

70426-5

70426-5

NO. 70426-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAHAD HILL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA A. MACK

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ISSUES PRESENTED</u> | 1 |
| B. <u>STATEMENT OF FACTS</u> | 2 |
| 1. PROCEDURAL FACTS | 2 |
| 2. SUBSTANTIVE FACTS | 2 |
| C. <u>ARGUMENT</u> | 5 |
| 1. SUFFICIENT EVIDENCE IN THE RECORD SUPPORTS HILL'S CRIMINAL TRESPASS CONVICTION | 5 |
| 2. THE CONTENT OF THE TRESPASS NOTICE WAS NOT TESTIMONIAL | 16 |
| D. <u>CONCLUSION</u> | 21 |

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Crawford v. Washington, 541 U.S. 36,
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)..... 17, 18, 20

Miranda v. Arizona, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... 4

Washington State:

State v. Alvarez, 105 Wn. App. 215,
19 P.3d 485 (2001)..... 7

State v. Bellerouche, 129 Wn. App. 912,
120 P.3d 971 (2005)..... 18, 20

State v. Collins, 110 Wn.2d 253,
751 P.2d 837 (1988)..... 7

State v. Fricks, 91 Wn.2d 391,
588 P.2d 1328 (1979)..... 19

State v. Goodman, 150 Wn.2d 774,
83 P.3d 410 (2004)..... 8

State v. Green, 94 Wn.2d 216,
616 P.2d 628 (1980)..... 6

State v. Green, 157 Wn. App. 833,
239 P.3d 1130 (2010)..... 12, 14, 15

State v. Hill, 123 Wn.2d 641,
870 P.2d 313 (1994)..... 6

State v. Hurtado, 173 Wn. App. 592,
294 P.3d 838, rev. denied,
304 P.3d 115 (2013)..... 18

| | |
|---|---------------|
| <u>State v. Jasper</u> , 158 Wn. App. 518, 245 P.3d 228 (2010), <u>aff'd</u> , 174 Wn.2d 96, 271 P.3d 876 (2012)..... | 18 |
| <u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007)..... | 16 |
| <u>State v. Kutch</u> , 90 Wn. App. 244, 951 P.2d 1139 (1998)..... | 7, 9 |
| <u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992)..... | 17 |
| <u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)..... | 16 |
| <u>State v. R.H.</u> , 86 Wn. App. 807, 939 P.2d 217 (1997)..... | 9, 10, 14, 15 |
| <u>State v. Rutherford</u> , 66 Wn.2d 851, 405 P.2d 719 (1965), <u>cert. denied</u> , 384 U.S. 267 (1966)..... | 19 |
| <u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)..... | 6 |
| <u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988)..... | 17 |
| <u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001)..... | 16 |
| <u>State v. Ware</u> , 111 Wn. App. 738, 46 P.3d 280 (2002)..... | 7 |

Constitutional Provisions

Federal:

U.S. Const. amend. VI 17

Statutes

Washington State:

RCW 9A.52.010 7
RCW 9A.52.070 7
RCW 9A.52.090 9, 14

Rules and Regulations

Washington State:

CrR 6.1 2
RAP 2.5 16

A. ISSUES PRESENTED

1. A person is guilty of criminal trespass in the first degree if the person knowingly enters or remains unlawfully in a building. Here, the State presented evidence that in 2009 Hill was permanently trespassed from the Federal Way Commons Mall (Commons Mall) for stealing from several stores; that in 2011 Hill went back to the mall, provided a fake name, and was trespassed a second time; that on September 22, 2012, Hill was inside the mall; that Hill ran away from the police; and that after being arrested Hill admitted knowing he had been trespassed twice, in 2009 and in 2011. Is there substantial evidence in the record to support Hill's conviction for criminal trespass in the first degree?

