

64909-4

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NO. 64909-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH RAWLINS,

Appellant.

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

The Honorable Charles R. Snyder, Judge

REPLY BRIEF OF APPELLANT

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CLERK COURT

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A. ARGUMENT IN REPLY

1. STATEMENTS BY THE WOMAN IDENTIFYING HERSELF AS SELLERS WERE TESTIMONIAL.

The State does not argue that it demonstrated unavailability or a prior opportunity to cross-examine the declarant. Rather, the State argues there was no violation of the Confrontation Clause because the woman's statements to police were not testimonial.

In making this argument, the State relies on the four factors discussed and applied in State v. Koslowski, 166 Wn.2d 409, 418-419, 209 P.3d 479 (2009), which are designed to assist in determining whether police interrogation of a witness is necessary to meet an ongoing emergency and therefore non-testimonial. See Brief of Respondent at 14-19. These factors do not support the State's position.

The first factor is whether the speaker was "speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events?" Koslowski, 166 Wn.2d at 418. Officer Perez and a second officer arrived on scene with one purpose – remove the occupants of the trailer at the landlord's request. RP 37, 46. Once the two officers removed all occupants from the trailer, the task at hand was complete and there

were no more “current events . . . requiring police assistance.” At that point, questioning each individual to determine his or her identify was aimed at past events (whether an individual had outstanding warrants or court orders) rather than the current reason for police assistance. See RP 39-42 (information used to run “records check” on everyone present).

The second factor is “[w]ould a ‘reasonable listener’ conclude that the speaker was facing an ongoing emergency that required help?” Koslowski, 166 Wn.2d at 419. Whether there was an ongoing emergency is a critical determination under the Confrontation Clause. Michigan v. Bryant, ___ S. Ct. ___, 2011 WL 676964, at *11, *15 (Slip op. filed 2/28/11). The State concedes there was no ongoing emergency here. Brief of Respondent, at 15 (“No emergency existed at the trailer when Officers Perez and Gates arrived.”).

Yet, despite this concession, the State argues the situation resembles the non-testimonial “initial inquiries” made of Michelle McCottry in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Brief of Respondent, at 15-16. There is no resemblance. When McCottry made her statements, there was an ongoing emergency because she was the victim of a crime,

unprotected by police, in immediate danger, and seeking aid. See Davis, 547 U.S. at 817-818, 827-828, 831-832. None of these facts are present in Rawlins' case, where officers were on the scene, they clearly had the situation under control, and there was no "victim" to protect during the eviction process. "[W]here the statements are neither a cry for help nor provision of information that will enable officers immediately to end a threatening situation, it is immaterial that the statements were . . . 'initial inquiries.'" Koslowski, 166 Wn.2d at 421 (quoting Davis, 547 U.S. at 832).

The third factor is the nature of the questioning – "Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what happened in the past?" Koslowski, 166 Wn.2d at 419. Again, *there was no emergency*. The State has conceded this point. And the purpose of the elicited statements was to determine past facts – whether those present had prior outstanding warrants or court orders.

The State stresses the importance of officers' ability to identify individuals with whom they have contact, noting such questioning is not by itself a seizure under the Fourth Amendment and assists in determining whether an individual poses a threat to

their safety. See Brief of Respondent, at 17-19. No one in this case is questioning officers' authority to ask for identifying information when necessary. They may do so. However, when that information is testimonial under the Confrontation Clause, it may not be used in a court of law in the declarant's absence. See Davis, 547 U.S. at 832 n.6 ("The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision.").

Finally, the fourth factor is the interrogation's level of formality. If, for example, the declarant is frantic, as opposed to tranquil and safe, the statement is less likely to be testimonial. Koslowski, 166 Wn.2d at 419. Since officers had control of the scene here, the situation and those involved are best described as tranquil and safe. No one was frantic. Moreover, "a certain level of formality occurs whenever police engage in a question-answer sequence with a witness." Id. at 429.

All four Koslowski factors confirm the statements taken from the woman identifying herself as Sellers were testimonial.

2. THE STATEMENTS WERE ALSO HEARSAY.

The State concedes the trial court erred when it found the statements admissible under ER 801(d)(1). Brief of Respondent, at 20. However, citing State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005), the State argues the statements at issue were admissible “to show why an officer conducted an investigation.” Brief of Respondent, at 1-2, 19-21.

Even if the statements could have been admitted for this purpose, the more salient fact is that they were not. Had the State made this argument below, and had the trial court agreed, the defense could have obtained a jury instruction limiting jurors’ consideration of the statements to this very narrow and benign purpose. But this theory was never argued below, and the statements were admitted for their truth. Compare RP 13-14 (court allows statements for their truth, erroneously believing they fall outside definition of hearsay) with Iverson, 126 Wn. App. at 336-337 (clear from court’s ruling that statements not admitted for truth). The statements at issue in this case were hearsay.

3. ADMISSION OF THE STATEMENTS WAS NOT HARMLESS ERROR.

The State argues that the admission of the woman's statements identifying herself as Sellers was harmless beyond a reasonable doubt because other evidence of her identity was overwhelming. See Brief of Respondent, at 21-22. This is incorrect.

Without the hearsay statements, the evidence simply revealed that Rawlins and an unidentified woman were both at the trailer, they obviously had a close relationship (they hugged and kissed), the woman was quite upset at the prospect of Rawlins' arrest, and Rawlins gave the woman certain personal property he was carrying. See RP 18-19, 21-24, 31, 50-51. Neither Officer Perez nor Deputy Jilk determined the woman's identity through a picture ID. RP 30-31, 57-58. And the woman refused to fill out paperwork or sign her name. RP 33-34.

The State argues that had the woman been someone other than Sellers, she would have said so to avoid Rawlins' arrest. Brief of Appellant, at 12, 22. But this is pure speculation. It is just as easy to speculate that the woman may not have been Rawlins' wife, but was someone with whom Rawlins' had an intimate

relationship and someone who did not want her identity known. Deputy Jilk conceded that sometimes individuals do not identify themselves when, for example, they have an outstanding arrest warrant. RP 30. A warrant would explain her failure to tell officers she was not Sellers and her level of distress over the consequence: Rawlins' arrest.

The untainted evidence of the woman's identity did not overwhelmingly establish that she was Rawlins' wife. Rather, it was the hearsay statements – statements that violated Rawlins' confrontation rights – that convinced jurors the woman was Sellers beyond any reasonable doubt. Once jurors heard that the woman repeatedly identified herself as Sellers, conviction was assured.

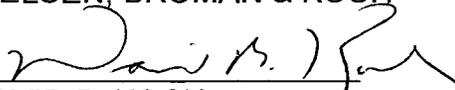
B. CONCLUSION

For the reasons discussed in Rawlins' opening brief and above, this Court should reverse his conviction and order a new trial without the offending evidence.

DATED this 11th day of March, 2011.

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 64909-4-1
)	
KEITH RAWLINS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF MARCH, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HILARY THOMAS
WHATCOM COUNTY PROSECUTOR'S OFFICE
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BELLINGHAM, WA 98225

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF MARCH, 2011.

x Patrick Mayovsky

MARCH 11 2011 11:19 AM