

SUPREME COURT NO. 89514-7
COURT OF APPEALS NO. 68606-2-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

YEVGENI OSTROVSKI,

Petitioner.

REC'D
OCT 16 2013
King County Prosecutor
Appellate Unit

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

PETITION FOR REVIEW

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STATE OF WASHINGTON *CPJ*

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A. IDENTITY OF PETITIONER

Petitioner Yevgeni Ostrovski asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Ostrovski, COA No. 68606-2-I, filed September 16, 2013, attached as an appendix to this petition.

C. ISSUE PRESENTED FOR REVIEW

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

D. STATEMENT OF THE CASE¹

1. Trial

Petitioner Yevgeni Ostrovski was convicted of second degree assault while armed with a deadly weapon, for allegedly threatening his wife Tatiana Brodiski with a knife on August 20, 2011. CP 1-7, 154-161.

¹ This petition 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.

The night of the incident, Brodiski called 911 and reported that her husband held a knife to her throat and said he was going to kill Brodiski and then himself. 4RP 15. She further reported that she was hiding in the bushes at a neighbor's house, but worried for her daughter, who was still in the home. 1RP 100. At trial, the 911 call was admitted as an excited utterance. 1RP 27; 2RP 18-19.

When officers arrived, they spoke to Ostrovski and Brodiski's 16 year-old daughter, Jesika, who said she saw her father hold a knife to her mother's throat in the kitchen. 3RP 70. Jesika reportedly heard him say he was going to kill Brodiski and then himself. 3RP 70. Jesika's statement was also admitted as an excited utterance. 3RP 55-57, 69.

At trial, however, both Brodiski and Jesika recanted their prior statements. Brodiski testified Ostrovski never threatened her with a knife. 3RP 34-35. She explained she had been drinking and 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 was gesticulating while holding it. 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 called police because she is generally fearful of knives. 3RP 35-36. She testified she overreacted. 3RP 28, 38.

Jesika's trial testimony corroborated her mother's. Jesika testified she awoke upon hearing her parents argue and went to the kitchen to investigate. 3RP 79-80. 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.

That same night, family friend Gennady Belyaev had been visiting at the house. 1RP 81-82; 2RP 7, 12, 57; 3RP 32-33. By the time of trial, however, he had returned to the Ukraine and was unavailable to testify. 1RP 32.

During defense counsel's motions in limine, the defense questioned the state's ability to introduce the knife reportedly used during the alleged assault. The court indicated it would have to be identified by one of the witnesses, presumably Brodiski or Jesika.

Evidence of the knife was admitted – over defense counsel’s objection – through Corporal David Herzog, however. 1RP 87. Herzog testified that after Ostrovski was arrested, he remained and assisted taking statements from Jesika, her mother and Belyaev. 1RP 88, 96. Herzog testified Belyaev spoke some 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.

Officer 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.

2. Appeal

On appeal, Ostrovski argued the trial court violated his constitutional right to confront witnesses when it admitted the testimonial hearsay statements of Belyaev through Corporal Herzog. Brief of Appellant (BOA) at 12-25. The state conceded error but argued it was harmless. Appendix at 1.

The Court of Appeals agreed the testimony was improperly admitted, but held the error was harmless:

But Ostrovski does not contend that the knife was not properly admitted into evidence. The jury heard the 911 recording in which the Russian interpreter translated Brodiski's report that Ostrovski "had a large knife" when he threatened to kill her. (Pretrial Exhibit 2 at 5). J.B. told police on the night of the incident that she saw Ostrovski hold a knife against her mother's throat. Although Brodiski and J.B. testified differently as to the use of the knife at trial, they both admitted that Ostrovski was holding a knife during an argument in the kitchen and they both agreed that the knife admitted into evidence was the same knife he held. Under these circumstances, we are convinced beyond a reasonable doubt that the improper admission of the fact that Belyaev pointed to the location of the knife "that was used" was harmless.

Appendix at 5 (emphasis added).

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

BECAUSE THIS CASE INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS, THIS COURT SHOULD ACCEPT REVIEW.

The state conceded the trial court erroneously admitted "an unavailable witness' nonverbal gesture to a police officer indicating that a particular knife was the one 'used' during" the alleged assault. Brief of Respondent (BOR) at 1. The Court of Appeals likewise agreed Belyaev's out-of-court testimony identifying the

knife “that was used” was improperly admitted. Appendix at 5. Yet, it upheld Ostrovski’s second degree assault conviction, on grounds the error was harmless. Contrary to the Court of Appeals opinion, however, the state failed to prove the error was harmless beyond a reasonable doubt. This Court should take review of this important constitutional question. RAP 13.4(b)(3).

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.

As argued in the opening brief of appellant and conceded by the state, Ostrovski was denied the right to confront his accuser when the court admitted Belyaev's out-of-court testimonial statements over defense counsel's objection. BOA at 14-19; BOR at 9 ("the State concedes that the objection should have been sustained as hearsay and the testimony stricken given Belyaev's unavailability for cross-examination[.]"). And the Court of Appeals agreed the court improperly admitted the fact that Belyaev pointed to the location of the knife "that was used." Appendix at 5.

