68606-2

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NO. 68606-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

YEVGENI OSTROVSKI,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

BRIEF OF APPELLANT

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1. The court's admission of a non-testifying witness' identification of a knife as being the one used by appellant during the charged assault violated appellant's right to confront his accusers.

2. The court's admission of the non-testifying witness' identification of the knife violated the rules of evidence.

3. The court erred in refusing to instruct the jury to disregard the non-testifying witness' identification of the knife.

Issues Pertaining to Assignments of Error

1. Was appellant's right to confront his accusers violated when the court allowed a police officer to testify that a non-testifying witness showed him the location of the knife used by appellant during the charged assault?

2. Did the court err in overruling defense counsel's timely hearsay objection to the officer's testimony about the non-testifying witness' identification of the knife?

3. Did the court err in refusing to give defense counsel's proposed instruction directing jurors to disregard that portion of the officer's testimony where he indicated that someone had pointed to the location of the knife?

B. STATEMENT OF THE CASE[1]

1. Procedural Facts

Yevgeni Ostrovski is appealing his convictions for second degree assault while armed with a deadly weapon, witness tampering and six counts of misdemeanor violation of a no contact order, following a jury trial in King County Superior Court. CP 154-161; Supp. CP __ (sub. no. 93, Notice of Appeal, 4/6/12); Supp. CP __ (sub. no. 83, Judgment and Sentence (non-felony)). Regarding the second degree assault charge, the state alleged Ostrovski threatened his wife Tatiana Brodiski with a knife on August 20, 2011. CP 1-7. The tampering charge and no contact order violations were based on telephone calls Ostrovski reportedly made later, while awaiting trial. 3RP 61-65; 4RP 39-59.

At sentencing, the court imposed an exceptional sentence below the standard range on the second degree assault, on grounds Brodiski was a willing participant to the no contact order violations, which – due to recent legislation – increased Ostrovski's offender score and resulted in a sentence the court deemed was

[1] This brief refers to the transcripts as follows: 1RP – motion to dismiss and pretrial hearings on November 1, December 12 and December 13, 2011; 2RP – jury trial on December 14, 2011; 3RP – jury trial on December 15, 2011; and 4RP – jury trial on December 19-21, 2011, and sentencing on March 19, 2012.

clearly excessive. CP 162-164; 4RP 194-95; RCW 9.94A.525(21)(c).

Regarding imposition of an existing no contact order, the court made exceptions for written and telephonic contact, as well as in-person contact during Ostrovski's incarceration. 4RP 198. Based on the transcript of the telephone calls, the court was not concerned about contact between Ostrovski and his wife:

> I did not find that this was an abusive relationship exchange like it is frequently. This was basically in the phone calls Mr. Ostrovski and Ms. Brodiski trying to figure out how to stop the proceedings that had been started because of his actions, but there was no bullying, there wasn't any disrespect in the phone calls that I saw at all. So I don't – I'm not concerned about their contact.

4RP 197-98.[2]

2. Trial Testimony

At about 11:00 p.m. on August 20, 2011, police officers were dispatched to Ostrovski and Brodiski's Mercer Island home, after receiving a 911 call from Brodiski. 1RP 76-79. Brodiski had reported Ostrovski held a knife to her throat and said he was going

[2] Although Ostrovski was also charged with felony harassment of his daughter, and a pre-trial no-contact order issued as a result, he was acquitted of that charge. Supp. CP __ (sub. no. 9, Pre-Trial No Contact Order, 9/6/11); CP 132 (verdict of acquittal). Accordingly, as the court noted at sentencing, there is no order limiting Ostrovski's contact with his daughter. 4RP 203; RCW 10.99.040(3).

to kill Brodiski and them himself.[3] 4RP 15. She reported to 911 dispatch she was hiding in the bushes at a neighbor's house, but was worried for her daughter who was still in the home. 1RP 100.