2. The content of a business record that is not prepared with an eye toward trial is not testimonial, and admissible with the proper foundation. Officer Adams issued a trespass notice to Hill in 2009 for stealing; Officer Adams completed the notice in the regular course of his duties at the Commons Mall; and the notice was kept on file. Was testimony of the content in the trespass notice properly admitted under the Confrontation Clause?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged juvenile respondent Jahad V.D. Hill by information with one count of first degree criminal trespass. CP 1. Fact Finding took place before the Honorable Barbara Mack, where she found Hill guilty as charged. CP 7; RP 73.¹ The court sentenced Hill on four separate cases for the following offenses: two counts of residential burglary; one count of attempted residential burglary; and one count of first degree criminal trespass.² The trial court imposed a standard range of 52-65 weeks at the Juvenile Rehabilitation Administration on each residential burglary, to run consecutively, and no further sanctions on the remaining charges. CP 8-12; RP 132-33. The court entered Findings of Fact and Conclusions of Law pursuant to CrR 6.1(d). CP 15-22.

2. SUBSTANTIVE FACTS

On November 12, 2009, Hill was identified as stealing from Sears and several other stores at the Commons Mall. RP 38, 44.

¹ The Verbatim Report of the Fact Finding and Disposition Proceedings consists of one volume referred to in this brief as: RP (April 1, 2013 and May 29, 2013).

² Hill has appealed all four convictions (70428-1-I, 70427-3-I, and 70429-0-I).

Federal Way Police Officer Adams, who was assigned to the Commons Mall to patrol and assist security staff in the mall, issued a permanent trespass notice to Hill. RP 26-28, 38-39. Every time that Officer Adams issues a trespass notice, he obtains the subject's information; verifies the information to the best of his ability; marks down the reason for the trespass; explains to the person what the trespass notice means; and advises the person of the duration of the notice. Lastly, Officer Adams has the subject sign the notice, and if the subject is unable to sign, he writes "served" on the signature line. RP 43-44. Officer Adams followed this procedure when he issued Hill the 2009 trespass notice, and wrote "served" on the form. RP 44. Officer Adams also took Hill's photograph at the time of the trespass. RP 39. The physical trespass notices are kept on file. RP 44. However, the notices are also kept and accessed electronically. RP 44.

Sometime in 2011, Hill went back to the Commons Mall and was trespassed a second time. RP 50. This time, however, Hill provided the name of "Girard" Hill, rather than his true name of Jahad Hill. RP 35-36, 50.

On September 22, 2012, William Stowers, a security officer at the Commons Mall, was dispatched to the American Eagle Store

to investigate four subjects who were at the store.³ RP 10, 44. The group consisted of three black males and a black female. RP 12. Stowers followed the group and as the four were exiting the mall, Stowers called the Federal Way Police Department. RP 12. As soon as the subjects exited the mall, they ran across the street. RP 12. Officers Adams and McConnell responded to the area. RP 30. The group split, and took off running away from the police. RP 30. The four subjects were apprehended and arrested for obstruction. RP 30-31.

Hill was one of the males in the group. RP 32. Officer Adams advised Hill of his Miranda⁴ warnings. RP 32. Hill waived his rights and provided a statement to Officer Adams. RP 36. Hill admitted being inside the mall; he said he had been in several stores, although he denied going to American Eagle; he denied stealing from American Eagle and said he could not be arrested for the theft because he didn't have stolen property. RP 37. Officer Adams checked the computer system and found two permanent trespass notices issued to Hill in 2009 and 2011. RP 37, 49-50. Officer Adams asked Hill about the trespass and Hill admitted

³ This part of the record incorrectly states September 24, 2012. The incident took place on September 22, 2012. RP 17, 50, 58; CP 1.

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

knowing he had been trespassed from the mall on two separate occasions. RP 37. Hill further stated he had given a different name during one of the times he had been trespassed, but had provided the same date of birth. RP 37. After speaking with Hill, Officer Adams confirmed that Hill had provided the name "Girard" in 2011. RP 50.

