Supreme Court No.: 91788-4
Court of Appeals No.: 44974-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MCCOMAS,

Petitioner.

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PETITION FOR REVIEW

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A. INTRODUCTION

Prior to trial, Michael McComas moved to exclude his wife's recorded statement to police as substantive evidence. The State indicated it would be forced to dismiss the charge if the court granted the defense's motion. The court denied Mr. McComas's motion, and he was convicted after a trial where, pursuant to the court's in limine ruling, the State presented the recorded statement to the jury as substantive evidence.

The Court of Appeals found the statement was wrongfully admitted, but affirmed Mr. McComas's conviction, finding the court's error was harmless. Logically, these two things cannot both be true. If the trial court had granted Mr. McComas's motion, as the Court of Appeals found it should have, the case against Mr. McComas would have been dismissed. Thus, the court's error was extraordinarily prejudicial. This is an issue of substantial public interest, and this Court should accept review.

B. IDENTITY OF PETITIONER AND THE DECISION BELOW

Mr. McComas requests this Court grant review pursuant to RAP 13.4(b) of the published decision of the Court of Appeals, Division Two, in State v. Michael McComas, No. 44974-9-II, filed March 10,

2015. A copy of the opinion is attached as Appendix A. Mr. McComas's motion for reconsideration was denied April 23, 2015. A copy of this order is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Despite the fact the State acknowledged prior to trial it would dismiss the criminal charge against Mr. McComas if the court granted the defense's motion to exclude Philana McComas's audio recorded statement, the Court of Appeals held the trial court's error in denying the motion was harmless. Where the criminal charge against Mr. McComas would have been dismissed if not for the court's error, yet this error was deemed "harmless" by the Court of Appeals, should this Court grant review in the substantial public interest? RAP 13.4(b)(4).

2. The Court of Appeals determined it was bound by this Court's decision in State v. Smith, 97 Wn.2d 856, 861-63, 651 P.2d 207 (1982), which allows for the admission of a statement to law enforcement as substantive evidence at trial if it meets the requirements of ER 801(d)(1)(i) and a "reliability" test. Although the court found the statement at issue in this case was inadmissible under Smith, it addressed Mr. McComas's challenge to Smith at length in its published decision. Should this Court grant review to decide this significant

constitutional question, and issue of substantial public interest, where the Court's use of a "reliability" test rather than the plain language of ER 801(d)(1)(i) has been called into question after Crawford v. Washington, 124 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)? RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE

Philana McComas went to the Mason County Sherriff's Office and reported that her husband, Michael McComas, Jr., assaulted her. 1 RP 4; 2 RP 99.[1] Deputy Robert Noyes interviewed Ms. McComas and observed marks on her neck, scratches on her chest, and a slightly red area on her lower right back. 1 RP 5; 2 RP 96, 99. He spoke to her only briefly before aid units were called. 1 RP 4-5, 2 RP 101.

Later that evening, two other deputies went to Ms. McComas's home to conduct an interview. 1 RP 13; 2 RP 105. Deputy Justin Cotte took Ms. McComas's oral statement, which she gave him permission to record. 1 RP 14; 2 RP 106; CP 62. In response to questioning, Ms. McComas stated that earlier that morning Mr. McComas had screamed at her and threw a "bunch of dishes" at the

[1] The verbatim report of proceedings are divided into Volume I and Volume II and will be referred to as "RP" using the volume and page number.

wall when she told him to settle down. CP 63. She stated that she tried to collect her cell phone and run from the house, but that Mr. McComas "attacked [her] down to the ground" and "choked" her. Id. Ms. McComas believed that she "kinda" blacked out for a second. Id.

Ms. McComas then ran to her car and had lunch with a friend, after determining that the "police station was closed for lunch or something." Id. She stated that her friend assisted her in going to the police station after lunch because the friend was the daughter of a police officer. Id. Ms. McComas stated she did not wish to press charges against her husband. 2 RP 66.

After Ms. McComas answered the deputy's questions, Deputy Cotte asked her if she declared, under penalty of perjury, that the foregoing was true and correct. Id. Ms. McComas responded that she did. Id. Mr. McComas was charged with domestic violence assault in the second degree. CP 72.