When police arrived, they found Ostrovski calmly sitting outside on the patio smoking a cigarette with his friend, Gennady Belyaev, who was staying with the family temporarily. 1RP 81-82; 2RP 7, 12; 2RP 57; 3RP 32-33. While Herzog and officer Michael Vickers were questioning Ostrovski and Belyaev, Ostrovski's 14-year-old daughter Jesika came out onto the patio. 1RP 84. According to the officers, she was visibly upset, shaking and crying. 1RP 85. Ostrovski started speaking to her calmly in Russian, but Herzog directed him to stop, as is standard police procedure when there are multiple witnesses. 1RP 84, 95, 99-100. Herzog directed Jesika to go with officer John Haraway back in the house. 1RP 84.

Haraway similarly described Jesika as upset. 3RP 67. After much coaxing, she was finally calm enough to explain what reportedly happened. 3RP 68. Jesika said she saw her father hold a knife to her mother's throat in the corner of the kitchen. 3RP 70. Jesika reportedly heard him say he was going to kill Brodiski and

[3] The 911 call was admitted at trial as an excited utterance. 1RP 27; 2RP 18-19.

then himself.[4] 3RP 70. Based on this, police arrested Ostrovski. 1RP 87; 3RP 70-71.

Meanwhile, police dispatch had advised Brodiski to return to the home so police could question her directly. 1RP 81. Police attempted to take statements from Brodiski and Belyaev but encountered difficulties because neither speaks or writes English fluently. 1RP 89; 3RP 88. As a result, police requested Jesika translate and transcribe their statements into English for them, which she did. 1RP 88. Herzog acknowledged this is not normal police procedure. 1RP 89.

At trial, Brodiski testified Ostrovski never threatened her with a knife. 3RP 34-35. She explained she had been drinking – which she seldom does – and that she and her husband were arguing. 3RP 16, 26, 32. Brodiski testified Ostrovski had a knife, but he was using it to chop salad. 3RP 24, 33. He did not threaten her with it, but he was "very talkative" and "talk[ing] too much" while holding the knife. 3RP 34-35. Brodiski testified she asked Ostrovski for the knife and threw it under the table after he handed it to her. 3RP 24-25. She subsequently called police, because she is generally

[4] Jesika's statement was also admitted at trial as an excited utterance. 3RP 55-57, 69.

fearful of knives. 3RP 35-36. She now believed she overreacted and never should have called the police. 3RP 28, 38.

Jesika's trial testimony corroborated her mother's. 3RP 79-83. Jesika testified she awoke upon hearing her parents argue and went out to the kitchen to investigate. 3RP 79-80. Generally, Jesika is not in good spirits when she wakes up and this night was no different. 3RP 87, 89, 106. Plus, she was upset her parents were arguing. 3RP 109.

Jesika explained her father has a habit of talking with his hands. 3RP 80. On this occasion, he was talking emotionally and gesturing with his hands, while also holding the knife and cutting salad. 3RP 80-81, 104. Although Ostrovski did not show any aggression, the situation frightened Jesika. 3RP 81. She was tired, did not understand what was happening and exaggerated to police because she was confused and upset about her parents fighting. 3RP 80-82, 100-102.

3. Admission of Non-Testifying Witness' Supposed Identification of Knife Used During Alleged Assault.

By the time of trial, Belyaev had returned to the Ukraine and was unavailable for trial. 1RP 32. The state initially claimed it

would seek to admit Belyaev's statement to police at trial,[5] if it could prove his unavailability was somehow the result of Ostrovski's wrongdoing. 1RP 33, 35, 69. The state later abandoned this undertaking, however. 2RP 3.

Significantly, in its motions in limine, the defense questioned the state's ability to introduce evidence of the knife reportedly used during the alleged assault. 1RP 38. In other words, the defense questioned, "whether the State has actually anybody to create a foundation for that knife as being part of the case." 1RP 39. The court indicated "the knife will obviously have to be identified by a witness[;]" the court assumed it would be Brodiski or Jesika. 1RP 39.

Evidence of the knife was admitted – over defense counsel's objection – through Corporal David Herzog. 1RP 97. Herzog testified that after Ostrovski was arrested, he remained at the home and assisted taking statements from Jesika, her mother and Belyaev. 1RP 88, 96. Herzog testified Belyaev spoke some

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[5] In the statement, which Jesika translated and transcribed, Belyaev reportedly alleged:

> Genia said when he gets out of jail he will kill his wife, daughter and himself no matter what. He grabbed a knife and swung the knife around saying he'll kill her.

