

No. 73839-9-1

73839-9

73839-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

H.A.S.

Appellant.

BRIEF OF APPELLANT

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H.A.S. is the Appellant.

III. ASSIGNMENT OF ERROR

H.A.S.'s SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED, DUE TO HIS ATTORNEY NOT OBJECTING TO THE HEARSAY EVIDENCE ABOUT M'S ALLEGED INJURY, WHICH VIOLATED THE CONFRONTATION CLAUSE AND H.A.S.'s RIGHT TO CONFRONT WITNESSES AND CROSS EXAMINE THEM.

IV. STATEMENT OF THE CASE

On March 26, 2014, H.A.S. got into a fight with IM at Thomas Jefferson High School during lunch time (RP 30, 34-38). IM testified at trial that he was sucker punched in the face by H.A.S. and “fell immediately to the floor” (RP 174, 176). IM then testified that while he was on the floor, H.A.S. was both punching and kicking him (RP 177). IM stated that he did not fight back; that he was just trying to cover up and block the punches and kicks (RP 177-178). IM stated that he was punched “seven or eight times,” that is, punches that landed (RP 180). IM testified that he was kicked in the head, near the right eye, on the forehead, and the back of the head as well (RP 180-181). As IM tried to get up, he stated that H.A.S. kicked him one more time (RP 181).

Officer Travis Tilford was stationed inside the cafeteria, stationed about 60 feet away from where the fight took place (RP 35-36). He testified at trial that it took him about 10 seconds before he was first aware of the fight taking place, and another 10 seconds to run over to where the fight was occurring (RP 40, 50). There was a school video that was taken, and a cell phone video as well that confirmed that H.A.S. was fighting with IM (RP 49-50, 62-63). Officer Tilford testified at trial that IM had a knot on his forehead, and that he had “black and darkened eyes” (RP 84-85).

Officer Tilford testified that he arrested H.A.S. almost immediately after he broke up the fight (RP 50). Officer Tilford searched him incident to arrest, put handcuffs on him, and “placed him in the back of a police car with a transporting officer,” who drove him to the police station (RP 67, 75, 90).

During the trial, Dr. Gregory Lopez testified about the medical condition of IM. Dr. Lopez testified that he was an emergency medical doctor at Auburn Medical (RP 144). His job is to see patients; Dr. Lopez also stated that with regard to the Physician’s Assistants (PA) that work there and see patients, “We are available to consult with us if they feel that what they’ve just encountered is outside their scope of practice” (RP 144). The State never tried to qualify Dr. Lopez as a medical expert, nor did the judge admit his testimony as expert testimony. Dr. Lopez was not listed as an expert witness on the State’s witness list (CP 71, p.37-38).

The prosecutor then asked Dr. Lopez with regard to the medical reports that the PA prepares, does the attending doctor sign off on it, to which Dr. Lopez replied:

“Yeah, we’re required – because we’re supervising them and we’re available to them, there’s a verbiage that you have to put on the bottom of every chart that basically says that the PA saw the patient and this is out chat” (RP 149).

The PA that examined IM was Carol Firmhart (RP 146-147). Dr. Lopez testified at trial that he did not examine IM, stating:

Prosecutor: So to clear something up, have you ever met, to your knowledge, somebody named IM?

Dr. Lopez: No.

Prosecutor: And do you have any personal knowledge about IM?

Dr. Lopez: No” (RP 145).

The State then went on to question Dr. Lopez about the medical report created by the PA Carol Firmhart. The State asked Dr. Lopez the following:

Prosecutor: So I’d like to talk a little bit more going back about IM’s diagnosis. What was his diagnosis as determined by the PA?

Dr. Lopez: I can read it right here. Head injury—

Prosecutor: I’m sorry, before you review that, do you need to review that to refresh your recollection?

Dr. Lopez: No, I’ve had some time.

Prosecutor: Okay.

Dr. Lopez: I just want to get the exact verbiage right, but I believe it was head injury and scalp contusions.

Prosecutor: What's a scalp contusion?

Dr. Lopez: So – or scalp hematoma, forgive me..." (RP 151).

H.A.S. objected to the testimony, but the testimony was admitted as evidence, based on the Business Record exception to the hearsay rule (RP 151). H.A.S. did not object on the basis of a Confrontation Clause violation.

H.A.S was found guilty of Assault in the 2nd degree, causing substantial bodily harm (RP 246).