Ms. McComas later claimed her statement was false. 1 RP 7; 2 RP 79. After the State learned this, Deputy Noyes contacted Ms. McComas to set up a second interview. 1 RP 8. In that interview, which was not recorded, Ms. McComas stated that Mr. McComas had

not choked her and that the injuries were a result of her falling and being scratched by her dog. 1 RP 8-10.

Prior to trial, Mr. McComas moved to exclude Ms. McComas's recorded statement for use as substantive evidence. CP 70. At the hearing on the defense's motion, Ms. McComas testified she had been forced by her friend to go to the sheriff's office. 1 RP 25. She explained she was diagnosed with a number of mental health issues which prevent her from maintaining employment and that she did not understand what the word "perjury" meant at the time she gave the recorded statement. 1 RP 23, 24.

The trial court denied Mr. McComas's motion, finding the State was permitted to use Ms. McComas's statement as substantive evidence if she offered inconsistent testimony at trial. CP 7. At trial Ms. McComas testified that she did not believe Mr. McComas had choked or punched her. 2 RP 71, 74. The recorded statement was played for the jury over Mr. McComas's objection. 2 RP 107-08, 109. It was admitted as evidence and the jurors were provided a transcript to read while the recording was played. 2 RP 108. The State later played the recording again during its closing argument. 2 RP 184.

The jury found Mr. McComas not guilty of assault in the second degree, but found him guilty of assault in the fourth degree. CP 17-18. It also found that the McComases were members of the same family or household. CP 16. The Court of Appeals affirmed Mr. McComas's conviction. Slip Op. at 13.

E. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. The Court should grant review in the substantial public interest because an error is not "harmless" when a correct ruling would have forced the State to dismiss the criminal charge.

Mr. McComas moved to exclude his wife's audio recorded statement as substantive evidence. CP 70. In his motion, he notified the court that the outcome of his motion would "determine if the State proceeds to trial on this case." CP 71 (emphasis added). Before starting the hearing, the State confirmed Mr. McComas had accurately represented the State's position:

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

4/18/13 RP 2 (emphasis added).

The trial court denied Mr. McComas's motion after an evidentiary hearing. CP 6. The Court of Appeals found this denial was

an error because Ms. McComas's audio recorded statement to a police officer did not qualify as a sworn statement under RCW 9A.72.085 and therefore did not meet the oath requirement in ER 801(d)(1)(i) or the "minimal guarantees of truthfulness" required by State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982). Slip Op. at 11. Despite determining the trial court erred when it admitted the statement as substantive evidence, the Court of Appeals affirmed Mr. McComas's conviction for fourth degree assault after finding the error harmless. Slip Op. at 12.

The court relied on State v. Thomas for the proposition that an error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." 150 Wn.2d 821, 871, 83 P.3d 970 (2004); Slip Op. at 12. It found Mr. McComas had not made a showing of prejudice because the "evidence of his guilt is overwhelming." Slip Op. at 12. Citing to Mr. McComas's testimony and the testimony of a sheriff's deputy admitted for impeachment purposes without a limiting instruction, it held, "It does not appear reasonably probable that the jury would have acquitted [Mr. McComas] of assault in the fourth degree had the trial court excluded [Ms. McComas]'s prior recorded statement as substantive evidence." Slip Op. at 12.

In reaching this conclusion, the court ignored the State's assertion at the motion hearing that it would <u>not proceed to trial</u> if the evidence was excluded. The Ninth Circuit has held that when a defendant's incriminating statements are improperly admitted at trial and there is strong possibility the unlawful admission of the statements induced the defendant to testify, the State is not permitted to rely on the defendant's testimony to show the inadmissible statements did not affect the jury's verdict. <u>Alvarado v. Hickman</u>, 316 F.3d 841, 857 (9th Cir. 2002), reversed on other grounds, <u>Yarborough v. Alvarado</u>, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). Here, there is no doubt the trial court's error induced Mr. McComas to testify, because the opportunity to testify would not have arisen had the trial court excluded Ms. McComas's statement.