CP 35.

English, that Herzog could understand what Belyaev "was trying to say, but it was broken." 1RP 96.

In fact, Herzog testified it was Belyaev who identified the knife:

> BY MS. HARRISON [prosecutor]:
>
> Q. Corporal Herzog, when you observed the kitchen area in addition to what you described, did you note anything?
>
> A. After the – after Jesika and the witness told us, I asked them where the knife was that we had the information that was used, and the roommate went to the kitchen counter and pointed out where the knife was.
>
> MR. WONG: Objection; hearsay.
>
> THE COURT: Overruled.
>
> Q. What happened with the knife; where was it?
>
> A. It was on the kitchen counter tucked in the back corner by the sink area.
>
> Q. Okay. Did you see it then?
>
> A. Yes, I did.
>
> Q. How big would you say it is?
>
> A. I would probably guess it to be about a six-inch, seven-inch blade.
>
> Q. So what happened with it; what was done with it?

> A. I believe that it was photographed and placed into evidence by it was either Officer Haraway or Officer DeChant.

1RP 96-97. Haraway testified he packaged the knife for evidence. 3RP 72.

The knife reportedly identified by Belyaev was itself offered through detective Peter Erickson, who retrieved it from the police property room. 2RP 19-20; Ex 3. Erickson had to-scale photographs taken, which were also admitted as evidence. 2RP 23; Ex 2. The photographs showed the blade was five-and-a-half inches long. 2RP 24.

4. Discussion of Limiting Instruction Regarding Out-of-Court Identification

Following Herzog's and Erickson's testimony, the court brought up the subject of Belyaev's identification of the knife, and the following exchange occurred:

> THE COURT: Okay. Before I have the defendant go, I was just looking over my notes from the other day and there was a motion by a defense [sic] in regards to the other person pointing out the knife, where the knife was located.
>
> MS. HARRISON: Yes.
>
> THE COURT: Yes. And there was an objection as to hearsay, and I overruled that objection, but I just want for the record to – and I didn't get this request, but just

> for the record I am going to say did the defense want a limiting instruction in regards to that?
>
> MR. WONG: I think it was fine, your Honor. We're okay with that. Because when I made the objection, I heard him did say (sic) somebody pointed or told, that's why I objected. That's not that critical for me.
>
> THE COURT: You don't want a limiting instruction?
>
> MR. WONG: No. No.
>
> THE COURT: Okay. That just sparked out to me.

2RP 44.

Moments later, however, defense counsel indicated he was "on the five-second delay," not thinking clearly, and would in fact propose a limiting instruction. 2RP 45. The following is what defense counsel proposed:

> You will recall that I had allowed Corporal Herzog's testimony that someone had pointed to the location of the knife. I will ask you to disregard that this [sic] portion of his testimony.

CP 68.

As the following discussion about this proposed instruction indicates, however, the court's willingness to give a limiting instruction was far more limited in scope than proposed by the defense:

> THE COURT: . . . And your limiting instruction
> –

MR. WONG: Is that now how you want it, your Honor?

THE COURT: Well, my understanding of the limiting instruction is that it doesn't strike the testimony, it just limits it for a particular purpose.

MR. WONG: Yeah, I wanted to clarify that with you, but ...

MS. HARRISON [prosecutor]: And, your Honor, as counsel did not move to strike that section of testimony at the time it happened, I understand –

THE COURT: Well, he made an objection –

MS. HARRISON: He did.

THE COURT: -- as to hearsay, and my recollection – it's been a while, and I don't think I took verbatim notes at that portion of it, but my recollection is that the officer testified that the witness – that he was asked to point out where the defendant had put the knife.

MS. HARRISON: He pointed out the knife that the defendant had used.

THE COURT: Yes.

MS. HARRISON: Yes.