V. ARGUMENT

- A. H.A.S.'s SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED, DUE TO HIS ATTORNEY NOT OBJECTING TO THE HEARSAY EVIDENCE ABOUT IM'S ALLEGED INJURY, WHICH VIOLATED THE CONFRONTATION CLAUSE AND**

**H.A.S.'s RIGHT TO CONFRONT WITNESSES AND
CROSS EXAMINE THEM.**

Under Washington Law, a defendant must satisfy a two-prong test in order to demonstrate an ineffective assistance of counsel claim. State v. Rainey, 107 Wn.App. 129, 135, 28 P.3d 10 (2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). First, a defendant must show that the defense counsel's representation was deficient, as defined as "falling below an objective standard of reasonableness." Rainey, at 135; State v. McFarland, 127 Wn.2d 322, 335-336, 899 P.2d 1251 (1995). Second, a defendant must show that he or she was prejudiced by the deficient representation. Id. at 335-336.

Prejudice exists if:

...there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 335-336.

In the present case, the PA Carol Firmhart was the medical person who examined the victim, IM (RP 146-147). At trial, the State asked Dr. Lopez about his personal knowledge of IM:

Prosecutor: So to clear something up, have you ever met, to your knowledge, somebody named IM?

Dr. Lopez: No.

Prosecutor: And do you have any personal knowledge about IM?

Dr. Lopez: No.”(RP 145)

The State then went on to question Dr. Lopez about the medical report created by the PA Carol Firmhart. The State asked Dr. Lopez the following:

Prosecutor: So I'd like to talk a little bit more going back about IM's diagnosis. What was his diagnosis as determined by the PA?

Dr. Lopez: I can read it right here. Head injury—

Prosecutor: I'm sorry, before you review that, do you need to review that to refresh your recollection?

Dr. Lopez: No, I've had some time.

Prosecutor: Okay.

Dr. Lopez: I just want to get the exact verbiage right, but I believe it was head injury and scalp contusions.

Prosecutor: What's a scalp contusion?

Dr. Lopez: So – or scalp hematoma, forgive me...” (RP 151).

H.A.S. objected to the testimony, but the State was allowed to go forward with the testimony based on the Business Record exception to the hearsay rule (RP 151). H.A.S. did not object on the basis of a Confrontation Clause violation. H.A.S. believes that the medical record and the testimony surrounding it are testimonial, and that it was ineffective assistance of counsel to not make the confrontation clause violation objection.

1. The Testimony By Dr. Lopez Revolving Around IM’s Medical Reports Violated the Confrontation Clause.

The Sixth Amendment’s Confrontation Clause provides that in all criminal prosecutions, the defendant will have the ability to confront witnesses that are against him. This “bedrock procedural guarantee applies to both federal and state prosecutions.” Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354 (2004). In Washington State, “Article 1, section 22 of the Washington State Constitution guarantees criminal defendants the right to confront and cross examine witnesses.” State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007).

Allowing the regulation of out-of-court statements to come under the law of evidence would render the Confrontation Clause

powerless. Crawford at 52. Protection from the Constitution is necessary, because “where testimonial statements are involved, we do not think that the Framers meant to leave the Sixth Amendments protection to the vagaries of the rules of evidence...” Crawford at 61.

The Washington State Supreme Court has ruled that the proper test to be used in determining whether a statement is testimonial or non-testimonial is the following:

“Whether a reasonable person in the declarant’s position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. The inquiry focuses on the declarant’s intent by evaluating the specific circumstances in which the out of court statement was made.” State v. Shafer, 156 Wn.2d 381, 390, 128 P.3d 87 (2006).

The rule in determining whether a statement was testimonial or not, was better defined by the Washington State Supreme Court a year later in State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007). The Ohlson court devised a four prong test to help determine if the statements were testimonial or not. Id. at 12.

The test is objective, with the four prongs being:

“1) The timing relative to the events discussed; 2) the threat of harm posed by the situation; 3) the need for information to solve a present emergency; 4) the formality of the interrogation.” Ohlson at 12.

Evidence is testimonial when the primary purpose is “to establish or prove past events potentially relevant to a later criminal prosecution.” Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Primary purpose

does not mean sole purpose, meaning that there can be dual purposes. These statements or documents are typically

“Made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Melendez-Diaz, 557 U.S. 305, 311, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

Hospital/medical records are analogous to 911 calls with regard to whether or not they are only business records, and whether or not they become testimonial. A 911 call can be just a business record if the call is about a cat being stuck in a tree; or if someone is reporting a car accident that is truly an accident and not criminal in nature. There is a process that is always followed with regard to a 911 call that can be considered under the business records exception of the hearsay rule, and there would be no confrontation clause violation, since they are 911 situations that don't fall under the purview of criminal law.

