any statements of Sandra Flores found to be inadmissible, the evidence presented in the present case would necessarily lead to a finding of guilt.

**3. THE EXCEPTIONAL SENTENCE IMPOSED WAS BASED ON FACTS FOUND BY THE JURY**

a. Appellant Incorrectly Identified the Counts in Which the Trial Court Imposed Consecutive Sentences

In his Supplemental Brief, Appellant incorrectly states the court imposed consecutive sentences on two counts of Involving a Minor in a Drug Transaction. The Appellant argues (based on this error) that these offenses were not aggravating factors under RCW 9.94A.535, and do not support an exceptional sentence.

A review of the Judgment and Sentence (CP 114-124), clearly shows that the two counts of Involving a Minor (counts II and IV), were found by the trial court to be the *same criminal conduct* as the deliveries

committed by the defendant on the same dates (counts I and III). CP 115.

By making this finding, the defendant did not receive any additional offender score for counts II and IV. Additionally, the Judgment and Sentence clearly states that the trial court imposed the sentences for counts II and IV to run *concurrently* with the sentences in counts I, III, V, VI, and VII. CP 120.

The trial court also imposed concurrent sentences for counts VIII (Delivery of a Controlled Substance) and IX (Possession with Intent to Deliver a Controlled Substance). CP 120.

The trial court imposed an exceptional sentence by ordering the sentences in counts VIII and IX run consecutive to counts I through VII. CP 120, CP 127. The exceptional sentence was based on the aggravating circumstance that counts I, III, V, VI, VII, VIII, and IX constituted major violations of the Uniform Controlled Substances Act. CP 114, 116, 125-127.

b. The Jury Verdict Provided Sufficient Facts to Support an Exceptional Sentence Under RCW 9.94A.535 (2).

Appellant argues that in light of *Blakely v. Washington*, 542 U.S. 296,

124 S. Ct. 2531 (2004), the trial court erred by imposing an exceptional sentence pursuant to RCW 9.94A.535 (2).

Even after *Blakely v. Washington*, imposition of an exceptional sentence was warranted where the jury found the defendant guilty of six separate counts of delivery of a controlled substance and one count of possession of a controlled substance with intent to deliver.

Under former RCW 9.94A.535(2), if the current offense was a major violation of the Uniform Controlled Substances Act, it is an “aggravating circumstance” warranting an exceptional sentence.

Under former 9.94A.535(2)(e), the presence of any of the listed factors is sufficient to identify a current offense as a major violation of the Uniform Controlled Substances Act; including: “*The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;*”. RCW 9.94A.535 (2) (e) (i).

In the present case the jury found the defendant guilty of seven separate transactions in which the defendant sold, transferred, or possessed controlled substances with intent to do so.

The trial court imposed and exceptional sentence based on the

finding that the offenses were a major violation of the Uniform Controlled Substances Act, CP 125-127. The jury finding specifically supported this basis to impose an exceptional sentence.

The fact that the trial court (prior to the *Blakely* decision) also analyzed the other mutually exclusive factors that *also* identified the defendant's current offenses as major violations of the Uniform Controlled Substances Act, does not diminish the jury's finding, nor invalidate the imposition of the exceptional sentence based on the jury's finding.

Not every aggravating factor cited must be valid to uphold an exceptional sentence. Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for re-sentencing. *State v. Hughes*, 154 Wn.2d 118, 134, 110 P.3d 192, (2005) (citing *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003)).

The exceptional sentence imposed in the present case is valid, even after *Blakely*.

**4. CONCLUSION**

The Court of Appeals should grant the State's motion on the merits and affirm the decision of the trial court. .

Dated this 29<sup>th</sup> day of December, 2005

Respectfully Submitted by:

  
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