THE COURT: And so pointing out the location of the knife is okay because he saw that, but even nonverbal testimony indicating that the defendant used the knife is not allowed, so the limiting instruction would be that they can consider the officer's testimony about the actions of the witness – and don't use this verbatim because you're going to have to write it better than I can say it off the top of

> my head – for the purpose of locating the knife but not the identify of a person who used the knife. Does that make sense to you?
>
> MR. WONG: Yes.
>
> MS. HARRISON: It does.
>
> THE COURT: Okay. So that was the limitation on that. Okay?

4RP 13-15.

Although defense counsel initially indicated he would provide a corrected instruction, he later decided against giving the limiting instruction as dictated by the court, reasoning it would merely highlight the knife evidence. 4RP 21-22, 70-71, 78, 83.

C. ARGUMENT

1. THE COURT'S ADMISSION OF BELYAEV'S OUT-OF-COURT ACCUSATION AND IDENTIFICATION OF THE ALLEGED KNIFE VIOLATED OSTROVSKI'S RIGHT TO CONFRONT HIS ACCUSERS.

The trial court violated Ostrovski's constitutional right to confront witnesses when it admitted the testimonial hearsay statements of Belyaev through Corporal Herzog. Because Ostrovski objected to the admission of these hearsay statements, the constitutional violation is properly before this Court. State v. O'Cain, 169 Wn. App. 228, 235-36, 279 P.3d 926 (2012) ("It is up to

the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live") (quoting Melendez–Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 2532 n.1, 174 L.Ed.2d 314 (2009)).

An accused person has both state and federal constitutional rights to confront witnesses. Article I, section 22 guarantees an accused shall have the right . . . to meet the witnesses against him face to face. Wash. Const. art. I, § 22 (Amend. 10); State v. Shafer, 156 Wn.2d 381, 395, 128 P.3d 87, cert. denied, 75 U.S. 3247 (2006). Likewise, the Sixth Amendment protects the right of the accused to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The essence of the right to confrontation is the right to meaningfully cross-examination one's accusers. Id. at 50, 59. Consequently, unless the speaker is unavailable and the accused had an earlier opportunity to cross-examine, hearsay evidence of a testimonial statement is inadmissible. Id. at 68. This Court reviews

alleged confrontation clause violations de novo. State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

"Hearsay" is any out-of-court statement offered as "evidence to prove the truth of the matter asserted." ER 801(c); ER 802; State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991). A statement includes nonverbal conduct intended as an assertion. ER 801(a)(2).

The "core class" of testimonial statements includes those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52.

In Davis, the Court elaborated on what did and did not constitute testimonial statements. Non-testimonial statements may occur in the course of police interrogation when, objectively viewed, the primary purpose of the interrogation is to enable police to meet an ongoing emergency. Davis, 547 U.S. at 822. In contrast, statements are testimonial when, objectively viewed, there is no such ongoing emergency the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id., 547 U.S. at 822; accord, State v. Ohlson, 162 Wn.2d 1, 11-12, 168 P.3d 1273 (2007).

Generally speaking, a police officer's testimony may not incorporate the out-of-court statements by an informant or dispatcher. Johnson, 61 Wn. App. at 549; State v. Aaron, 57 Wn. App. 277, 280, 787 P.2d 949 (1990). A police officer may describe the context and background of a criminal investigation, but such explanation must not include out-of-court statements. State v. O'Hara, 141 Wn. App. 900, 910, 174 P.3d 114 (2007), reversed on other grounds, 167 Wn.2d 91, 217 P.3d 756 (2009).

Corporal Herzog's testimony about Belyaev's assertive conduct and/or statements indicating Ostrovski assaulted his wife with a knife and identifying the particular knife he used violated Ostrovski's right to confront of witnesses. The statements were hearsay and, under the test set forth in Davis, they were testimonial.

As indicated above, Herzog testified:

> After the – after Jesika and the witness told us, I asked them where the knife was that we had the information that was used, and the roommate went to the kitchen counter and pointed out where the knife was.

1RP 97.

First, it cannot be doubted that by "witness" and "roommate," Herzog was referencing Belyaev. This is evident because

immediately preceding this testimony, Herzog testified he remained behind to assist taking statements, including Belyaev's, and because Hertzog had just described Belyaev's ability to communicate in English. Moreover, Belyaev was a houseguest.