It is undisputed that if the evidence had been excluded, the State would have been forced to dismiss. Because the exclusion of Ms. McComas's statement would have resulted in the dismissal of the criminal charge against Mr. McComas, the error was not harmless. To the contrary, the error greatly prejudiced Mr. McComas because it resulted in his case not being dismissed. The court's failure to

recognize this error as prejudicial raises an issue of substantial public interest. This Court should accept review.

2. **This Court should grant review because whether <u>State v. Smith</u> remains good law raises a significant constitutional question and is an issue of substantial public interest.**

The trial court admitted Ms. McComas's statement pursuant to ER 801(d)(1)(i) and the test developed by this Court over 20 years ago in <u>Smith</u>, 97 Wn.2d at 861-63. Under ER 801(d)(1)(i), a statement is not hearsay if:

> The declarant testified at the trial or hearing and is subject to cross examination concerning the statement, and the statement is... inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

In <u>Smith</u>, this Court relied on the inclusion of the phrase "other proceeding" to find that a victim's notarized written statement to law enforcement was admissible as substantive evidence because under "the totality of [the] circumstances" ER 801(d)(1)(i) was satisfied. <u>Smith</u>, 97 Wn.2d at 863. This Court held that although the circumstances in <u>Smith</u> did not meet the definition of "other proceeding," the original <u>purpose</u> of the sworn statement – to determine the existence of probable cause – was the same as in those situations

that did meet the definition of "other proceeding" (grand jury indictment, inquest proceeding, filing of a criminal complaint before a magistrate). Id. at 862. Therefore, the court found that the statement was admissible as substantive evidence under ER 801(d)(1)(i). Id. at 862-63. The court was clear, however, to state that "each case depends on its facts with reliability the key," and developed a four-factor test to assess a statement's reliability. Id. at 861-63.

The error in the Smith analysis was addressed in Delgado-Santos v. State, 471 So.2d 74, 79 (Fla. Ct. App. 1985), where the court disagreed with Smith's case-by-case approach to admitting a statement under its identical rule of evidence. The court stated:

> Smith... purport[s] to make the question turn on the "reliability" of the contents of the particular statement and of the conditions under which it was given. In our view, the basic flaw in this conclusion is that it finds no basis in the statute. While the legislature and Congress may have been ultimately concerned with the "reliability" of a particular statement, they sought to vindicate that concern only by establishing given and objective criteria as to the circumstances, including the kind of forum, under which it was given. And it is for the legislature, not the courts, to determine not only the policy to be promoted, but the means by which that end is to be achieved. By suggesting, without statutory authority, that the determination that the existence of a proceeding can depend upon what is said before it, the Robinson-Smith test of reliability violates this basic principle.

Id. (citing 10 Fla.Jur.2d Constitutional Law § 147 (1979). Delgado-Santos found that a "bright line" test was mandated by the statute and that police questioning clearly was not an "other proceeding." 471 So.2d at 79.

Further, in Crawford, the Court explained the inherent problem with granting the courts power to determine whether an out-of-court statement is "reliable." Crawford v. Washington, 124 U.S. 36, 63, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "Reliability is an amorphous. if not entirely subjective, concept." Id. Too frequently, it found, courts end up attaching the same significance to opposite facts (e.g. the Colorado Supreme Court found a statement was reliable because it was "detailed" and the Fourth Circuit found a statement was reliable because it "fleeting"; the Virginia Court of Appeals found a statement reliable because the witness was in custody while the Wisconsin Court of Appeals found a statement reliable because the witness was not in custody). Id. (internal citations omitted). When left to the court's discretion, too many facts can be turned either in favor or against the "reliability" of a statement.

The Court of Appeals did not need to address the validity of Smith because it found Ms. McComas's statement inadmissible under

ER 801(d)(1)(i) and Smith. Slip Op. at 11 (the "prior statement did not satisfy the oath requirement in ER 801(d)(1)(i) or meet the minimal guarantees of truthfulness that Smith requires). However, it discussed Mr. McComas's challenge to Smith at length in its published opinion and determined it was bound by this Court's decision. Slip Op. at 5-9 ("Until ER 801(d)(1)(i) is amended accordingly, or until our Supreme Court overrules Smith, Washington courts are bound by the reliability test set forth in Smith in determining the admissibility of any prior inconsistent statement made during a police interview."). Slip Op. at 9.

