

NO. 63298-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY A. ZIERMAN,

Appellant.

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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

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

The Honorable Larry E. McKeeman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's right to confrontation by permitting a police officer to relate an anonymous caller's testimonial statement to a 911 operator.

2. The trial court erred under the rules of evidence by admitting irrelevant evidence of a 911 call for the purported non-hearsay purpose of explaining a police officer's behavior in response to the call.

Issues Pertaining to Assignments of Error

In the appellant's trial for manufacturing methamphetamine, the trial court admitted an anonymous 911 caller's statement that "an individual was moving tanks around in someone else's yard."

- Where the caller did not describe an ongoing emergency and the police did not treat the call as describing an emergency, was the statement testimonial and therefore admitted in violation of the appellant's confrontation clause right?
- Assuming the statement was testimonial, was it inadmissible under the confrontation clause despite its admission for the limited "non-hearsay" purpose of explaining the officer's actions in response to the call?

- Was the statement admitted in violation of the evidence rules because the officer's actions were not relevant to any trial issues?

B. STATEMENT OF THE CASE

1. *Trial and Sentencing*

Officer James Upton went to a residence rented by Jeffrey Adcock in response to a report of a man moving tanks around in someone else's backyard. 2RP 42-43, 53-54.<sup>1</sup> Adcock gave Upton permission to search his backyard. 2RP 42-43, 56. Upton went into a shed in the yard and observed the appellant, Jeffrey A. Zierman, a lit hand torch on the floor, and a suspected methamphetamine laboratory. 2RP 43-45, 56. Upton arrested Zierman and contacted drug task force officers for further assistance. 2RP 45.

Adcock knew Zierman as a neighbor and fellow musician. 2RP 57-58. He did not give Zierman permission to be in his back yard or shed. 2RP 58. Nor did he speak with Zierman that day. 2RP 62-63. Adcock

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<sup>1</sup> The report to which Upton responded was the subject of a pretrial motion to exclude discussed in subsection (2) of the Statement of the Case.

This brief cites to the four-volume verbatim report of proceedings as follows: 1RP – 9/25/2008; 2RP – 10/13/2008; 3RP – 10/14/2008 (a.m.) and 10/15/2008; 4RP – 10/14/2008 (p.m.).

did not use the shed, which was about 10 feet from his home, because it had holes in the roof. 2RP 55-56, 60-62. The door to the shed was generally open. 2RP 61. During the three months he lived at the residence, Adcock never saw anyone go into the shed. 2RP 62.

Task force personnel agreed with Upton that someone was operating a methamphetamine lab inside the shed. 2RP 69-70, 85-87, 3RP 118-19. The officers collected evidence from inside the shed, including tubes, propane tanks, glass jars, a can of fuel, a jug of muriatic acid, lithium batteries, and a spoon with residue. 3RP 116-18. Detective Jose Vargas testified the items collected were typical of those found in methamphetamine labs. 3RP 118-19.

David Northrop, a Washington State Patrol crime lab chemist, analyzed four items seized from the shed. 4RP 6, 12-13. The results of the tests led Northrop to believe the items were consistent with those used to manufacture methamphetamine. 4RP 28, 35-36.

Neither Northrop nor anyone else analyzed the clothing Zierman was wearing at the time he was arrested. 3RP 172-73, 4RP 37-39. A thorough search of the shed and items therein by an experienced fingerprint officer failed to yield a fingerprint that matched Zierman's. 2RP 84-89, 4RP 47-48.

Based on this information, the state on May 23, 2007, charged Zierman with unlawful storage of ammonia. CP 90-91. The trial court entered an order setting trial for August 3, 2007. Ex. 37; Supp. CP \_\_ (sub. no. 10, Order Setting Trial Date, filed June 14, 2008). The second page of the order, which Zierman signed, stated failure to appear for trial may result in "criminal prosecution for bail jumping." Ex. 37; 4RP 58-61. The court entered a second order the same day releasing Zierman on his own recognizance. Supp. CP \_\_ (sub. no. 8, Order on Release, filed June 11); 4RP 70-71.

Zierman did not appear for the August trial and a warrant issued for his arrest. Ex. 36; 4RP 63-65. Zierman next appeared in court February 25, 2008. Supp. CP \_ (sub. no. 15, Minute entry, filed February 25, 2008). The state filed an amended information September 8, 2008, charging Zierman with manufacturing methamphetamine and bail jumping. CP 84-85.

