NO. 44974-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MCCOMAS, JR.,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The reliability test developed in State v. Smith is invalid after Crawford v. Washington.

Michael McComas, Jr. was convicted of committing assault in the fourth degree against his wife, Philana McComas. CP 9. Ms. McComas recanted her statement before trial, and the trial court denied Mr. McComas's motion to exclude Ms. McComas's prior out-of-court statement as substantive evidence pursuant to ER 801(d)(1)(i). 1 RP 8; CP 7. Philana McComas's recorded audio statement was admitted at trial and played for the jury. 2 RP 107-08. While the State played the recording, the jurors were provided a transcript to read while listening to the statement. 2 RP 108.

The court relied on State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982), to admit Ms. McComas's statement. As explained in the appellant's opening brief, Smith is no longer good law under Crawford v. Washington, 124 U.S.36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). See Op. Br. at 7-13. The State's response to this issue consists of one sentence, in which it states "[b]ecause the witness testified at trial and was subject to cross examination on both her current testimony and her prior inconsistent statement, the admission of her prior inconsistent

statement into evidence was not barred by Crawford v. Washington." Resp. Br. at 18. It cites to State v. Grover, 55 Wn. App. 252, 259, 777 P.2d 22 (1989) as an example in support of its argument. Resp. Br. at 18. However, Grover was decided 15 years before Crawford and provides no guidance as to whether Smith survives Crawford.

Contrary to the State's conclusory statement, the issue raised by Mr. McComas is not resolved by whether the witness testified and was subject to cross examination. ER 801(d)(1)(i) plainly directs that a prior inconsistent statement is only admissible if the "declarant testifies at the trial or hearing and is subject to cross examination concerning the statement" and it is undisputed that Ms. McComas testified at trial and was cross examined by the defense.

The question in Smith was whether the victim's written, notarized statement elicited by police was admissible as substantive evidence under ER 801(d)(1)(i) given the rule's language requiring that the statement be "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or a deposition." 97 Wn.2d at 859. When laying out the issue before it, the Smith court stated "[w]e are here concerned with the interpretation of the words 'other proceeding' as used in that rule." Id. The court examined the history of the rule and

found that although the circumstances in Smith did not meet the definition of "other proceeding," the original purpose of the sworn statement was the same as in those situations that did meet the definition. Id. at 862. Similar to a grand jury indictment, inquest proceeding, or filing of a criminal complaint before a magistrate, the purpose of the statement was to determine the existence of probable cause. Id.

Smith declined to adopt a general rule on the admissibility of statements under ER 801(d)(1)(i), holding instead that "[i]in determining whether evidence should be admitted, reliability is the key." 97 Wn.2d at 857, 861. Smith articulated four factors a court should consider to determine whether an affidavit is admissible as substantive evidence, but then reiterated "[t]o sum up, each case depends on its facts with reliability the key." Id. at 863.

Smith's dependence on a reliability analysis to determine the admissibility of a prior statement was squarely rejected in Crawford. 514 U.S. at 63. In Crawford, the Court held "[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them." 541 U.S. at 63. It noted that Crawford's procedural history was the perfect example of

why a reliability test was problematic. Id. at 65. The trial court had admitted the statement, listing several reasons why it was reliable. Id. This Court then reversed, listing several other reasons why the statement was not reliable. Id. The Supreme Court reinstated the defendant's conviction, relying on one factor the trial court considered but disregarding all the other factors. Id. Thus, the case served as a "self-contained demonstration" of the "unpredictable and inconsistent application" of a reliability analysis. Id. at 66.

Crawford's denunciation of a reliability test affirmed the concerns raised about Smith in Delgado-Santos v. State, 471 So.2d 74, 79 (Fla. Ct. App. 1985). See Op. Br. at 11. ER 801(d)(1)(i) provided objective criteria upon which a prior, inconsistent statement may be admitted as substantive evidence. Delgado-Santos, 471 So.2d at 79. Smith's detour from that objective criteria to a reliability analysis is invalid after Crawford.

2. Even if the Court finds State v. Smith remains good law, Ms. McComas's statement was inadmissible because it was not given under oath.

The State concedes Ms. McComas did not provide her statement under oath pursuant to RCW 5.28.010 and RCW 5.28.020. Resp. Br. at 16. Given this concession, the Court must reverse under State v. Sua,

115 Wn. App. 29, 48, 60 P.3d 1234 (2003) (the Court may not "just ignore ER 801(d)(1)(i)'s requirement that the out-of-court statement of an in-court witness be 'given under oath subject to the penalty of perjury'"); see also Op. Br. at 13-15.

The State claims Ms. McComas's statement was admissible despite this omission because the statement complied with the requirements of RCW 9A.72.085 "except that it was oral rather than written." Resp. Br. at 16 (emphasis added). This argument is without merit.

First, RCW 9A.72.085 provides:

> Whenever... under any rule... any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification or certificate, which:
>
> (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
> (2) Is subscribed by the person;
> (3) States the date and place of its execution; and
> (4) States that it is so certified or declared under the laws of the state of Washington.