The same is true for hospital and medical records. If someone goes to the hospital for an appendicitis, it's only a business record; it is not a criminal case, because there is no foreseeable criminal case where the medical record of an appendicitis could be used.

If someone is in a fight and goes to the hospital, and is rushed there by ambulance and must be attended to immediately in what can be considered as an emergency situation, the primary

purpose can be considered a medical emergency and would be considered non-testimonial.

In the present case, on page one IM's medical report, it states the following:

"IM is a 16 year old male who presents after an assault at school today. Apparently, his girlfriend and another girl had a fight yesterday, the other girl told her boyfriend to come and beat him up. He approached him outside the school, not (sic) into the ground, pushed him down and kicked him in the head two times in the front and two times in the back... he was also punched in the mouth... the police were at the scene." (State's Exhibit #8).

Both Dr. Lopez and the PA were aware that IM had been beaten up, and thus, that there was likelihood that the medical record and any future testimony about IM's medical condition would be a part of a future criminal proceeding. Like Melendez-Diaz and Bullcoming, this was not an ongoing emergency. H.A.S. had been arrested almost immediately at the high school. IM was still at the high school 30 minutes after the assault took place, sitting in the nurse's office with an ice pack on him (RP 84-85). There was no rush to take IM to the hospital for emergency care.

When looking at the objective four prong test in Ohlson, the medical report and statements surrounding the medical report and IM's condition were testimonial. Ohlson at 12. The timing of the assault relative to the medical examination by the PA was anywhere from an hour to a few hours after the assault occurred, based on Officer Tilford's testimony (RP 84-85) and the times

listed on the medical report (State's Exhibit #8). There was no threat of harm, because Officer Tilford testified that he had arrested H.A.S. almost immediately after the assault occurred (RP 50). There was no present emergency; there was no threat of another assault, nor was there a threat of a health emergency, given the lag time of IM going to the hospital and being seen by the PA. While it wasn't a police interrogation, there was formality; the PA asked information about how the injuries occurred during a medical examination, and listed in detail the information at the beginning of the medical report as to IM being assaulted (State's exhibit 8). Like Melendez-Diaz and Bullcoming, the testimony surrounding IM's medical reports were testimonial in nature and were a violation of the Confrontation Clause, under both the Sixth Amendment and article 1, section 22.

In Melendez-Diaz and Bullcoming,

"The Court held that the particular forensic reports at issue qualified as testimonial statements, but the Court did not hold that all forensic reports fall into the same category. Introduction of the reports in those cases ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial. There was nothing resembling an ongoing emergency, as the suspects in both cases had already been captured, and the tests in question were relatively simple and can generally be performed by a single analyst. In addition, the technicians who prepared the reports must have realized that their contents (which reported an elevated blood-alcohol level and the presence of an illegal drug) would be incriminating." Williams v. Illinois, 132 S. Ct. 2221, 2243, 183 L. Ed. 2d 89 (2012).

Dr. Lopez's testimony about IM's injuries was all derived from the PA's medical report and the "chat" (RP 149, LN 19-25, and State's Exhibit # 8) that Dr. Lopez had with the PA. The only other testimony Dr. Lopez gave was when he got into the nuances about the injuries that the PA had concluded IM had suffered; that is, the testimony from Dr. Lopez's that wasn't sourced from the PA was what would typically be expert testimony. However, as stated earlier, Dr. Lopez was never qualified as an expert, nor did the State ever attempt to have him qualified as an expert. He was not listed on the State's witness list as an expert witness. It was ineffective assistance of counsel for H.A.S. not to object to that testimony. It should not have been allowed, unless Dr. Lopez was ruled qualified by the Court as an expert witness.

In Williams, Justice Kagan in her dissent cut to the chase and got to the heart of the problem about letting a supervisor who had no personal knowledge, testify in place of the underling who did have personal knowledge:

"Still worse, that approach would allow prosecutors to do through subterfuge and indirection what we previously have held the Confrontation Clause prohibits. Imagine for a moment a poorly trained, incompetent, or dishonest laboratory analyst. (The analyst in Bullcoming, placed on unpaid leave for unknown reasons, might qualify.) Under our precedents, the prosecutor cannot avoid exposing that analyst to cross-examination simply by introducing his report. See Melendez-Diaz, 557 U.S., at 311. Nor can the prosecutor escape that fate by offering the results through the testimony of another analyst from the laboratory. See Bullcoming, 564 U.S., at ____." Williams, 2273 (Dissent Justice Kagan).