At the resulting trial, Zierman and his girlfriend, Christina Dunlap, testified they were eating breakfast at a friend's residence on the morning of Zierman's arrest. 4RP 77-78, 85-87. Adcock, who lived down the street, came by and asked Zierman to look around his residence because he saw someone there. Zierman had known Adcock for two or three years, so

he and his dog went to Adcock's yard. 4RP 78-79, 87-91. The dog ran into the shed so Zierman went inside. 4RP 79. He was looking for the dog when Upton arrived. Zierman did not notice any of the items inside the shed. 4RP 79-81.

Zierman testified he missed his August 3, 2007 court appearance because his car ran out of gas. He did not contact the court or his attorney. 4RP 82-85. Police arrested him on a warrant in February 2008. 2RP 84-85.

A Snohomish County jury found Zierman guilty of manufacturing methamphetamine and bail jumping. CP 42-43. The trial court imposed concurrent standard range sentences. CP 19-32.

2. *Motion in Limine to Prohibit Admission of Anonymous Complaint*

Before trial, Zierman moved for exclusion of evidence relating to a 911 call from an anonymous and unavailable caller. CP 68; RP2 14-15. The caller said a man who may have been Zierman was carrying propane tanks into a shed. 2RP 15. Zierman contended the information was inadmissible hearsay. Anticipating the state's response, Zierman argued the evidence was not admissible to explain why Upton reacted to the dispatch as he did. CP 68. Citing State v. Aaron, 57 Wn. App. 277, 787 P.2d 949 (1990), Zierman argued a police dispatcher's statement relating

the contents of a 911 call was not relevant to prove a material fact because Upton's state of mind was not at issue. CP 68.

The prosecutor asserted the evidence was not hearsay because it was not offered for the truth of the matter asserted, but rather to explain why Upton responded to Adcock's house and why he asked Adcock for permission to search the shed. 2RP 16. The prosecutor said he did not plan to introduce evidence that the caller identified Zierman as the person in the yard, "just a report of an individual moving these tanks into the shed." 2RP 16-17.

Zierman responded it did not matter that the state would refrain from including the caller's identification of him as the tank mover because the fact Upton found him in the shed "rules out another person doing this." 2RP 17.

The trial court precluded the caller's identification of Zierman as the individual moving tanks, but ruled admissible the other portions of the 911 call. 2RP 37. The court offered to instruct jurors the evidence was not to be considered for the truth of the matter asserted but rather to explain what Upton knew when he went to Adcock's and to explain his actions that followed the receipt of the information. 2RP 37-38. Zierman accepted the court's offer to instruct. 2RP 38.

Near the beginning of Upton's testimony, the prosecutor asked for the information the officer received from dispatch. 2RP 41. Zierman made a hearsay objection, which the trial court overruled. 2RP 41. The court then gave the following instruction:

There are different reasons why information or evidence can be admitted. Some of it is for the truth of the matter. And generally that's the case. There's other times when evidence is admitted for other purposes. In this instance, because the person who made the report is not here to be cross-examined and won't be testifying, it is not admitted for the truth of what was told to the 911 dispatch person or to the officer, but simply for the purposes of describing or explaining why the officer went and did whatever actions he took afterwards.

2RP 42. Upton testified, "Dispatch had an anonymous complaint that an individual was moving tanks around in someone else's yard." 2RP 42.

C. ARGUMENT

THE TRIAL COURT VIOLATED ZIERMAN'S RIGHT TO CONFRONT WITNESSES BY ADMITTING THE CONTENTS OF THE 911 CALL. IN ADDITION, THE INFORMATION WAS NOT RELEVANT FOR ANY NONHEARSAY PURPOSE AND ITS ADMISSION VIOLATED THE RULES OF EVIDENCE.

The trial court admitted the contents of a 911 telephone call for the purported non-hearsay purpose of explaining a police officer's actions in response to the call. The 911 caller's statement was testimonial and, despite its alleged non-hearsay purpose, inadmissible under the

confrontation clause. In addition, because the officer's actions were not relevant to any trial issues, the trial court violated the rules of evidence.