Officer Adams testified that he did not remember the specific circumstances of the 2009 trespass notice, other than the fact that Hill was arrested for theft after having been identified as stealing from several stores. RP 44. Officer Adams recognized the photograph he took of Hill in 2009 when issuing the trespass notice. RP 39-43.

C. ARGUMENT

1. SUFFICIENT EVIDENCE IN THE RECORD SUPPORTS HILL'S CRIMINAL TRESPASS CONVICTION.

Hill does not challenge the fact that he was inside the Commons Mall on September 22, 2012; that he had been trespassed from the mall; and that Officer Adams issued the 2009 trespass notice. Nonetheless, Hill claims on appeal that the State's evidence was insufficient to support a conviction for criminal

trespass because the State did not prove that Hill's 2009 exclusion from the mall was lawful. The evidence established that Officer Adams issued a permanent trespass notice to Hill in 2009 for stealing from Sears and other stores. Thus, there was sufficient evidence to support Hill's conviction, and his claim should be rejected.

It is not the role of the reviewing court to determine whether or not it believes the evidence at trial established guilt beyond a reasonable doubt; “[i]nstead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (italics added). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Thus, in reviewing a juvenile court adjudication, the appellate court must decide whether substantial evidence supports the trial court's findings of fact and, in

turn, whether the findings support the conclusions of law. State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001).

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Ware, 111 Wn. App. 738, 741, 46 P.3d 280 (2002). A person is guilty of first degree criminal trespass if he knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1). A person "enters or remains unlawfully" when he is not then licensed, invited, or otherwise privileged to so enter or remain. RCW 9A.52.010(5). A person's presence may be rendered unlawful by a revocation of the privilege to be there. State v. Collins, 110 Wn.2d 253, 258, 751 P.2d 837 (1988). In fact, a private property owner may restrict the use of its property so long as the restrictions are not discriminatory. State v. Kutch, 90 Wn. App. 244, 247, 951 P.2d 1139 (1998).

Hill does not assign error to the trial court's Findings of Fact that Hill had been permanently trespassed from the mall in 2009 and in 2011; that Officer Adams was the officer who had permanently trespassed Hill from the mall in 2009; and that Officer Adams was sure Hill was the same person he trespassed in 2009 and detained on September 22, 2012. CP 15-17 (Findings of Fact 14, 16, and 19). Therefore, these findings are verities on appeal.

State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Hill objects only to the trial court's finding that Hill knew he had been "permanently" trespassed, and the court's conclusion that Hill knowingly entered or remained in the Commons Mall knowing that the entry or remaining was unlawful. (Finding of Fact 15, Conclusion of Law II).

At trial, the evidence established that Officer Adams issued a permanent trespass notice to Hill from the Commons Mall on November 12, 2009, for stealing from Sears and several other stores. RP 38, 50. Officer Adams testified that when he issues trespass notices, he obtains the subject's information, verifies the information to the best of his ability, marks down the reason for the trespass, and if the subject is unable to sign the form, Officer Adams writes "served" on the notice once he has explained to the subject what the trespass notice means and its expiration date. RP 43-44. In this particular case, Officer Adams wrote "served" on the trespass notice he issued to Hill in 2009. RP 44. Although Officer Adams did not remember the specific circumstances of the trespass notice in 2009, he remembered that Hill was arrested for theft and that it involved several stores. RP 44. Officer Adams identified the photograph he took of Hill when he issued the

trespass notice in 2009. RP 39. Furthermore, Hill admitted knowing that he was not allowed to be in the mall because he had been trespassed from it twice before. RP 35-36.