Second, this testimony was hearsay. At its core, it contained a verbal assertion that there was an assault in which a knife was used. By stating "after Jesika and the witness told us, I asked them where the knife was that we had the information that was used," Herzog necessarily revealed the witness (Belyaev) stated a knife was used. 1RP 97 (emphasis added). Moreover, Herzog necessarily revealed that the witness (Belyaev) stated that the knife was used during *the alleged assault*, because that was the whole point of the police investigation.

But the testimony contained an additional, nonverbal assertion as well. By pointing out the knife on the kitchen counter in response to Herzog's question about the knife that was used, Belyaev asserted that the knife (subsequently admitted as exhibit 3) was the knife used during the assault by Ostrovski. There can be no doubt both of the statements made by Belyaev were offered for the truth of the matters asserted, as they had no other relevance.

The next question is whether they were testimonial. To determine whether statements elicited through police questioning trigger the confrontation clause, the question is whether, objectively considered, the interrogation that took place produced testimonial statements. Davis, 547 U.S. at 826. Under the primary purpose test, courts must objectively appraise the interrogation to determine whether its primary purpose is to enable police to meet an ongoing emergency. Id. at 822.

In applying the test to the cases of two defendants, Davis and Hammon, the Davis Court discussed four pertinent factors to be considered in making such a determination: (1) the timing relative to the events discussed; (2) the threat of harm posed by the situation; (3) the need for information to resolve a present emergency; and (4) the formality of the interrogation. Id. at 827-30; Ohlson, 162 Wn.2d at 12.

In Davis' case, the Court determined a caller's statements to a 911 operator during a domestic disturbance, including the caller's identification of her assailant by name in response to the operator's questions, were not testimonial. First, the caller was speaking about events as they occurred. Second, a reasonable listener would have concluded the caller faced an immediate physical

threat. Third, objectively viewed, the elicited statements were necessary to resolve the present emergency, rather than simply to learn (as in Crawford) what happened in the past. Finally, as to the level of formality, unlike the declarant in Crawford, the caller provided answers in a frantic environment. The Davis Court concluded the circumstances of the interrogation objectively indicated its primary purpose was to enable police to meet an ongoing emergency, rendering the resulting statements non-testimonial. Davis, 547 U.S. at 827-28.

With respect to Hammon's case, however, the Davis court held a woman's statements to a police officer who responded to a domestic disturbance call were testimonial. When the officer questioned the woman, and elicited the challenged statements, he was not seeking to determine what was happening, but rather what happened. Id. at 830. There was no emergency in progress. Id. at 829. Finally, while the Crawford interrogation was more formal, the interrogation at issue was formal enough. Id. at 830. The Davis Court concluded, "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct, rendering the resulting statements testimonial." Id. at 829.

The circumstances of Belyaev's statements are like those in Hammon's case. The police questioning here was somewhat formal, in that written statements were being translated and transcribed by Jesika. Whether that qualifies as "formal" under Crawford, it was, in the words of the Davis Court, formal enough. Id. at 830. More significant to this Court's analysis, however, is the fact that Ostrovski had already been removed from the scene and police were no longer responding to an ongoing emergency. On the contrary, the police were in the process of collecting evidence. Belyaev's statements are within that core class of statements a reasonable person would expect to be used prosecutorially.

Based on the pertinent Davis factors, Belyaev's out-of-court statements were testimonial and prohibited by the confrontation clause. The court therefore erred in overruling Ostrovski's timely objection and in refusing to give Ostrovski's proposed instruction directing jurors to disregard the offending testimony.

In response, the state may attempt to argue Ostrovski somehow invited the error by declining the court's offer to give a "limiting" instruction. However, the court's proposed instruction – which would have allowed jurors to consider "the officer's testimony about the actions of the witness [i.e. pointing out the location of the

knife] . . . for the purpose of locating the knife but not the identity of a person who used the knife" was nonsensical. 4RP 13-14.

The court's apparent reasoning was that because Herzog observed Belyaev point to the knife, the act somehow did not constitute hearsay. 4RP 13-15. But Belyaev was not just standing there pointing at a knife for no reason. His action was in response to the officer's question as to the location of the knife that was used in the assault. The very act of pointing out the knife was therefore testimonial hearsay, as indicated above.