*a. The Statements Made by the 911 Caller were Testimonial.*

The confrontation clause<sup>2</sup> prohibits admission of an absent witness's testimonial statements unless the witness is not available to testify and the accused has had an earlier opportunity for cross examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); State v. Koslowski, 166 Wn.2d 409, 413, 209 P.3d 479 (2009). Statements are non-testimonial where their primary purpose is to "enable police assistance to meet an ongoing emergency." Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Statements are testimonial when circumstances objectively indicate there is no ongoing emergency and the chief purpose of the statement is to relate past events potentially relevant to later criminal prosecution. Davis, 547 U.S. at 822.

This definition applies as equally to volunteered statements as it does to statements made in response to questioning. Melendez-Diaz v.

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<sup>2</sup> The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Massachusetts, 129 S. Ct. 2527, 2535 174 L. Ed. 2d 314 (2009). See United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004) (danger to accused "might well be greater if the statement introduced at trial, without a right of confrontation, is a statement volunteered to police rather than a statement elicited through formalized police interrogation" because of the "temptation that someone who bears a grudge might have to volunteer to police, truthfully or not, information of the commission of a crime, especially when that person is assured he will not be subject to confrontation."). This danger is heightened where, as in Zierman's case, the declarant's identity is concealed from the accused: "The allowance of anonymous accusations of crime without any opportunity for cross-examination would make a mockery of the Confrontation Clause." Cromer, 389 F.3d at 675.

The state bears the burden of proving challenged statements are non-testimonial. Koslowski, 166 Wn.2d at 417 n.3. The state cannot meet its burden in Zierman's case.

Officer Upton testified he went to Adcock's residence because "[d]ispatch had an anonymous complaint that an individual was moving tanks around in somebody else's yard." 2RP 42. "Moving tanks around in somebody else's yard" does not in and of itself describe an ongoing

emergency. It follows, then, that the primary purpose of the complainant's statements was not to enable police to address an emergency.<sup>3</sup> Cf., State v. Williams, 136 Wn. App. 486, 503, 150 P.3d 111 (2007) (caller's statements to 911 operator were non-testimonial; call was made shortly after group of men who had forcibly entered her residence left; caller said her life and the lives of her children were in danger and described the at-large assailants as dangerous gang members who took note of where people lived). The primary purpose of the call was thus to relate events that would possibly be pertinent to a criminal prosecution. In other words, the statement was testimonial.

This fact does not change because the unnamed caller described present rather than past facts:

Information essential to assessing a situation will necessarily sometimes include recitations of events that occurred in the past, if only by a matter of minutes. Furthermore, it is worth considering that, while [the declarant's] non-testimonial statements in Davis [v. Washington] were phrased in the present tense, she was, most likely, technically describing events that had already occurred. Certainly there is no indication that she was being assaulted as she spoke with the 911 operator. Thus, Davis supports a more nuanced approach when considering the timing of a

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<sup>3</sup> Indeed, police obviously did not consider the matter particularly urgent. During the parties' discussion of Zierman's motion in limine to preclude admission of the statement, the prosecutor informed the trial judge about one hour and 15 minutes elapsed between the time of the dispatch and Upton's discovery of Zierman in the shed. 2RP 17-18.

statement than merely noting whether a declarant phrased his or her statement using past or present tense.

State v. Ohlson, 162 Wn.2d 1, 14-15, 168 P.3d 1273 (2007).

*b. Admission of Testimonial Out-of-Court Statements for a "Non-Hearsay" Purpose may Nevertheless Violate the Confrontation Clause.*

The state may assert the confrontation clause did not bar admission of the anonymous caller's testimonial statement in Zierman's case because the statement was admitted for the non-hearsay purpose of explaining Officer Upton's state of mind and his actions following the receipt of the dispatch. Zierman urges this Court to follow our state Supreme Court's lead in State v. Mason<sup>4</sup> and to reject such a claim.<sup>5</sup>

The Mason Court noted that in Crawford, the Supreme Court parenthetically observed that the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Mason, 160 Wn.2d at 921 (citing Crawford, 541 U.S. at 59 n. 9, (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct.

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<sup>4</sup> State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007), cert. denied, 128 S. Ct. 2430, 171 L. Ed. 2d 235 (2008).

