

No. 66276-7

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BUD MICHAEL FRASER,

Appellant.

2011 DEC - 8 PM 5:01  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. MR. CROSS'S TESTIMONIAL STATEMENT TO POLICE WAS ADMITTED IN VIOLATION OF MR. FRASER'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES

The State concedes Mr. Cross's statement to police, in which he asserted "I am constantly being harassed, and fear for my and my girlfriend's life," is "testimonial" for purposes of the Confrontation Clause. SRB at 20; RP 486. Yet the State contends Mr. Fraser's constitutional right to confront the witnesses was not violated because the statement was admitted for a non-hearsay purpose. SRB at 15. To the contrary, the statement was admitted to prove the truth of the matter asserted, i.e., that Mr. Cross was in fear for his life. Therefore, even if the statement was admissible under the "state of mind" exception to the hearsay rule, it was not exempt from Confrontation Clause protection.

The State relies on footnote 9 from Crawford and the Washington Supreme Court's decision in State v. Davis. SRB at 17 (citing Crawford v. Washington, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) and State v. Davis, 154 Wn.2d 291, 301, 111 P.3d 844 (2005), aff'd, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)). In footnote 9 of Crawford, the United States Supreme Court stated in *dicta*, "The Clause also does not bar the

use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)). In Davis, the Washington Supreme Court similarly stated in *dicta*, "even testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted." 154 Wn.2d at 301 (citing Crawford, 541 U.S. at 59 n.9).

But as stated, Mr. Cross's testimonial statement was admitted to prove the truth of the matter asserted. The State offered, and the trial court admitted, the statement to show Mr. Cross was in fear of Mr. Fraser and therefore did not likely reach for the gun as Mr. Fraser claimed. RP 45, 479-82; see SRB at 22-23 (whether Mr. Cross feared Mr. Fraser bore directly on the credibility of Mr. Fraser's claim that his actions caused the gun to go off accidentally). Therefore, Mr. Fraser had a constitutional right to confront Mr. Cross about the statement. That conclusion is consistent with the courts' *dicta* in Crawford and Davis.

Other Washington cases are in accord. As argued in the opening brief, in State v. Mason, the Washington Supreme Court cautioned that out-of-court statements properly admitted under the "state of mind" hearsay exception may nonetheless violate the

Confrontation Clause if the statements are used for their truth. 160 Wn.2d 910, 921-22, 162 P.3d 396 (2007). "To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge." Id., at 922.

The State attempts to distinguish Mason by arguing the court in that case was concerned that the non-hearsay purpose for admitting the evidence was not the real reason it was admitted. By contrast, here, the State points out, the justification for offering the statement was the same as the real reason for using it—to show Mr. Cross was afraid of Mr. Fraser. SRB at 22-23. But as stated, the statement was not relevant for that purpose unless the matter asserted in the statement was true. The statement was not relevant to show Mr. Cross was afraid of Mr. Fraser unless it was true that, as he told police, he was "in fear for my and my girlfriend's life." RP 486.

The State also relies on State v. James, 138 Wn. App. 628, 639-41, 158 P.3d 102 (2007) and In re Personal Restraint of Theders, 130 Wn. App. 422, 433, 123 P.3d 489 (2005). SRB at 18-19. Those cases are consistent with the analysis presented here.

In James, the trial court admitted a witness's statement to police that he or she saw a black man armed with a handgun near

the scene just before the shooting. 138 Wn. App. at 639. The statement was offered to explain why police were investigating in that neighborhood. Id. at 639-40. The court also admitted the statement of the mother of the defendant's girlfriend made soon after the incident, in which she stated her daughter was out with a man named "Brian" (the defendant's first name was Bryan). Id. at 640-41. On appeal, the Court concluded that even if the above statements were offered merely to explain the reasons for the officers' conduct, they were nonetheless "testimonial." Id. Because the statements tended to prove the truth of the matters asserted and tied the defendant to the crime, they were subject to Confrontation Clause protection. See id.

In Theders, Theders and co-defendant Graves were charged with attempted first degree murder. 140 Wn. App. at 425. At trial, the court admitted Graves' cell phone call to his wife and his later statement to police, in which he provided a false alibi. Id. at 430. Theders was present during the cell phone call and could overhear Graves' side of the call. Id. at 431. He also gave a statement to police providing a false alibi almost identical to the one given by Graves. Id. at 428. The court admitted Graves' statements not for the truth of the matters asserted, but to show Theders' collusion in

the development of the false alibi. Id. at 431. This Court held the Confrontation Clause was not implicated by admission of the statements because they were not offered for their truth. Id. at 433.

Theiders is clearly distinguishable from this case. In Theiders, by the time of trial, all of the parties acknowledged the out-of-court statements were untrue. Id. at 426. The statements were relevant not to establish their truth, but to show collusion between the co-defendants. By contrast, here, the primary purpose for admitting the out-of-court statement was to establish the truth of the matter asserted—that Mr. Cross was afraid of Mr. Fraser.