In the present case, it was clear that the State preferred to have a medical doctor who had a prestigious background and education testify, rather than a PA. The State's first question for Dr. Lopez was about the schools he had attended, and he answered Harvard undergraduate, and NYU medical school, two of the most prestigious schools in the country (RP 143). Dr. Lopez went on to list his experience and credentials (RP 143-145). It was obvious that the State preferred to have the more credentialed Dr. Lopez testify, than the PA, because his words would be taken with more weight than the PA.

However, this allowed the State to have the less qualified PA, who was the medical person with personal knowledge of IM's medical condition, avoid the scrutiny of cross examination. As Judge Kagan wrote in her dissent, "The prosecutor could choose the analyst-witness of his dreams." Williams, 2273 (Dissent, Justice Kagan). This is in essence what the State has done: They chose their dream witness to testify, a Harvard educated, NYU educated doctor, to bolster the medical testimony, and shield the less credentialed PA from the scrutiny of cross examination.

Both Dr. Lopez and the PA were aware that this report or testimony based on the report could be used to prove the guilt of a criminal defendant; there was no ongoing emergency; and the report was generated by one person, the PA. The State could have

easily had the PA testify at trial; there was no reason given why the PA didn't testify at trial. The State could have listed Dr. Lopez as an expert witness, qualified him, and then let him testify about almost anything that he wanted to once the PA testified. This is a way of sneaking evidence through the back door, bolstering the testimony with a more qualified supervisor, without allowing the cross examination of the underling that actually did the examination. Or as Stated in the dissent in Lui, "a well credentialed conduit for testimonial hearsay." State v.Lui, 179 Wn.2d 457, 525, 315 P.3d 493 (2014)(Dissent, Justice Stephens) (quoting United States v. Ramos-González, 664 F.3d 1, 5 (1st Cir. 2011)).

Like Melendez-Diaz and Bullcoming, the testimony surrounding IM's medical reports were testimonial in nature. Despite the State's attempts at characterizing these statements that rely on IM medical reports at trial as a business records exception, the U.S. Supreme Court and the Washington State Courts agree that these records are testimonial in nature, because they are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." State v. Jasper, 174 Wn.2d 96, 115, 271 P.3d 876 (2012); Melendez-Diaz, 557 U.S. at 310. This was a violation of

the Confrontation Clause, under both the Sixth Amendment and article 1, section 22.

B. WITH REGARD TO THE CONFRONTATION CLAUSE, THE PRESENT CASE IS MORE AKIN TO THE BULLCOMING AND MELENDEZ DIAS LINE OF CASES THAN WILLIAMS AND LUI.

H.A.S. believes that Williams and Lui would not be on point with the present case. The facts in Williams are the following:

“In Williams, an expert testified that a DNA profile taken from a rape victim matched a DNA profile recovered from the defendant. Id. at 2230. The expert did not prepare the DNA profile; rather, she relied on a DNA profile prepared by an outside laboratory. Id. at 2229. No one from that laboratory was subject to cross-examination. Lui, at 477.

In the present case, Dr. Lopez did not testify as an expert. The State never tried to have him qualify as an expert; the judge never qualified Dr. Lopez as an expert, or admitted his testimony as expert testimony; and the State never listed Dr. Lopez on the witness list as an expert (CP 71, p.37-38). When the State admitted testimony from Dr. Lopez about the medical examination that was performed by the PA, it was admitted under the business records exception for hearsay (RP 151).

Also, Williams and Liu were DNA cases. This is important, because the decisions in Williams and Lui were narrow decisions that applied to experts testifying in DNA cases; the Lui Court stated:

“The United States Supreme Court would reach the same result as this opinion under these facts. The result in Williams was that a

forensic specialist was permitted to rely on an outside laboratory's DNA profile when testifying that it matched a sample of the defendant's blood without violating the defendant's confrontation rights. See *Williams*, 132 S. Ct. at 2228 (plurality opinion), 2255 (THOMAS, J., concurring in judgment). Our opinion reaches the same result today: experts may rely on DNA profiles created by other laboratory analysts when concluding there is a DNA match without violating the confrontation clause.” *Lui*, at 483.

The majority in both cases ruled that DNA lab results were nontestimonial; it was the analysis of the DNA samples that were testimonial. *Williams*, at 2243-2244; *Lui*, at 467, 485, 489.

H.A.S. believes that his case falls more in line with *Melendez-Diaz* and *Bullcoming*. This is because they deal with reports that are testimonial in nature. These reports were being presented at trial and testified about, by supervisors who did not prepare the reports. These same people have no personal knowledge of any of these tests, and were not qualified as experts at trial, virtually the same as what occurred in H.A.S.’s case.