<sup>5</sup> Counsel for appellant has found no cases that have addressed this issue post-Mason.

2078, 85 L. Ed. 2d 425 (1985))).<sup>6</sup> Mason nevertheless held admission of a statement for a purpose other than to prove the truth of its assertion does not necessarily immunize the statement from confrontation clause analysis. Mason, 160 Wn.2d at 922. Responding to Crawford's footnote 9, Mason held:

However, the Crawford court also said, “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence.” Id. at 61, 124 S.Ct. 1354. Whether or not the United States Supreme Court would approve the introduction of [the victim's] entire testimonial story to explain the admission of exhibits or someone's state of mind, under one theory or another that the evidence was not offered for its truth is, at the very least, debatable. Courts use analytical tools such as whether the statements were or were not hearsay, were exceptions to hearsay, or whether they were offered for their truth, to determine if statements are testimonial. These tools may, like reliability, subject to judicial abuse the right of confrontation. Deciding which statements are testimonial, and which are not, may be difficult until the Supreme Court develops the definition of testimonial further. However, we are not convinced a trial court's ruling that a statement is offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis. To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge.

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<sup>6</sup> The Court's observation came at the end of a long footnote assailing an argument made by the dissent's author. Crawford, 541 U.S. 59 n.9. The Court wrote: "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985).)"

Mason, 160 Wn.2d at 921-22.

This language has been interpreted by a respected commentator of Washington evidence law as putting a stop to the former practice of admitting out-of-court statements offered for a non-hearsay purposes such as explaining "why the police conducted a particular investigation, or to provide context for other evidence heard by the jury." 5C Karl B. Tegland, Wash. Prac, Evidence, § 1300.9, at 26 (2007 & Supp. 2008). Other courts are in accord. See e.g., Sanabria v. State, 974 A.2d 107, 113-114 (Del. 2009) ("Such statements are sometimes erroneously admitted under the argument that the officers are entitled to give the information upon which they acted. The need for this evidence is slight, and the likelihood of misuse great. Instead, a statement that an officer acted 'upon information received,' or words to that effect, should be sufficient."); United States v. Maher, 454 F.3d 13, 22 (1st Cir. 2006) ("government's articulated justification-that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statement and thus not within Crawford-is impossibly overbroad."), cert. denied, 549 U.S. 1025 (2006); United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004) ("Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is

not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule.")

There are other reasons, in addition to this authority, why this Court should not literally apply Crawford's sweeping, off-hand observation. First, it is dicta; there was no dispute the out-of-court statements at issue in Crawford were introduced to prove the truth of the matter asserted. Statements in a case that do not pertain to an issue before the court and are unnecessary to decide the case constitute dictum and need not be followed. In re Personal Restraint of Domingo, 155 Wn.2d 356, 366, 119 P.3d 816 (2005).

Second, closer examination of Street reveals its holding to be narrower than the Crawford Court made it appear. In Harvey Street's trial, the state relied on a detailed confession implicating Street and an unavailable co-defendant in a burglary and murder. Street 471 U.S. U.S. at 411. Street testified that he did not commit burglary or participate in the murder. He asserted his confession was derived from a written statement the co-defendant had previously presented to the same officer who took his confession. Street testified the officer read from the co-defendant's statement and directed him to say the same thing. Street 471 U.S. at 411. On rebuttal, the state called the officer, who denied he had read the co-

defendant's statement to Street. To corroborate this testimony and to rebut Street's claim, the officer read the co-defendant's confession to the jury. The trial court twice informed jurors the evidence was not presented to prove the truth of the co-defendant's statement, but for rebuttal only. Street, 471 U.S. at 411-12.

The Supreme Court held

The non-hearsay aspect of [the co-defendant's] confession-not to prove what happened at the murder scene but to prove what happened when respondent confessed-raises no Confrontation Clause concerns. The Clause's fundamental role in protecting the right of cross-examination, . . . was satisfied by [the officer's] presence on the stand. If respondent's counsel doubted that [the co-defendant's] confession was accurately recounted, he was free to cross-examine the [officer].

Street, 471 U.S. at 414.

Two critical features emerge after scrutinizing the opinion in Street. The first is that Street's right to confront witnesses was satisfied when the officer testified because Street's testimony put the officer's credibility in play, not the co-defendant's. As the Court emphasized, cross examination of the co-defendant would not have helped Street to undermine the limited purpose of the evidence. Street, 471 U.S. at 416.