Finally, this analysis is consistent with the United States Supreme Court's decision in Street, 471 U.S. at 414, which was cited by the Crawford Court. See Crawford, 541 U.S. at 59 n.9. In Street, Street was arrested for murdering his neighbor Ben Tester. Id. at 411. He admitted to police that he participated in the burglary of Tester's home during which Tester was murdered. Id. At trial, however, Street recanted his statement and claimed the sheriff coerced the confession by reading to him the confession of his co-defendant Clifford Peele and directing him to say the same things. Id. In rebuttal, the sheriff denied telling Street to repeat Peele's confession and read from a portion of Peele's confession to prove it

was different from Street's. Id. at 411-12. The Supreme Court held admission of Peele's confession did not violate the Confrontation Clause because it was introduced "for the legitimate, nonhearsay purpose of rebutting [Street's] testimony that his own confession was a coerced 'copy' of Peele's statement." Id. at 417.

Thus, Mr. Fraser had a constitutional right to confront Mr. Cross about his testimonial statement to police because the statement was used to establish its truth—that Mr. Cross was afraid of Mr. Fraser. Because Mr. Fraser did not have an opportunity to cross-examine Mr. Cross, his right to confrontation was violated. For the reasons set forth in the opening brief, the error was unfairly prejudicial and the conviction must be reversed.

2. MR. FRASER MAY RAISE HIS  
CONFRONTATION CLAUSE CHALLENGE  
TO EXHIBITS 1 AND 45 FOR THE FIRST  
TIME ON APPEAL

The State contends Mr. Fraser may not challenge admission of the cell phone records for the first time on appeal because it is not a manifest error affecting a constitutional right. SRB at 29-32. But if Mr. Fraser had raised the issue at trial and prevailed, the cell phone records would have been excluded. The cell phone records showing the frequency and duration of calls and text messages between Mr. Fraser and Ms. Sigmond, and the content of Mr.

Fraser's text messages, were a principal piece of evidence the State relied upon to show motive and premeditation. Because admission of the records had a practical and identifiable impact on the trial, the error was manifest.

A manifest error is one that "had practical and identifiable consequences in the trial of the case." State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). It is to be contrasted with "[a] purely formalistic error." Kronich, 160 Wn.2d at 899. The question of whether the error is "manifest" is separate from the question of whether it is harmless or warrants reversal of the conviction. State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). The focus of the manifest error inquiry is on "whether the error is so obvious on the record that the error warrants appellate review." Id.

The error in admitting the cell phone records in this case is obvious and warrants appellate review due to the central importance of the records to the State's case. The principal issue at trial was whether Mr. Fraser acted with premeditated intent or whether the shooting was accidental. The State relied heavily on the cell phone records to show motive and premeditation.

Detective Erickson testified at length—covering 15 pages of transcript—about the cell phone records, the length and frequency

of the calls between Mr. Fraser and Ms. Sigmond, and the content of Mr. Fraser's text messages. RP 534-49. The State prepared and used at trial an illustrative exhibit showing a timeline and summary of the calls. RP 531-32; Exhibit 46.<sup>1</sup> The prosecutor emphasized the evidence in closing argument, arguing the messages and calls showed Mr. Fraser got more and more frantic and obsessed, and was stalking Ms. Sigmond and Mr. Cross, in the days leading up to the incident. RP 822-26. No other evidence presented at trial on the issue of premeditation and motive was as detailed or damaging as exhibits 1 and 45.

Washington courts routinely permit criminal defendants to raise Confrontation Clause challenges for the first time on appeal. In addition to State v. Lee, 159 Wn. App. 795, 247 P.3d 470 (2011), cited in the opening brief, other cases include: State v. Kronich, 160 Wn.2d 893, 899-901, 161 P.3d 982 (2007) (admission of Department of Licensing certification of defendant's driving status); State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006) (admission of child's hearsay statements); State v. Fleming, 155 Wn. App. 489, 228 P.3d 804 (2010) (admission of "quote sheet" establishing replacement value of stole property); and State v. Rangel-Reyes,

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<sup>1</sup> Exhibit 46 was admitted for illustrative purposes only.

119 Wn. App. 494, 81 P.3d 157 (2003) (admission of co-conspirator's statements).

In sum, the erroneous admission of the cell phone records in this case was not merely a "formalistic error." Kronich, 160 Wn.2d at 899. The error had "practical and identifiable consequences in the trial." Lynn, 67 Wn. App. at 345. The error was therefore manifest and Mr. Fraser may raise it for the first time on appeal.