2.The Violation of the Confrontation Clause Was Not Harmless Error.

With regard to Confrontation Clause errors, “they are subject to constitutional harmless-error analysis. *Lui*, at 527; *Jasper*, at 117. It’s much “more stringent than that for violations of court rules and other non-constitutional errors.” *Lui*, at 527. The difference is that

“Under the constitutional error standard, prejudice is presumed and the State must show ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Lui*, at 527; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.

Ed. 2d705 (1967); State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

With regard to the overwhelming untainted evidence test, it “considers the untainted evidence admitted at trial to determine ‘if it is so overwhelming that it necessarily leads to a finding of guilt.’” Lui, at 528; State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (citing State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)). The purpose of this test is that it

“Ensures that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.” Lui, at 528.

The testimony by Dr. Lopez goes directly to an element of this type of assault: “That the respondent thereby recklessly inflicted substantial bodily harm on IM” (RP 243). If Dr. Lopez was not allowed to testify to what the PA wrote in her report and what was discussed between the two of them (State’s Exhibit #8), there would not have been any medical testimony to support the finding of “substantial bodily harm.” While an assault definitely took place, without that medical testimony, there is no way to determine if this is an assault in the 4th degree, 3rd degree, or 2nd degree.

3.The Judge in this Bench Trial Cannot Disregard the Testimonial Evidence that Was Inadmissable.

The present case was a bench trial. Under normal circumstances, a judge in a bench trial is presumed to have the ability to disregard inadmissible information because:

“When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose. As we have noted, “[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.” Williams, at 2235; Harris v. Rivera, 454 U.S. 339, 346, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981) (per curiam). There is a “well-established presumption” that “the judge [has] adhered to basic rules of procedure,” when the judge is acting as a factfinder. Williams, at 2235; Harris, at 346-347,

While the present case was a bench trial, this was not a situation where the Court was able to separate out Dr. Lopez’s inadmissible testimony that violated the confrontation clause, because the Judge admitted all of the inadmissible testimony based on the business record exception to hearsay rule (RP 151). The judge was obligated to rely on the information that was testimonial, but inadmissible, because it violated the confrontation clause was admitted into evidence.

VI. CONCLUSION

H.A.S. requests that the Appellate Court rule that his right to effective assistance of counsel under the Sixth Amendment was denied, due to his attorney’s failure to properly object to the Dr. Lopez’s testimony with regard to IM’s medical report and conversations that Dr. Lopez had with the PA. This led to

testimony to be admitted into the trial that was testimonial in nature and violated the Confrontation Clause. H.A.S. requests that the Appellate Court reverse the conviction of Assault in the Second degree, causing substantial bodily harm, and order the case back to the trial court for a new trial.

June 10th, 2016

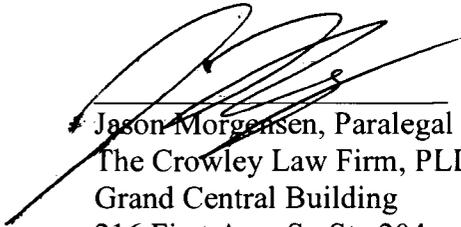


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PROOF OF SERVICE

On March 11, 2016 I filed the attached Appellant's Brief with the Washington State Court of Appeals Division I via US Mail, postage prepaid, at Division I Court of Appeals, 600 University Street, Seattle, WA 98101-1176. On this same date, I served via US Mail, postage prepaid, the King County Prosecutor's Office with a copy of this Appellant's Brief at 516 Third Avenue, W400, Seattle, WA 98104. The Appellant in this case was mailed a copy of the Appellant's Brief on the same date.

DATED this 10th day of June, 2016.



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June 10, 2016

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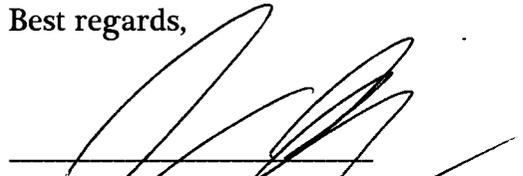
Re: *State v. Al-Shiblawi King County Superior Court Ca No 14-8-00481-0 SEA, State of Washington Court of Appeals Division I Ca No 740296-I*

73839.9

Dear Court Clerk,

Please find the attached Appellant's Brief. A copy has been mailed to the King County Prosecutor and the Appellant on today's date. Should you have any questions, please do not hesitate to contact me.

Best regards,



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