The second feature is that Street stands for the proposition that when a defendant himself refers to otherwise inadmissible out-of-court statements, he waives his Confrontation Clause rights and "opens the

door” for the state to introduce the out-of-court statements for rebuttal purposes. Stephen Aslett, Crawford's Curious Dictum: Why Testimonial "Non-hearsay" Implicates the Confrontation Clause, 82 Tul. L.Rev. 297, 323-27 (2007). Street is replete with references indicating it should be read in the "open door" context:

- The Court explained it granted certiorari to decide whether the trial court violated Street's confrontation clause rights by admitting "the confession of an accomplice for the non-hearsay purpose of rebutting respondent's testimony that his own testimony was coercively derived from the accomplice's statement." Street, 471 U.S. at 410 (emphasis added).
- "The State's most important piece of substantive evidence was respondent's confession. When respondent testified that his confession was a coerced imitation, therefore, the focus turned to the State's ability to rebut respondent's testimony." Street, 471 U.S. at 415 (emphasis's added).
- Because [the co-defendant's] confession was introduced to refute respondent's claim of coercive interrogation, the co-defendant's] testimony would not have made the State's point. Street, 471 U.S. at 416 (emphasis added).
- The State introduced Peele's confession for the legitimate, non-hearsay purpose of rebutting respondent's testimony that his own confession was a coerced "copy" of Peele's statement. Street, 471 U.S. at 417 (emphasis added).

In the concurring opinion, Justice Brennan highlighted Street's limited scope: "With respect to the State's need to admit the confession for rebuttal purposes, it is important to note that respondent created the need to admit the statement by pressing the defense that his confession

was a coerced imitation of [the co-defendant's] confession." Street, 471 U.S. at 417.

The limited nature of Street's holding has not been lost on other courts. For example, in Francois, the court noted the Street Court "made clear" the case did not implicate the Confrontation Clause "not only because the statement was being offered for a non-hearsay purpose and the giving of the trial court's limiting instruction, but also because the defendant "opened the door" to its admission by his testimony . . . ." United States v. Francois, 295 F.Supp.2d 60, 65 (D.D.C. 2003). Another court held, "In Street the defendant 'opened the door' by alleging that his confession was coercively patterned after that of his accomplice; the defendant in effect made his accomplice's confession relevant to a factual question that he put at issue in the case." Lee v. Kolb, 707 F.Supp. 394, 399 (E.D.Wis. 1989), reversed on other grounds sub. nom. Lee v. McCaughtry, 892 F.2d 1318, 1325 (7th Cir. 1990); see also United States v. Taylor, 569 F.3d 742, 750 (7th Cir. 2009) (if used in "complicating circumstances," non-hearsay testimony does not offend an accused's right to confront witnesses); People v. Gladden, 298 A.D.2d 462, 463, 748 N.Y.S.2d 170, 171 (N.Y. Ct. App. 2002) (citing Street, court holds admission of co-defendant's out of court statements did not violate right to

confrontation because defendant opened door by implying officer had no basis to arrest and question the defendant); People v. Jefferson, 184 Ill.2d 486, 497, 705 N.E.2d 56, 61, 235 Ill.Dec. 443, 448 (Ill. 1998) (citing Street, court holds "evidence that is inadmissible may become admissible if the defense opens the door to its introduction"); United States v. Cruz-Diaz, 550 F.3d 169, 178 (1st Cir. 2008) (finding defendant "opened the door" to non-sanitized testimony detailing co-defendant's confession by challenging adequacy of government's investigation), cert. denied, 129 S. Ct. 2031 (2009).

Finally, courts have held an accused's confrontation rights can be waived on other equitable grounds such as through "forfeiture by wrongdoing." Giles v. California, \_\_\_ U.S. \_\_\_ 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) ("forfeiture by wrongdoing" doctrine extinguishes right of confrontation when defendant acts with intent to prevent witness from testifying); Mason, 160 Wn.2d at 925 (adopting "forfeiture by wrongdoing" rule); State v. McLaughlin, 272 S.W.3d 506, 510 (Mo. App. 2008) (trial court properly admitted decedent's statements under forfeiture by wrongdoing doctrine). The "open door" doctrine is an equally effective and equitable method of preventing an accused from unfairly taking refuge in the confrontation clause.