(Emphasis added.)

As the State acknowledges, this statute applies to a written document. Resp. Br. at 16. In this case, the deputy elicited an oral statement from Ms. McComas. 1 RP 14; 2 RP 106; CP 62. Although he asked if she certified or declared under penalty of perjury under the laws of the state of Washington that her statement was true and correct, and she responded "yes," this does not meet the plain requirements of RCW 9A.72.085. The statute requires that the document be "subscribed by the person" and state the date and place of its execution. RCW 9A.72.085(2), (3).[1] This allows the witness to review the statement, correct any inaccuracies, and then decide whether to sign under penalty of perjury. Here, Ms. McComas was not informed prior to questioning that she would be asked to affirm her responses as true and correct and she was not given the opportunity to review what she had told the officer before declaring the truthfulness of her statements.

Any doubt about whether the statement was "subscribed" by Ms. McComas is resolved by the recent amendment to the statute, effective June 12, 2014, which describes the various ways a person may subscribe to an unsworn written statement. RCW 9A.72.085(3)(a)-(d).

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[1] As amended, effective 6/12/14, RCW 9A.72.085(1)(b) and (c) lay out these requirements.

All of the permissible ways involve affixing a signature or name to the document, as is common with written statements. Id. Ms. McComas did not affix her signature, or provide the date and place of execution of the document, as required by the statute, because there was no document to sign. The fact that Ms. McComas's oral statement was later transcribed does not change the form her statement. Despite the State's attempts to conflate the two, a transcription of an oral statement is not a written statement. See Resp. Br. at 17.

As explained in the appellant's opening brief, this Court has found a written statement met the requirements of RCW 9A.72.085 and was therefore admissible under Smith. State v. Nelson, 74 Wn. App. 380, 389, 874 P.2d 170 (1994); Op. Br. at 14. However, in Nelson, the witness told the detective what to write. 74 Wn. App. at 389. The detective read the affidavit to the witness and administered the oath in the presence of a notary. Id. at 386. The witness then reviewed the written affidavit and oath and signed the affidavit, which was then notarized. Id. Unlike the witness in Nelson, Ms. McComas did not appear before a notary, did not have her statement read back to her, and did not have the opportunity to review her statement. Instead, Ms. McComas responded to questions orally and then was simply asked,

essentially, whether she had just told a law enforcement officer the truth. 1 RP 17; CP 66. Ms. McComas did not provide a signed, written statement in conformance with RCW 9A.72.085. Her oral statement was not admissible under ER 801(d)(1)(i).

3. The court's error was not harmless.

The State claims that even if the trial court erred when it admitted Ms. McComas's statement, that error was harmless. Resp. Br. at 19. Because the jury acquitted Mr. McComas of the second degree assault charge based on an allegation of strangulation, and found Mr. McComas guilty of fourth degree assault, it argues "substantial evidence other than the victim's audio-recorded statement supports the jury's verdict." Resp. Br. at 19. Specifically, the State points to the photographs of Ms. McComas's injuries and Mr. McComas's testimony at trial. Resp. Br. at 20.

This argument fails to acknowledge that the State informed the trial court that its decision on Mr. McComas's motion in limine was dispositive. Before the evidentiary hearing on Mr. McComas's motion to exclude Ms. McComas's statement as substantive evidence, the State engaged in the following exchange with the trial court:

> THE COURT: Let me ask you this, is the Court's ruling on this, is this a dispositive motion?
>
> MR. RICHARDS: Well, for the State at least, yes.

1 RP 2. In other words, had the trial court granted Mr. McComas's motion to exclude, the State would not have proceeded to trial. This is an unsurprising concession given that, had it proceeded to trial without Ms. McComas's statement, the photographs would have been the State's only substantive evidence. It could not have relied on Mr. McComas's testimony, as the State suggests in its response, because the evidence presented by the defense was entirely outside of its control.

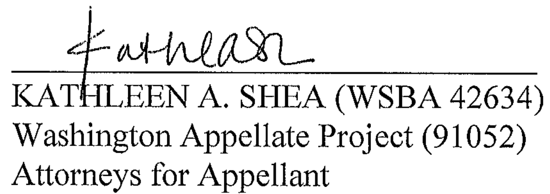
When it is reasonably probable that the trial court's error materially affected the outcome at trial, reversal is required. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). The State cannot plausibly claim that the court's error did not materially affect the outcome of trial when it previously informed the court the case would not proceed to trial unless Ms. McComas's statement was ruled admissible as substantive evidence. The court's error was not harmless, and Mr. McComas's conviction must be reversed and his case remanded for dismissal.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. McComas respectfully requests this Court reverse his conviction and remand for dismissal.

DATED this 27th day of June, 2014.

Respectfully submitted,



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Appellant.	)	

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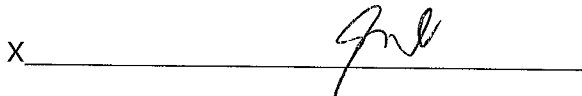
X 

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