As the appellate court notes, confrontation clause errors are subject to harmless error analysis. Shafer, 156 Wn.2d at 395. The state bears the burden of proving beyond a reasonable doubt that the error was harmless. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The court looks to the "untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985) (citing Parker v. Randolph, 442 U.S. 62, 70-71, 99 S. Ct. 2132, 2137, 60 L. Ed. 2d 713 (1979)).

Contrary to the appellate court, the error was prejudicial. In the absence of Belyaev's testimony that exhibit 3 was the knife "that was used," jurors might have had a reasonable doubt a knife "was used" to commit assault. Although Brodinski and Jesika identified exhibit 3 as "the salad knife we use," both asserted it was used only to chop salad. 3RP 25, 82-83.

But from the context of Herzog's testimony, it is clear the message conveyed by Belyaev to Herzog was that exhibit 3 was the knife used to commit *assault*, not chop salad. By stating "after Jesika and the witness [Belyaev] told us, I asked them where the knife was that we had the information that was used," Herzog necessarily revealed Belyaev's indication that exhibit 3 was used to commit assault, because that was the whole point of the police investigation. Accordingly, regardless of whether the knife was properly admitted, in the absence of Belyaev's out-of-court testimony, there would have been no corroboration to persuade jurors to find a knife was used. The jury may well have found Brodinski and Jesika's trial testimony more credible than their prior statements.

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.

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 was in evidence and that its quality as a “deadly weapon is not in question,” as the evidence showed its blade was 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,² she acknowledged 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).

² 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?

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.

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 Court of Appeals erred in finding the admission of Belyaev’s identification testimony harmless.

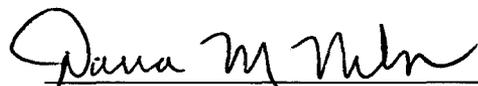
F. CONCLUSION

The court’s admission of Belyaev’s testimonial hearsay violated Ostrovski’s right to confront his accusers. This Court should accept review because this case involves a significant question of law under the state and federal constitutions. RAP 13.4(b)(3).

Dated this 16th day of October, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 68606-2-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
YEVGENI OSTROVSKI,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: <u>September 16, 2013</u>

FILED
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STATE OF WASHINGTON
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SPEARMAN, J. — Yevgeni Ostrovski appeals his conviction for second degree assault, arguing the trial court admitted a nonverbal identification of a knife by a witness who was unavailable for trial in violation of his confrontation rights. The State concedes error but argues that the error was harmless. Because the knife was properly admitted based on untainted testimony provided by other witnesses, the error was harmless. We also reject the claims in his statement of additional grounds and affirm.

FACTS

Just before 11:00 p.m. on August 20, 2011, Tatiana Brodiski called 911 and reported that her husband, Yevgeni Ostrovski, had a large knife and threatened to kill her, their child, and himself. In broken English and her native Russian, Brodiski cried and screamed during the call, telling the 911 operator that she had taken the knife from her husband, thrown the knife under the table, and run from the house to hide in a boat in a neighbor's yard.

When Mercer Island Police arrived at their home, they found Ostrovski sitting outside on the patio with his friend Gennady Belyaev. While the officers

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were questioning the men, Ostrovski's daughter J.B., who was visibly upset, came out on the patio. J.B. told an officer that she had seen her father hold a knife against her mother's neck and heard him say that he was going to kill her mother and then kill himself. J.B. told the officer she believed her father would kill her mother and then kill her. The police arrested Ostrovski.

The State charged Ostrovski with second degree assault while armed with a deadly weapon and two counts of felony harassment. Based on incidents occurring after the arrest, the State charged Ostrovski with witness tampering and six counts of misdemeanor violation of a no contact order.

At trial, the State called Mercer Island Police Corporal David Herzog as its first witness. Herzog testified that he learned from the dispatcher that there "was a domestic violence that had occurred involving a knife." Verbatim Report of Proceedings (VRP) (12/13/2011) at 78. When he arrived at the home, Herzog saw two males sitting on the patio and kept them there for questioning. Herzog explained, "I didn't want them to go back inside the house because . . . I didn't want them if they did have a knife to go back in there and use it[.]" VRP (12/13/2011) at 81. Herzog determined that the men were Ostrovski and Belyaev, who was a family friend or roommate. When J.B. came out to the patio and Ostrovski began speaking to her, Herzog separated them, sending another officer to speak to J.B. elsewhere.

After another officer arrested Ostrovski and took him away from the house, Herzog assisted other officers in taking statements. Herzog testified, "After [J.B.] and the witness told us, I asked them where the knife was that we had the

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information that was used, and the roommate went to the kitchen counter and pointed out where the knife was." VRP (12/13/2011) at 97. Defense counsel objected on hearsay grounds, but the trial court overruled the objection. Herzog described the knife and testified that another officer photographed it and placed it into evidence. Officer Peter Erickson later identified a knife he retrieved from the evidence room and the trial court granted the State's motion to admit the knife into evidence.