As this discussion makes clear, Street is limited in scope; it simply holds defendants can waive their confrontation rights by “opening the door” to otherwise inadmissible out-of-court statements. It should not be read as holding that non-hearsay is categorically beyond the reach of the Confrontation Clause.

In contrast to the defendant in Street, Zierman did not "open the door" to admission of the anonymous caller's statements to the 911 operator. Unlike Street, Zierman did not challenge any of the state's evidence in a way that required introduction of the caller's statements. For example, he did not assert Upton had no business being in the yard when he saw Zierman in the shed. Nor did he suggest his arrest was unlawful. This Court should therefore reject any argument that relies on the dicta in Crawford, which in turn relies on an implicitly overbroad reading of Street. The purported non-hearsay use of the caller's statement – to explain Upton's actions -- did not take its admission outside the protections of the confrontation clause.

*c. There was no Legitimate Non-Hearsay Purpose Served that Justified the Admission of the 911 Statement.*

Even if this Court reads Street as immunizing non-hearsay from confrontation clause challenge, it remains to be determined whether the

trial court admitted the caller's statements for a legitimate non-hearsay purpose. See Street, 471 U.S. at 417 (court's introduction of co-defendant's confession "for legitimate, non-hearsay purpose of rebutting respondent's testimony" combined with jury instruction limiting use of evidence for that purpose, "were the appropriate way to limit the jury's use of that evidence in a manner consistent with the Confrontation Clause.").

A non-hearsay purpose is not legitimate if it is not relevant to any issues in the trial. State v. Edwards, 131 Wn. App. 611, 614-615, 128 P.3d 631 (2006) (officer's testimony relating confidential informant's statements was not admissible under theory testimony was offered for non-hearsay purpose of explaining why officer commenced his investigation because reason why investigation began was not at issue); State v. Marintorres, 93 Wn. App. 442, 449, 969 P.2d 501 (1999) (evidence offered for non-hearsay purpose of proving statements' effect on hearer's state of mind admissible only where the effect of statement on hearer is relevant to an issue at trial); State v. Johnson, 61 Wn. App. 539, 545-46, 811 P.2d 687 (1991) (out-of-court statements made to police officer that are otherwise hearsay admissible to demonstrate officer's or declarant's state of mind only if his or her state of mind is relevant to a material issue); United States v. Benitez-Avila, 570 F.3d 364, 370 (1st Cir. 2009)

(aspects of alleged non-hearsay purposes of context or background for which evidence is offered must be relevant).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "Evidence which is not relevant is not admissible." ER 402.

A trial court's decision to admit evidence under these and other rules is reviewed for abuse of discretion. State v. Athan, 160 Wn.2d 354, 382, 158 P.3d 27 (2007). A trial court abuses its discretion when it bases its ruling on an erroneous view of the law. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

The trial court abused its discretion in admitting the 911 call against Zierman under the state of mind exception to the hearsay rule because the ruling ignores years of contrary precedent. See State v. Wicker, 66 Wn. App. 409, 412, 832 P.2d 127 (1992) (in rejecting admission of information for non-hearsay purpose of explaining "police department procedures," which were neither challenged nor at issue, this Court held, "The State cannot volunteer an unnecessary explanation as an excuse to introduce otherwise inadmissible hearsay."); State v. Aaron, 57 Wn. App. 277, 280-81, 787 P.2d 949 (1990) (officer's state of mind in

reacting to dispatch information was not in issue and was not valid non-hearsay reason to admit information); State v. Stamm, 16 Wn. App. 603, 611, 559 P.2d 1 (1977) ("Out of court statements are admissible to show a declarant's state of mind only if said state of mind is 'relevant to a material issue in the cause.'") (quoting C. McCormick, Evidence, § 249 (2d ed. E. Cleary 1972)); State v. Lowrie, 14 Wn. App. 408, 412-13, 542 P.2d 128 (1975) (admission of officer's recitation of out-of-court statement for non-hearsay purpose of "showing that the statement was made and that it in turn resulted in police action" improper because "neither the making of the statement . . . nor the resultant police action was in issue."), review denied, 86 Wn.2d 1010 (1976).