Accordingly, jurors should not have been allowed to consider it at all, regardless of whether it was "limited" to showing how police located the knife, as opposed to showing that any particular person used the knife. The court's distinction in this regard is confounding. Significantly, there was only one person accused. Accordingly, the "limitation" proposed by the court would hardly have benefitted the defense. Defense counsel wisely declined the court's offer, as the court's proposed instruction would, in fact, have highlighted the knife evidence. Accordingly, any such argument by the state that the error was somehow invited should be rejected.

Confrontation clause errors are subject to harmless error analysis. Shafer, 156 Wn.2d at 395. A constitutional error is

harmless only if the appellate court is convinced beyond a reasonable doubt that a reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is presumed prejudicial and the state bears the burden of proving the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

The State cannot meet its burden to demonstrate beyond a reasonable doubt the jury would have reached the same result absent the erroneously admitted evidence. By the time of trial (and even before), both Brodiski and Jesika changed their statements. At trial, Brodiski explained she had been drinking and overreacted, due to a childhood fear of knives. Jesika explained she saw her father gesticulating with the knife in his hand and was confused, because she was upset and tired. Both of these explanations are plausible and might have given the jury reasonable doubt as to whether an assault occurred, were it not for Belyaev's accusations – which were left to dangle before the jury – with no opportunity for the defense to challenge.

Second, regardless of any doubts about the underlying assault, Belyaev's supposed identification of the five-and-one-half-inch bladed knife may have caused the jury to find the state proved

the knife used qualified as a "deadly weapon" for purposes of second degree assault as well as the deadly weapon enhancement.

For second degree assault, the state had to prove the knife was: a "weapon, device, instrument, article, or substance, . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm[.]" RCW 9A.04.110(6) (emphasis added); CP 103.

For the deadly weapon enhancement, the state was required to prove the knife was "an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." RCW 9.94A.825 (emphasis added). Under the enhancement statute, a knife with a blade longer than three inches is considered a deadly weapon per se. RCW 9.94A.825; CP 126.

As evidence the knife used was in fact a deadly weapon, the prosecutor specifically relied on the length of the blade of exhibit 3 – the knife reportedly identified by Belyaev. The prosecutor noted the knife itself was in evidence and that its quality as a deadly was evidenced by its blade of "five and a half inches." 4RP 120-121.

Although the prosecutor claimed both Brodiski and Jesika "identified it as the kitchen knife," 4RP 21, their identifications were not so concrete. On direct, the prosecutor held Exhibit 3 and asked Brodiski: "Is this one of your kitchen knives?" 3RP 25. Brodiski responded: "I think so, yeah." 3RP 25. When the prosecutor then asked whether "this was what your husband was chopping the salad with," Brodiski did say, "Yes." 3RP 25. However, considering that Brodiski first said only that she thought exhibit 3 was one of her kitchen knives, her subsequent response that it was the one Ostrovski used to chop salad is somewhat equivocal.

And significantly, Brodiski testified: "When police arrive, I think they found the knife under the table, in the same place under the table." 3RP 36. Considering police did not obtain exhibit 3 from under the table, jurors would have had reason to doubt whether it was the knife used, had it not been for Belyaev's unchallenged testimony.

Similarly, although Jesika apparently identified exhibit 3 at trial as the knife her father used to chop salad,[6] she acknowledged

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[6] This *apparent* identification is based on the following exchange during direct:

> Q. So did you see the knife your dad was using for the salad cutting?

that in her statement to police that night, she said her mother threw the knife under the table (3RP 102), which was different than her trial testimony that her mother put it on the counter (3RP 82).

Accordingly, even if jurors believed an assault occurred, they might not have believed the state proved exhibit 3 was the knife in question – had it not been for Belyaev's out-of-court identification. As a corollary, jurors might not have found that the state proved a deadly weapon was used for purposes of either the second degree assault or the enhancement. For all these reasons, the conviction and deadly weapon enhancement should be reversed.

A. Yeah, yeah.

Q. The gesturing?

A. Yeah.

Q. Okay. Did you recognize it as something from your house?

A. Yeah.

Q. Okay. Is this –

A. Yeah. Yeah, the salad knife we use.

3RP 82-83.