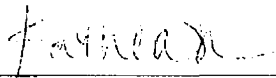
In light of this Court's departure from the plain language of ER 801(d)(1)(i) over twenty years ago, and Crawford's more recent discussion about the impossibility of making a consistent determination about "reliability," this Court should accept review in order to reexamine its decision in Smith.

F. CONCLUSION

On each of these bases, the Court should grant review of the Court of Appeals published opinion affirming Mr. McComas's conviction for fourth degree assault.

DATED this 22nd day of May, 2015.

Respectfully submitted,



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APPENDIX A

COURT OF APPEALS, DIVISION II PUBLISHED OPINION

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL E. MCCOMAS, JR., Appellant.	No. 44974-9-II PUBLISHED OPINION

MELNICK, J. — Michael E. McComas, Jr. appeals his conviction of domestic violence assault in the fourth degree, arguing that the trial court erred by admitting the victim's recorded statement concerning the assault as substantive evidence under ER 801(d)(1)(i). Because the victim did not make her statement under oath, the court erred by admitting that statement as substantive evidence. However, we hold the error was harmless and we affirm McComas's conviction.

FACTS

I. SUBSTANTIVE FACTS

On November 15, 2012, Philana McComas, while upset and crying, went to the Mason County Sheriff's Office and reported that her husband Michael choked and hit her.[1] Deputy Robert Noyes observed visible signs of injury on Philana including abrasions on her neck, scratches on her chest, and a red area on her lower back.

Later that afternoon, Deputy Justin Cotte went to the McComases' home and took an audio-recorded statement from Philana. She stated that Michael became angry that morning and screamed vulgarities at her. When she told him to calm down, he threw some dishes against the

[1] For clarity we refer to the McComases by their first names. We intend no disrespect.

wall. Philana added that when she tried to grab her cell phone and leave, Michael attacked her, took her to the ground, and choked her. She said that she blacked out momentarily. She then ran out of the house. Because the police station was closed for lunch, Philana went to lunch with a friend before going back to the police station.

At the end of her statement, Deputy Cotte asked Philana if she declared, under penalty of perjury, that "the foregoing is true and correct." Clerk's Papers (CP) at 66. Philana replied yes. The State subsequently charged Michael with domestic violence assault in the second degree by strangulation.

In January 2013, Philana recanted her November statement. During a second interview with the police, she denied being strangled or choked. Philana said that she fell to the floor while trying to take an iPod from Michael. She added that her injuries resulted from Michael landing on top of her and their dog scratching her. Philana declined to allow her recantation to be recorded.

II. Pretrial Motion to Exclude Statement

Before trial, the defense moved to exclude Philana's recorded statement as substantive evidence. At the hearing on that motion, Philana testified that she remembered giving a statement on November 15 but that she did not remember it being recorded. She also did not remember the deputy advising her that her statement was made under penalty of perjury. She added that she did not understand the word "perjury" until its meaning was explained two days before trial. Philana further testified that mental health issues contributed to her inability to fully understand the nature of her recorded statement.

The trial court found this testimony not credible. The trial court denied the defense motion. It entered written findings of fact and conclusions of law that admitted Philana's prior recorded

statement as substantive evidence under ER 801(d)(1)(i) and *State v. Smith*, 97 Wn.2d 856, 857, 651 P.2d 207 (1982).

III. Trial Proceedings

At trial, Philana testified that she awoke to Michael making noise. When she told him to settle down, he threw some dishes. When asked whether Michael had choked her, she replied, "There was dogs around and we were down on the ground." 2 Report of Proceedings (RP) at 71. She did not think that Michael choked her: "I think the dog had stepped on me or something like that." 2 RP at 71. She said that she blacked out because she was upset, and not because Michael choked her. She also acknowledged giving three statements about the episode.

Deputy Noyes testified about the injuries he saw on Philana's neck, chest, and back when she came to the police station. The trial court admitted into evidence photographs of Philana's neck and chest injuries. Noyes also testified, over a defense objection, that Philana identified Michael as her assailant. The trial court admitted this testimony as impeachment evidence.