Zierman made the trial court aware of this Court's holding in Aaron in his motion in limine. The trial court did not find Upton's state of mind relevant, probably because it was not pertinent to any material issue in the trial. Simply put, it did not matter why Upton felt the need to go to Adcock's and to ask him for permission to search his shed. Had the trial court wished to allow context for the investigation, it would have been sufficient to permit Upton to explain to jurors he acted upon "'information received.'" Aaron, 57 Wn. App. at 281.

The trial court ignored well-established precedent in permitting Upton to testify about the 911 caller's information. In so doing, the court abused its discretion. Under Street the evidence served no legitimate, non-hearsay purpose. The trial court's admission of the testimony violated the confrontation clause. For the same reason, the trial court violated the rules of evidence.

*d. The Trial Court's Error was not Harmless.*

"Confrontation clause violations are subject to harmless error analysis." State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006), review denied, 159 Wn.2d 1017 (2007). Unless the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, there is error. State v. Shafer, 156 Wn.2d 381, 395, 128 P.3d 87, cert. denied, 549 U.S. 1019 (2006).

The erroneous admission of the 911 caller's statements was not harmless because without their admission, there is not overwhelming, untainted evidence that Zierman had anything to do with the creation or operation of the methamphetamine lab in the shed. Upton saw an ignited torch on the floor when he found Zierman in the shed, but he did not say where the torch was in proximity to where Zierman stood. In addition, Zierman's fingerprints were not found on any item in the shed. Nor was

there evidence Zierman was wearing gloves or otherwise appeared to make any effort to prevent his prints from being placed on any items. Furthermore, because the state failed to test Zierman's clothes, there was no evidence of vapors or chemicals that could have tied Zierman to the manufacturing process. Finally, neither Upton nor Adcock testified as to how long Zierman was in the shed.

Zierman testified he had gone into the shed only moments before Upton arrived, did not pay attention to the inside of the shed, and entered at Adcock's request and to retrieve his dog. Given the shortcomings in the state's proof, Zierman's testimony is plausible and could have been relied on by a reasonable juror to find reasonable doubt.

In this context, evidence that an individual was moving tanks in Adcock's yard about an hour before Upton arrived was particularly damaging to Zierman's defense. Because no one else was found in or near the yard, the only reasonable conclusion was that Zierman was that individual. And if Zierman was moving tanks, he must have been involved in the operation of the lab. The testimonial statement consequently was not harmless and deprived Zierman of his right to a fair trial.

The same result obtains because of the trial court's violation of the evidence rules. The erroneous admission of irrelevant evidence is prejudicial if it is reasonably probable the trial's outcome was affected by the evidence. State v. Cole, 54 Wn. App. 93, 97, 772 P.2d 531 (1989). As explained, the inadmissible 911 statement undermined Zierman's testimony that he was not involved with the lab. The state may have shown Zierman was present in the lab, but it offered no evidence to prove Zierman was associated in a methamphetamine manufacturing enterprise. It is therefore reasonably probable the evidence affected the verdict. Reversal of Zierman's conviction for manufacturing methamphetamine is warranted.

D. CONCLUSION

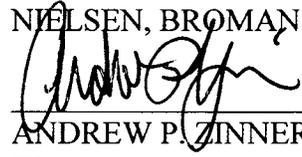
The trial court violated Zierman's right to confront an adverse witness by permitting Officer Upton to relate the 911 statements of an anonymous, unavailable caller. The "non-hearsay" purpose for the admission did not immunize the evidence from the protections of the confrontation clause. Nor was the evidence relevant. The trial court

therefore violated the rules of evidence as well. Finally, the evidence was not harmless. This Court should accordingly reverse Zierman's conviction and remand for a new trial.

DATED this 21 day of September, 2009.

Respectfully submitted,

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State V. Jeffrey Zierman

No. 63298-1-I

Certificate of Service by Mail

On September 21, 2009, I deposited in the mails of the United States of America,  
A properly stamped and addressed envelope directed to:

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Containing a copy of the opening brief, re Jeffrey Zierman  
Cause No. 63298-1-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the  
foregoing is true and correct.



John Sloane  
Office Manager  
Nielsen, Broman & Koch  
Done in Seattle, Washington

9-21-09  
Date