

67536-2

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No. 67536-2-I

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

STATE OF WASHINGTON,

Respondent

v.

AARON OLSEN,

Appellant.

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

REPLY BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS DIVISION ONE
JAN TRASEN

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A. ARGUMENT

BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING HARRIET GRIFFIN'S AFFIDAVIT AS SUBSTANTIVE EVIDENCE, REVERSAL IS REQUIRED.

1. The affidavit admitted by the trial court did not satisfy the elements of ER 801(d)(1)(i). The affidavit in this case did not meet the elements of the "Smith-test," because each of the four required factors was not satisfied. State v. Smith, 97 Wn.2d 856, 863, 651 P.2d 207 (1982).

Here, the minimal guaranties of truthfulness were absent when the complainant signed the affidavit. The required guaranty of truthfulness element is satisfied if the prior statement was made under oath, subject to the penalty of perjury and in a formalized proceeding. Smith, 97 Wn.2d at 862; ER 801(d)(1)(i).

This case is similar to State v. Nieto, where this Court held that a prior statement not made under oath subject to the penalty of perjury was not sufficiently reliable to uphold a conviction. 119 Wn. App. 157, 163, 79 P.3d 473 (2003). Where no notary is present and no formal procedures are followed when a complaining witness signs a statement following a volatile incident, this Court has found the evidence insufficiently reliable to support the suggestion that an

affidavit was made under the penalty of perjury. Nieto, 119 Wn. App. at 163.

2. The trial court erroneously admitted Ms. Griffin's affidavit, therefore, reversal is required. This prior statement was the primary evidence against Mr. Olsen of counts one and two. The admissibility of a prior inconsistent statement under ER 801(d)(1)(i) is reviewed for abuse of discretion. Where the trial court based its evidentiary ruling on an incomplete legal analysis or a misapprehension of the legal issues, the ruling was an abuse of discretion. City of Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000).

The trial court here misapplied the law when it admitted Ms. Griffin's prior statement as substantive evidence. Two of the four Smith factors, as discussed in appellant's opening brief, were absent from Ms. Griffin's affidavit. The proponent of the statement's admissibility bears the burden of proving each of these elements. Nieto, 119 Wn. App. at 161. Here, the State failed to establish the affidavit's reliability prior to its admission. Accordingly, the trial court abused its discretion when it allowed the statement to be used as substantive evidence against Mr. Olsen. Counts one

and two cannot be sustained in the absence of the improperly admitted Smith affidavit.

Accordingly, because the trial court's decision to admit the prior statement was an abuse of discretion, which cannot be considered harmless, reversal is required. Smith, 97 Wn.2d at 862; Nieto, 119 Wn. App. at 161.

B. CONCLUSION

For the above reasons, as well as those stated in the opening brief, Aaron Olsen's conviction must be reversed and dismissed without prejudice. In the alternative, the domestic violence aggravator must be vacated.

Respectfully submitted this 7th day of June, 2012.



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STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67536-2-I
v.)	
)	
AARON OLSEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **REPLY 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:

<p>[X] LEAH TAGUBA, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] AARON OLSEN 853071 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JUNE, 2012.

X _____

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