Deputy Cotte testified that he saw damage to the house consistent with Michael throwing plates against the wall. The trial court admitted photographic evidence of this damage. Cotte also testified about the recorded statement he took from Philana. The trial court admitted the CD (compact disc) of the statement into evidence and allowed the jury to review the transcribed statement as it listened to the recording.

Michael testified on his own behalf and stated that on the morning of the incident, Philana confronted him about making too much noise. He admitted that they argued and that he damaged the wall by throwing two cup holders against it. He claimed that Philana hit him as well as herself, and that he pulled her to the ground and held her down in self-defense and to protect her. "[Y]ou've

got to hold her down with the shoulders and hold her arms down to the ground with your knees so she doesn't punch herself in the face." 2 RP at 124-25.

Both parties proposed self-defense jury instructions. The defense proposed a lesser included instruction on assault in the fourth degree. The trial court instructed the jury accordingly.

During closing argument, defense counsel admitted that Michael assaulted Philana but argued that he did so in self-defense. Counsel concluded that the proper verdict was "not guilty all the way around based on the self-defense defense that you were instructed on. And if you do not accept that, then the proper verdict is fourth degree assault with the family relation part of it." 2 RP at 193.

The jury returned a verdict of not guilty on the charge of assault in the second degree by strangulation, but it found Michael guilty of assault in the fourth degree. The jury also answered "yes" to the special verdict asking whether Michael and Philana were family or household members. CP at 16. The trial court sentenced Michael to 364 days in jail with 304 days suspended.

Michael appeals his conviction. He argues that the trial court erred by admitting Philana's prior recorded statement as substantive evidence under ER 801(d)(1)(i).

ANALYSIS

I. STANDARD OF REVIEW

We review a trial court's decision to admit evidence for abuse of discretion. *State v. Nieto*, 119 Wn. App. 157, 161, 79 P.3d 473 (2003). If the trial court based its evidentiary ruling on an incomplete legal analysis or a misapprehension of legal issues, the ruling may be an abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 15, 11 P.3d 304 (2000); *Nieto*, 119 Wn. App. at 161.

II. ER 801—PRIOR INCONSISTENT STATEMENTS

The rule against hearsay generally excludes out-of-court statements that are offered in court for the truth of the matter asserted. ER 801(a)-(c); ER 802. A witness's prior inconsistent statement is not hearsay and may be admitted as substantive evidence if the declarant testified at trial, was subject to cross-examination, and the declarant gave the statement under oath subject to penalty of perjury "at a trial, hearing, or other proceeding, or in a deposition." ER 801(d)(1)(i); *Nieto*, 119 Wn. App. at 161.

Michael argues that the trial court improperly admitted Philana's recorded statement under ER 801(d)(1)(i) because the police interview did not constitute a "proceeding" under the rule and because Philana did not make her statement under oath.

A. OTHER PROCEEDING UNDER ER 801

In *Smith*, the Washington Supreme Court considered the admissibility of an assault victim's sworn written statement to investigating police officers. 97 Wn.2d at 857. The victim's complaint in *Smith* identified the defendant as her assailant. 97 Wn.2d at 857. When the victim named another man as her assailant at trial, the trial court allowed her prior complaint to be used as substantive evidence under ER 801(d)(1)(i). *Smith*, 97 Wn.2d at 857.

In reviewing the trial court's ruling, the Supreme Court declined to adopt a bright line rule as to whether a sworn statement given during a police interrogation would be admissible as a statement provided during a "proceeding" under ER 801(d)(1)(i). *Smith*, 97 Wn.2d at 861. "We do not interpret the rule to always exclude or always admit such affidavits. The purposes of the rule and the facts of each case must be analyzed. In determining whether evidence should be admitted, reliability is the key." *Smith*, 97 Wn.2d at 861 (footnote omitted).

The *Smith* court considered a variety of factors in assessing such prior inconsistent statements: (1) whether the witness voluntarily made the statement, (2) whether there were minimal guarantees of truthfulness, (3) whether the statement was taken as standard procedure in one of the four legally permissible methods of determining the existence of probable cause, and (4) whether the witness was subject to cross-examination when giving the subsequent inconsistent statement. *State v. Nelson*, 74 Wn. App. 380, 387, 874 P.2d 170 (1994) (citing *Smith*, 97 Wn.2d at 861-63).