Nonetheless, Hill claims that the State did not present evidence to show that the exclusion was lawful. Hill argues for the first time on appeal that the “public premises” statutory defense applies in his case. A statutory defense that negates one of the elements of a crime on a challenge of sufficiency of the evidence can be raised for the first time on appeal because it is an issue of constitutional magnitude. State v. R.H., 86 Wn. App. 807, 811, 939 P.2d 217 (1997). By statute, it is a defense to criminal trespass if the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises. RCW 9A.52.090(2). However, because a private property owner may restrict the use of its property, as long as the restrictions are not discriminatory, a mall has the authority to exclude known shoplifters. Kutch, 90 Wn. App. at 248. Hill was not excluded based on race, gender, religion, or for any other discriminatory reason. Instead, Hill was excluded because he had stolen from Sears and other stores in 2009. Thus, Hill’s access to the mall had been lawfully revoked.

Hill relies on R.H. to support his claim that because the Commons Mall is open to the public, he had license to be inside. However, this case is unlike R.H. where the respondent's license to be in a public restaurant had not been revoked. 86 Wn. App. 812-13.

In R.H., several young people were loitering and skateboarding in the parking lot of a fast food restaurant. The restaurant manager twice asked them to leave, but they did not comply. Id. at 809. R.H. arrived later by skateboard. R.H. planned to eat at the restaurant with a friend and waited in the parking lot for that friend. Id. In light of the youths not leaving, the manager asked the police to disperse them, without specifying who should be removed. Id. The officer brought the group together and told them if they did not leave the premises, they would be arrested for criminal trespass. R.H. believed this order did not apply to him because he was not part of the loitering group and planned to eat with his friend at the restaurant. Id. R.H. eventually left after the officer told him to leave several times. Id. at 810. R.H. traveled through the parking lot on his skateboard looking for his friend, and continued to an adjacent business. The police followed R.H. and arrested him for trespass. Id.

At trial, the evidence established that the parking lot was open to the public; that customers could travel to the restaurant on skateboards; that R.H. was not specifically identified as someone whom the manager wanted removed; that if R.H. was waiting for another customer, he had permission to stay on the premises; and that R.H. repeatedly informed the arresting officer that he was waiting for such a customer. Id. at 811. The unchallenged findings stated that R.H. was not part of the loitering group, and that R.H. was privileged to remain on the premises because his intent was to patronize the restaurant with another who was arriving later. Id. at 812. Nonetheless, the trial court convicted R.H. of criminal trespass concluding: “[I]t was unlawful for [R.H.] to return to the property” because he “understood that he had been ordered off the property” and “believed that he was not allowed to return to that property that night.” Id. In reversing R.H.’s conviction this Court held that what R.H. “understood” or “believed” was not relevant to whether his presence was unlawful. Id. at 812-13.

By contrast here, in addition to the evidence establishing that Hill knew he was not welcome at the Commons Mall, the evidence showed that Hill was permanently trespassed from the mall in 2009 by Officer Adams for stealing from Sears and several other stores.

The evidence also established that in 2011, Hill went back to the mall, provided a false name, presumably because he knew he was not allowed on the premises, and was trespassed a second time.⁵ Hill received two trespass admonitions, which he never contested. Thus, the statutorily recognized “public premises” defense to trespassing is not applicable to Hill.

Despite testimony that the reason for the exclusion from the mall was theft, Hill claims that this evidence was insufficient to establish that the revocation was lawful. Hill relies on State v. Green, 157 Wn. App. 833, 239 P.3d 1130 (2010), to further his argument. Hill’s reliance on Green is misplaced.