3. EXHIBITS 1 AND 45 ARE "TESTIMONIAL"  
FOR PURPOSES OF THE CONFRONTATION  
CLAUSE

The State argues admission of exhibits 1 and 45 did not violate the Confrontation Clause because they were not testimonial hearsay. SRB at 32-37. The State contends admission of the records does not fall under the rule established in Melendez-Diaz v. Massachusetts, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) and Bullcoming v. New Mexico, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) because those cases concerned out-of-court "statements." SRB at 34-35. By contrast, in this case, the act of compiling the records into a single document is non-verbal conduct that was not intended to be an assertion. SRB at 36. The records custodian who prepared the exhibits did not interpret the data in the documents or give an opinion as to its effect. SRB at

37. At most, according to the State, the person's act conveys "these are the records kept in Sprint's database that you requested," which is the kind of statement the Melendez-Diaz Court recognized is exempt from Confrontation Clause protection. SRB at 36-37 (citing Melendez-Diaz, 129 S. Ct. at 2539).

Melendez-Diaz does not support the State's argument. There, the Court acknowledged a narrow class of evidence that, although prepared for use at trial, was traditionally admissible without an opportunity for cross-examination: a clerk's certificate authenticating an official record, or a copy thereof, for use as evidence. 129 S. Ct. at 2538. But the clerk's authority in that regard was "narrowly circumscribed"; the clerk "was permitted 'to certify to the correctness of a copy of a record kept in his office,' but had 'no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.'" Id. at 2539 (citing State v. Wilson, 141 La. 404, 409, 75 So. 95, 97 (1917); State v. Champion, 116 N.C. 987, 21 S.E. 700, 700-01 (1895); 5 J. Wigmore, Evidence § 1678 (3d ed. 1940)). "A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts

did here: *create* a record for the sole purpose of providing evidence against a defendant." Id.

Here, the Sprint employee who prepared exhibits 1 and 45 did not merely authenticate or provide a copy of an already existing, otherwise admissible, record. Instead, he or she "*create[d]* a record for the sole purpose of providing evidence against a defendant." Id. Therefore, the evidence does not fall under the narrow exception identified in Melendez-Diaz.

As the State acknowledges, SRB at 36-37, exhibits 1 and 45 convey implicit assertions by the person who prepared the records,<sup>2</sup> i.e., that he or she searched the Sprint database, that the calls and text messages identified and contained in the exhibits were actually sent or received by Mr. Fraser's cell phone, that they were actually sent or received on the dates specified and lasted for the length of time stated, that no relevant information was omitted, and so on. These kinds of assertions are ripe for cross-examination.

In Melendez-Diaz, the Court stated that traditionally, the prosecution could not admit, without an opportunity for cross-examination, a clerk's certificate attesting to the fact that the clerk

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<sup>2</sup> Although the implicit assertions contained in the documents were not given under oath, "the absence of [an] oath is not dispositive in determining if a statement is testimonial." Bullcoming, 131 S. Ct. at 2717 (citation omitted).

had searched for a particular relevant record and failed to find it. 129 S. Ct. at 2539. In other words, contrary to the State's argument, SRB at 37, a clerk need not interpret records or express opinions about them in order to be subject to cross-examination. Just as the prosecution may not admit, without an opportunity for cross-examination, a clerk's statement that he or she searched a database for a particular record and failed to find it, the prosecution should not be allowed to admit, without an opportunity for cross-examination, a clerk's assertion that he or she searched a database, compiled information by applying particular criteria (without omitting anything relevant), and created a record specifically for use at trial.

Finally, the State contends Mr. Fraser waived his right to object to admission of the records because he stipulated to their authenticity. SRB at 31. But the question of whether the records were "authentic" is separate from the question of whether they were "testimonial." "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). "Authentication is a threshold requirement designed to assure that evidence is what it purports to

be.'" State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003) (quoting 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 900.2, at 175; § 901.2, at 181-82 (4th ed. 1999)).

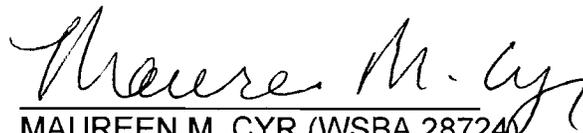
Thus, by stipulating to the authenticity of the records, Mr. Fraser merely stipulated that they were cell phone records created by someone at Sprint. He did not stipulate to all of the facts that could have been brought out by cross-examination regarding the truth, completeness and accuracy of the information contained in the records.

In sum, admission of exhibits 1 and 45, without an opportunity to cross-examine the person who prepared the reports, violated Mr. Fraser's constitutional right to confront the witnesses. For the reasons set forth above and in the opening brief, the error was not harmless and the conviction must be reversed.

B. CONCLUSION

For the reasons above and in the opening brief, the conviction must be reversed.

Respectfully submitted this 8th day of December 2011.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 66276-7-I
	)	
BUD FRASER,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8<sup>TH</sup> DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |                                                                                                                     |                   |                                     |
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| [X] | BUD FRASER<br>345509<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13 <sup>TH</sup> AVE<br>WALLA WALLA, WA 99362       | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 8<sup>TH</sup> DAY OF DECEMBER, 2011.

X \_\_\_\_\_ 

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STATE OF WASHINGTON  
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