Here, the trial court applied these factors and concluded that Philana's prior recorded statement was reliable and thus admissible. Michael contends that the trial court abused its discretion by relying on *Smith* and urges us to abandon the *Smith* reliability test in favor of a bright-line rule stating that police interviews do not qualify as a "proceeding" under ER 801(d)(1)(i).

In support of his argument, Michael cites the legislative history of Fed. R. Evid. 801(d)(1)(A). ER 801(d)(1)(i) was "taken verbatim" from this federal rule. *Smith*, 97 Wn.2d at 859. The original version of the federal rule would have allowed all prior inconsistent statements to be used as substantive evidence. *United States v. Castro-Ayon*, 537 F.2d 1055, 1057 (9th Cir. 1976). A subsequent version narrowed the rule to allow substantive admissibility only if the prior inconsistent statement was given under oath, subject to prosecution for perjury, subject to cross-examination, and given in a trial, hearing, or deposition. *Castro-Ayon*, 537 F.2d at 1057; *State v. Sua*, 115 Wn. App. 29, 44, 60 P.3d 1234 (2003). The final compromise version required the prior statement to be given under oath, subject to prosecution for perjury, and given in a "trial, hearing, or other proceeding." *Castro-Ayon*, 537 F.2d at 1057; *Sua*, 115 Wn. App. at 45-46. This final version abandoned the cross-examination requirement to permit the inclusion of grand jury

proceedings within the category of "other proceeding." *Castro-Ayon*, 537 F.2d at 1057; *Smith*, 97 Wn.2d at 860.

In *Castro-Ayon*, the Ninth Circuit extended the "other proceeding" category further and determined that a tape-recorded statement made under oath and taken in an immigration investigation was admissible under Fed. R. Evid. 801(d)(1). 537 F.2d at 1057-58; *Smith*, 97 Wn.2d at 860. The court observed that the choice of the open-ended term "other proceeding" showed Congress's intent to extend the rule beyond grand jury proceedings. *Castro-Ayon*, 537 F.2d at 1058. The court also observed that the immigration proceeding at issue bore similarities to a grand jury proceeding: both were investigatory, ex parte, inquisitive, sworn, basically prosecutorial, held before an officer other than the arresting officer, recorded, and held in circumstances of some legal formality. *Castro-Ayon*, 537 F.2d at 1058. The Ninth Circuit limited its holding, stating that not every sworn statement given during a police-station interrogation would be admissible. *Castro-Ayon*, 537 F.2d at 1058.

As stated, the *Smith* court determined that reliability was the key to admitting a prior inconsistent statement made during a police interview. 97 Wn.2d at 861. Michael now argues that *Smith* expanded the "other proceeding" category beyond what Congress intended, and he supports his claim of error by citing *Delgado-Santos v. State*, 471 So. 2d 74 (Fla. Dist. Ct. App. 1985).

In *Delgado-Santos*, the court considered the admissibility of a prior inconsistent statement made by a juvenile during police questioning. 471 So. 2d at 75. The court rejected the argument that police investigatory activity constitutes a "proceeding" under the Florida statute based on Fed. R. Evid. 801(d)(1)(A). *Delgado-Santos*, 471 So. 2d at 75 (citing Fla. Stat. Ann. § 90.801(2)(a)). The court observed that the word "proceeding" implied "a degree of formality, convention,

structure, regularity and replicability of the process in question" that police questioning does not include. *Delgado-Santos*, 471 So. 2d at 77.

The *Delgado-Santos* court expressly rejected the *Smith* court's reliance on reliability, finding that it had no basis in the statute:

> While the legislature and Congress may have been ultimately concerned with the "reliability" of a particular statement, they sought to vindicate that concern only by establishing given and objective criteria as to the circumstances, including the kind of forum, under which it was given. And it is for the legislature, not the courts, to determine not only the policy to be promoted, but the means by which that end is to be achieved.

471 So. 2d at 79. The court concluded that the *Smith* reliability test violated this basic principle by suggesting, without statutory authority, that the existence of a "proceeding" can depend on what is said before it. *Delgado-Santos*, 471 So. 2d at 79.