In Green, the defendant was convicted of criminal trespass arising from Green’s entry into her child’s school in violation of a notice of trespass issued to her by the school district. 157 Wn. App. at 837. The school district issued Green a letter constituting a notice of trespass where it informed Green she was restricted from entering the school without prior permission, with the exceptions of either picking up her son or contacting the office with questions about her son. Id. at 838. A subsequent letter clarified

⁵ It is reasonable to infer that Hill knew he had been permanently trespassed in 2009, because he provided a fake name in 2011 when he was located at the Commons Mall and trespassed a second time.

that Green could also enter the premises to attend non-school-related functions and to vote. Neither letter addressed a process for appealing or challenging the notice. Id. Green wrote to the Kent School District Board of Directors requesting an opportunity to discuss the trespass notice. The school board responded that its members and the superintendent had determined that further discussion was not necessary and that it expected Green to abide by the trespass notice. Id. Neither letter provided information on any further right of review. Id. at 839. Green, in violation of the trespass notice, went on campus on three different occasions without prior approval. Id. at 840. Green was arrested and charged with first degree criminal trespass as a result of two of the three visits. Id.

At trial, the general counsel for the school district testified about two incidents giving rise to the trespass notice, although he did not work at the school when the incidents took place. Id. at 842. The general counsel testified that Green had been disruptive over the years, taking up a significant amount of teacher and staff time. Id. Green testified in her own defense, refuting the claims that she had been disruptive. Id. at 842-43. Green further raised

the statutory defense that she had complied with all lawful conditions imposed on the trespass notice. Id. at 843.

At the trial level, and on appeal, Green argued that the trespass notice was issued in violation of her right to due process because of the lack of procedures available to challenge the notice. For the same reason, Green argued that the State had failed to prove the basis for the trespass notice. Id. at 837.

Just as in R.H., supra, once Green offered some evidence that the entry was permissible under the statutory defense, the State had the burden to prove beyond a reasonable doubt that she lacked license to enter the school. Id. at 844; RCW 9A.52.090. Thus, the central issue in Green was whether the State had proved beyond a reasonable doubt that Green had disrupted the classroom procedures or learning activities, triggering the statutory right of the school district to restrict Green's access as contained in the trespass notice. Id. at 845. In reversing Green's conviction, this Court found that there was no competent testimony, i.e., evidence that Green had acted in a disruptive manner, to establish that the school district had the basis to revoke Green's limited statutory right of school access. Id. at 852.

The case at bar is not analogous to Green. Hill did not contest the lawfulness of the trespass order. By providing a fake name in 2011, he implicitly acknowledged that he was violating the 2009 trespass notice. There is no reason to believe the exclusion was unlawful because the evidence established he was trespassed for shoplifting. Additionally, unlike in Green, where the only testimony supporting the basis for the trespass was inadmissible hearsay evidence, here there was competent testimony that Hill's trespass notice was lawfully issued. Although Officer Adams did not remember the specific circumstances of the trespass, other than that Hill was arrested for theft after having been identified as stealing from several stores, he testified that he recognized Hill as the person he had trespassed in 2009. RP 44, 50.

In sum, the evidence established that in 2009 Hill stole from Sears and as a result was permanently trespassed from the Commons Mall; in 2011 Hill was trespassed a second time; on September 22, 2012, Hill went to the Commons Mall in violation of both notices; at the time of arrest, Hill admitted he had been trespassed, not only once, but twice; and unlike in Green or R.H., the lawfulness of the exclusion was not contested at trial. There was ample evidence in the record to support a finding that Hill's

2009 trespass notice was lawful. Hill's conviction should be affirmed.

2. THE CONTENT OF THE TRESPASS NOTICE WAS NOT TESTIMONIAL.

For the first time on appeal, Hill argues that evidence of the content of the trespass notice was testimonial and inadmissible hearsay. Specifically, Hill contends that (1) Officer Adams' testimony violated his constitutional right to confrontation; and (2) the admission of this evidence was not harmless. Because Officer Adams' testimony was admissible under the business record exception to the hearsay rule, and Hill cannot make a showing of actual prejudice, these arguments fail.