2. THE COURT'S ADMISSION OF BELYAEV'S OUT-OF-COURT ACCUSATION AND IDENTIFICATION OF THE ALLEGED KNIFE ALSO VIOLATED THE RULES OF EVIDENCE.

Assuming arguendo this Court finds the confrontation clause violation is not preserved for appeal, this Court should nevertheless reverse because Belyaev's statements were admitted – over defense objection – in violation of the rules of evidence.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Unless a rule or statute provides otherwise, hearsay is not admissible. ER 802.

Under ER 801(d)(1)(iii), a statement is not hearsay if the declarant is subject to cross-examination and the statement is one of identification of a person made after perceiving the person. A descriptive statement is not the same as an identifying statement. An identification is a statement of identity. See Webster's Third New International Dictionary 1123 (1993). A description is, by contrast, inclusive. It may narrow the field of possible suspects, but it does not identify a particular suspect. Likewise, the rule refers only to statements identifying a person and does not mention statements in which the declarant identifies an object, place, or the

like. Tegland, 5B Wash. Prac., Evidence Law and Practice § 801.31 (4th ed. 1999).

Two cases are instructive. In State v. Grover, one witness gave police a description of the assailants, while a second witness identified them by name. 55 Wn. App. 252, 254, 777 P.2d 22, review denied, 113 Wn.2d 1032 (1989). The trial court admitted the identification under ER 801(d)(1)(iii), but not the description. Id. at 255-56. On appeal, the appellate court declined to limit the rule solely to formal identifications from lineups or photographic montages, but it did not include descriptions. Id. at 256.

In State v. Jenkins, the trial court held an officer could testify that a child witness had described a vehicle used in a crime and then identified it in the neighborhood. 53 Wn. App. 228, 231, 766 P.2d 499, review denied, 112 Wn.2d 1016 (1989). However, Jenkins was a bench trial where the rules of evidence are more liberally applied. Jenkins, 53 Wn. App. at 231 (citing State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970)).

Thus, neither Grover nor Jenkins expands the ER 801(d)(1)(iii) category of nonhearsay to include descriptions that do not amount to an identification of a person.

As indicated above, the court admitted Belyaev's statements to Herzog: first indicating that a knife was used in the assault; and second, indicating the knife that was used. The defense objected on hearsay grounds, but was overruled without explanation. The state proffered no applicable exception, even when the court's proposed limiting instruction was discussed.

The court's apparent reasoning for overruling the objection was that Herzog observed, rather than heard, Ostrovski's identification. But hearsay can be a nonverbal assertion as well.

Any argument by the state at this juncture that the testimony was somehow admissible under ER 801(d)(1)(iii) should be rejected. First, the declarant (Belyaev) was not subject to cross-examination. Second, Belyaev's statements did not concern the identify of a person. Rather, they concerned his identification of the knife he claimed Ostrovski used during the charged assault. This is precisely the type of out-of-court assertion the hearsay rules were designed to protect against. The court therefore erred in admitting the statements, and in refusing to instruct the jury to disregard them.

Evidentiary error requires reversal if, within reasonable probabilities, the outcome of the trial was affected by the admission

of the evidence. State v. Zwicker, 105 Wash.2d 228, 243, 713 P.2d 1101 (1986). For the reasons stated in the preceding argument, there is a reasonable possibility the erroneous admission of Belyaev's statements affected the outcome of the trial.

D. CONCLUSION

The court's admission of Belyaev's testimonial hearsay violated Ostrovski's right to confront his accusers. It also violated the rules of evidence. Because Belyaev's testimony likely influenced the jury's resolution of the assault charge and/or the deadly weapon enhancement, the conviction and deadly weapon enhancement should be reversed.

Dated this 30th day of November, 2012

Respectfully submitted

NIELSEN, BROMAN & KOCH

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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68606-2-I
	)	
YEVGENI OSTROVSKI,	)	
	)	
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 30TH DAY OF NOVEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] YEVGENI OSTROVSKI
DOC NO. 357185
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF NOVEMBER, 2012.

x Patrick Mayovsky