Michael argues that the Florida court's concerns about the *Smith* test are confirmed by the United States Supreme Court's concerns about a reliability standard for admitting hearsay, as expressed in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In *Crawford*, the Court concluded that confrontation clause protections should not be left to "amorphous notions of 'reliability.'" 541 U.S. at 61. The Court abandoned the *Roberts* test, which allowed a jury to hear hearsay evidence based on a judicial determination of reliability, in favor of a new rule stating that the admission of testimonial hearsay evidence at trial violates the Sixth Amendment when the witness is unavailable and cannot be cross-examined by the defendant. *Crawford*, 541 U.S. at 62, 68, *abrogating Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

There are fundamental problems with Michael's challenge to the *Smith* decision. First, we are bound to apply Washington law as interpreted by the Washington Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). We cannot abandon the reliability test set forth

in *Smith* in favor of a bright-line rule holding that police questioning does not qualify as a "proceeding" under ER 801(d)(1)(i). Second, there is no confrontation clause problem when the witness testifies at trial, concedes making the prior statement, and is subject to unrestricted cross-examination. *United States v. Owens*, 484 U.S. 554, 560, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988); *State v. Thach*, 126 Wn. App. 297, 309, 106 P.3d 782 (2005) (citing *Crawford*, 541 U.S. at 59 n.9). *Crawford* has no bearing on the admissibility of prior inconsistent statements under ER 801(d)(1)(i) and does not compel abandonment of the *Smith* test. *Thach*, 126 Wn. App. at 309.

Some states have resolved the issue presented in this case by expressly including recorded statements within the categories of prior inconsistent statements that are admissible as substantive evidence. *See McManamon v. Washko*, 906 A.2d 1259, 1267 (Pa. Super. 2006); *State v. Fields*, 120 Haw. App. 73, 89 n.3, 201 P.3d 586 (2005), *affirmed*, 108 Haw. 503, 168 P.3d 955 (2007).[2] Until ER 801(d)(1)(i) is amended accordingly, or until our Supreme Court overrules *Smith*, Washington courts are bound by the reliability test set forth in *Smith* in determining the admissibility of any prior inconsistent statement made during a police interview.

B. OATH REQUIREMENT

Michael argues that even if *Smith* remains good law, the court erred by admitting Philana's statement because it was not made under oath, as ER 801(d)(1)(i) requires. In a related argument, Michael contends that the trial court erred in concluding that Philana's prior statement met the minimal guarantees of truthfulness that *Smith* requires. Michael did not raise the oath requirement as a separate issue below, but his argument that Philana's prior statement did not satisfy the *Smith*

[2] Pa. R. Evid. 803.1(1)(C) excludes from the hearsay definition a witness's prior inconsistent statement that is "a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement." Haw. R. Evid. 802.1(1)(C) excludes prior inconsistent statements that are "[r]ecorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement."

test preserves this issue on appeal. *See Nieto*, 119 Wn. App. at 163 (minimal guarantees of truthfulness standard is satisfied by an oath and a formalized proceeding).

We addressed the oath requirement in *Sua*, where each alleged victim provided a written statement and signed a paragraph stating, "The above is a true and correct statement to the best of my knowledge. No threats or promises have been made to me nor any duress used against me." 115 Wn. App. at 32. We compared these facts with *Smith*, where the declarant took an oath from a notary public, and with *Nelson*, where the declarant complied with RCW 9A.72.085. *Sua*, 115 Wn. App. at 48. In contrast, neither declarant in *Sua* took an oath, complied with RCW 9A.72.085, or in any other way gave her statement under oath subject to penalty of perjury. 115 Wn. App. at 48. As a consequence, we held that the trial court erred by admitting the victims' statements as substantive evidence under ER 801(d)(1)(i). *Sua*, 115 Wn. App. at 49.

RCW 9A.72.085(1) sets forth the circumstances in which an unsworn statement may be treated as a sworn statement:[3]

> Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, 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:
>
> (a) Recites that it is certified or declared by the person to be true under penalty of perjury;
> (b) Is subscribed by the person;
> (c) States the date and place of its execution; and
> (d) States that it is so certified or declared under the laws of the state of Washington.

[3] GR 13 also allows for the use of unsworn statements.