It is well-settled that appellate courts generally will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An exception exists for manifest errors affecting the defendant's constitutional rights. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). But this exception is a narrow one. State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). In order to raise a claim for the first time on appeal, the defendant must show

that the error alleged is both truly “manifest” and of constitutional dimension. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). It is not sufficient to merely identify a constitutional error and then require the State to prove it harmless beyond a reasonable doubt. State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

Hill acknowledges that he did not object to the testimony of Officer Adams, but urges this Court to find that this testimony violated his right to confrontation. Hill speculates that if he had successfully raised his confrontation rights, this evidence would have been excluded. Hill makes a general statement that Officer Adams’ testimony was testimonial hearsay and inadmissible under Crawford.⁶ This argument is flawed because Officer Adams’ testimony was properly admitted.

The Confrontation Clause of the Sixth Amendment bars the admission of testimonial out-of-court statements in the absence of an opportunity for cross-examination. The Confrontation Clause applies only to testimonial statements or materials. A testimonial statement is a “solemn declaration or affirmation made for the

⁶ Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

purpose of establishing or proving some fact.” Crawford, 541 U.S. at 68. The United States Supreme Court has not yet provided a comprehensive definition of what constitutes a testimonial statement, but the Court has listed three possible formulations for the core class of testimonial statements: (1) *ex parte* in-court testimony or its functional equivalent; (2) extrajudicial statements that contain formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. State v. Hurtado, 173 Wn. App. 592, 598-99, 294 P.3d 838, rev. denied, 304 P.3d 115 (2013) (citing State v. Jasper, 158 Wn. App. 518, 527, 245 P.3d 228 (2010), aff’d, 174 Wn.2d 96, 271 P.3d 876 (2012)).

Since Crawford, this Court has addressed whether information contained in documents offered as business records constitutes testimonial hearsay. In State v. Bellerouche, 129 Wn. App. 912, 917, 120 P.3d 971 (2005), this Court held that a trespass notice could be admitted as a business record exception to the hearsay rule. In that case, a police officer issued Bellerouche a notice stating that he was prohibited from entering

the property listed on the notice and that entering such property “may result in prosecution.” Id. at 914. The police officer did not testify at the hearing. Id. The trial court admitted the notice as a business record over defense counsel’s objection. Id. This Court reasoned that business records are not prepared with an eye toward trial. Id. at 917. The Court noted that a trespass notice is not the functional equivalent of testimony and may be admitted at trial. Id. However, when the person who prepares the document testifies at trial, the document need not be admitted to prove its contents. When the required foundation for the admission of a business record is satisfied, the content of the record is admissible as trustworthy evidence even if the document itself is not introduced at trial. State v. Rutherford, 66 Wn.2d 851, 854-55, 405 P.2d 719 (1965), cert. denied, 384 U.S. 267 (1966). But see, State v. Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979) (holding the contents of a document not admissible when the document itself is not admissible for lack of foundation).

Here, Officer Adams testified at trial that Hill had been trespassed for stealing. The record is silent as to the specifics of that theft. Hill speculates that witnesses or other police officers reported the theft to Officer Adams, implying that Officer Adams did

not have personal knowledge. Officer Adams testified that he completed the trespass notice in the normal course of his duties as an officer of the Commons Mall. RP 43. Officer Adams included information that was relevant to the mall's right to revoke Hill's access to the business – Hill's identifying information and reason for the exclusion – independent of any relevance that the same information might have in a criminal proceeding. By filling out the trespass notice, Officer Adams was not making a "solemn declaration" for prosecutorial testimonial purposes, excludable under Crawford. That the contents of the notice were ultimately used in a criminal prosecution against Hill does not transform the notice's information into the functional equivalent of testimony under Crawford. Bellerouche, 129 Wn. App. at 917.

Therefore, this Court should decline Hill's invitation to speculate as to how Officer Adams obtained the information in the trespass notice and hold that the business record on which Officer Adams' testimony was based on was not testimonial in nature.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Hill's conviction for first degree criminal trespass.

DATED this 23rd day of April, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Richard W. Lechich, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JAHAD HILL, Cause No. 70426-5 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 23 day of April, 2014



Bora Ly
Done in Seattle, Washington