Although the 911 call and their prior statements to the police were admitted at trial as excited utterances, both Brodiski and J.B. testified that Ostrovski had not threatened them. Brodiski testified that she had been drinking on the night of the incident when she began bickering with Ostrovski while he chopped salad. She testified that she overreacted because she has a fear of knives. J.B. testified that when she came out of her room and saw her parents arguing while her father chopped salad, she "freaked out like [she] got mixed messages," and continued crying after she "heard them calm down" because she didn't like hearing them argue. VRP (12/15/11) at 80, 83. Both Brodiski and J.B. identified the knife in evidence as the knife Ostrovski had used to chop salad.

The jury acquitted Ostrovski on the charge of felony harassment as to J.B. but found him guilty of the remaining charges. The trial court imposed an exceptional sentence below the standard range.

Ostrovski appeals.

DISCUSSION

Ostrovski contends that the trial court violated his constitutional confrontation rights by allowing Corporal Herzog to testify about Belyaev's nonverbal identification of the knife. The State concedes that the trial court should have sustained defense counsel's hearsay objection and stricken the testimony because Belyaev had left the country and was unavailable for cross-examination. However, the State contends that the error was harmless beyond a reasonable doubt.

Confrontation Clause errors are subject to harmless error analysis. State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012) (citing Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431 L.Ed.2d 674 (1986)). The State bears the burden of proving beyond a reasonable doubt that the error was harmless. Id. We look to the "untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985) (citing Parker v. Randolph, 442 U.S. 62, 70-71, 99 S. Ct. 2132, 2137-34, 60 L.Ed.2d 713 (1979)).

Ostrovski argues that the jury may have accepted the version of events Brodiski and J.B. offered at trial were it not for the testimony of Belyaev's identification of the knife. He also contends that Brodiski's identification of the knife was "somewhat equivocal," [Brief of Appellant at 23] because she said "I think so, yeah. Yes," when asked whether she recognized the exhibit as one of her kitchen knives. VRP (12/15/2011) at 25. Finally, he claims that the jury may

not have believed that the knife admitted into evidence was a deadly weapon or was the knife used by Ostrovski because Brodiski testified that she threw the knife under the table but J.B. testified that Brodiski put it on the counter.

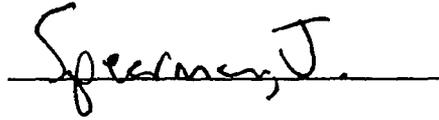
But Ostrovski does not contend that the knife was not properly admitted into evidence. The jury heard the 911 recording in which the Russian interpreter translated Brodiski's report that Ostrovski "had a large knife" when he threatened to kill her. (Pretrial Exhibit 2 at 5). J.B. told police on the night of the incident that she saw Ostrovski hold a knife against her mother's throat. Although Brodiski and J.B. testified differently as to the use of the knife at trial, they both admitted that Ostrovski was holding a knife during an argument in the kitchen and they both agreed that the knife admitted into evidence was the same knife he held. Under these circumstances, we are convinced beyond a reasonable doubt that the improper admission of the fact that Belyaev pointed to the location of the knife "that was used" was harmless.

In his statement of additional grounds, Ostrovski contends that (1) the trial court violated his right to a speedy trial and deprived him of the opportunity to confront Belyaev at trial by granting a continuance to the State over defense counsel's objection on October 21, 2011; (2) the jail miscalculated his good time credits; (3) the witness statements about the location of the knife were "inconsistent;" and (4) the quality of J.B.'s translation between English and Russian for the investigating officers "is in question." The third ground appears to duplicate the issue presented by counsel on appeal and is too conclusory to permit review. See RAP 10.10(c) (appellate court will not consider argument in

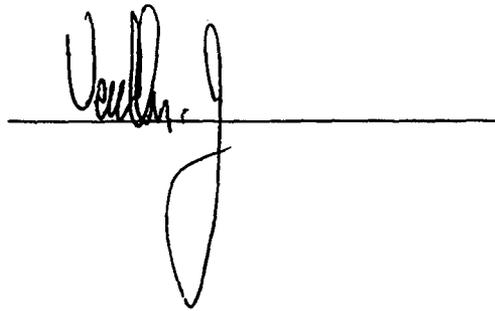
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statement of additional ground for review if it does not inform the court of the nature and occurrence of the alleged errors). The other allegations appear to involve matters outside of the record and therefore cannot be considered on appeal. See State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

Affirmed.

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WE CONCUR:

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 68606-2-1
)	
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 16TH DAY OF OCTOBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** 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
C/O TATIANNNA BRODISKI
3434 97TH AVENEUE SE
MERCER ISLAND, WA 98040

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF OCTOBER, 2013.

X *Patrick Mayovsky*

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COURT OF APPEALS
STATE OF WASHINGTON
CLERK