The statute thus permits verification of unsworn written statements by signing and certifying, under penalty of perjury, that the information is true and providing the time and place of signing. *Gates v. Port of Kalama*, 152 Wn. App. 82, 88, 215 P.3d 983 (2009).

As we observed in *Sua*, the sworn written statement in *Nelson* satisfied each requirement of RCW 9A.72.085. 115 Wn. App. at 47-48 (citing *Nelson*, 74 Wn. App. at 390). Because the evidence supported a finding that the declarant understood that her sworn statement was made under penalty of perjury, her signature on that statement satisfied the required minimal guarantees of truthfulness. *Nelson*, 74 Wn. App. at 390; *see also Thach*, 126 Wn. App. at 308 (declarant's testimony that she signed her statement under penalty of perjury, and officer's witnessing of her signature, supported a finding that her statement carried minimal guarantees of truthfulness).

Philana testified that she did not understand the meaning of the word "perjury" until shortly before trial, but the trial court found this testimony neither credible nor truthful. On appeal, Michael challenges these findings by citing Philana's testimony as well as the lack of evidence showing that anyone explained the meaning of the word "perjury" to her.

It is well settled that credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). But, even if we defer to the trial court's findings regarding Philana's lack of credibility, her statement did not qualify as a sworn statement under RCW 9A.72.085. The police transcribed her oral statement, but she did not review, sign, and date the transcription. *See State v. Johnson*, 40 Wn. App. 371, 378, 699 P.2d 221 (1985) (statements to police that were oral or unsigned were inadmissible under ER 801(d)(1)). Consequently, Philana's prior statement did not satisfy the oath requirement in ER 801(d)(1)(i) or meet the minimal guarantees of truthfulness that *Smith* requires. The trial court erred by admitting the statement as substantive evidence.

III. HARMLESS ERROR

The State argues that any failure to satisfy the oath requirement in ER 801(d)(1)(i) or one of the *Smith* factors was harmless error. We agree.

A reviewing court will not reverse due to an error in admitting evidence where the error does not prejudice the defendant. *Thomas*, 150 Wn.2d at 871. Where the error is from the violation of an evidentiary rule rather than a constitutional mandate, courts do not apply the more stringent "harmless error beyond a reasonable doubt" standard. *Thomas*, 150 Wn.2d at 871. Rather, evidentiary error is not prejudicial unless, within reasonable probabilities, the trial's outcome would have differed had the error not occurred. *Thomas*, 150 Wn.2d at 871.

The evidence of Michael's guilt is overwhelming. The record shows that Philana went to the police station in a state of distress. She had visible injuries consistent with an assault. She told Deputy Noyes that Michael had inflicted those injuries.[4] Although Michael denied choking Philana, he admitted arguing with her, throwing items against the wall, and assaulting her.

The issues before the jury were whether Michael acted in self-defense or whether he committed assault in the second degree by strangulation or assault in the fourth degree. It does not appear reasonably probable that the jury would have acquitted Michael of assault in the fourth degree had the trial court excluded Philana's prior recorded statement as substantive evidence.

[4] The trial court admitted this testimony for impeachment purposes but did not offer the jury a limiting instruction. In the absence of a limiting instruction, the jury could consider Deputy Noyes's testimony about Philana's statements as substantive evidence. *See State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) (absent request for limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for other purposes).

We hold that the trial court's error was harmless based on the additional evidence supporting Michael's conviction of assault in the fourth degree. We affirm the conviction.

Melnick, J.

Melnick, J.

We concur:

Worswick, J.

Worswick, J.

Bjorgen, A.C.J.

Bjorgen, A.C.J.

APPENDIX B

ORDER DENYING MOTION FOR RECONSIDERATION

April 23, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON
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DEPUTY

STATE OF WASHINGTON, Respondent, v. MICHAEL E. McCOMAS, Appellant.	No. 44974-9-II ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's March 10, 2015 opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Worswick, Melnick

DATED this 23rd day of April, 2015.

FOR THE COURT:

Bjorgen, A.C.J.
ACTING CHIEF JUDGE

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☒ respondent Timothy Higgs [timh@co.mason.wa.us]
Mason County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 22, 2015

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