

65735-6

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COA No. 65735-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES O'CAIN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Jim Rogers

REPLY BRIEF

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A. REPLY ARGUMENT

THE MEDICAL HEARSAY WAS MANIFEST CONSTITUTIONAL ERROR AND REQUIRES REVERSAL.

As argued in the Opening Brief, Mr. O’Cain may raise his Confrontation Clause challenge for the first time on appeal. The State contends Mr. O’Cain waived his Confrontation Clause challenge because defense counsel did not object to admission of the medical hearsay statements to medical personnel on the basis of the defendant’s confrontation rights. But courts routinely permit criminal defendants to raise Confrontation Clause challenges for the first time on appeal.

Here, the constitutional error is "manifest" and therefore may be raised under RAP 2.5(a)(a)(3). Based upon a 911 call to police by Sheila Robinson reporting a physical altercation at her home, and upon Ms. Robinson’s police statement given to law enforcement at Highline Hospital, James O’Cain was arrested and charged. CP 1-6, 19-22. However, Sheila Robinson did not testify at trial. As a result, various of her out-of-court statements were assessed for admissibility at trial under Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004),

and neither Robinson's written statement describing how she cut her back, nor any testimony by Deputy Thomas regarding the alleged verbal threat by the defendant, were admitted.

However, the State relied on medical hearsay that was admitted under the ER 803(a)(4) exception to the hearsay bar. As a consequence of this ruling, Highline Hospital physician's assistant David Island, who removed glass, including a large fragment, from Ms. Robinson's back, stated that Ms. Robinson told him she was "thrown onto a [glass] table," which broke. 6/30/10RP at 175. Robinson also had a "tenderness along her facial features." 6/30/10RP at 172. Robinson told Island she had been "knocked out," which the witness testified meant she "lost consciousness." 6/30/10RP at 178. There was no diagnosis or detection of head injury by Island beyond Robinson's own "statement [to Island that] she was struck in the head." 6/30/10RP at 178-79. Robinson also stated that she was "choked" but no further details were provided. 6/29/10RP at 180-81. Mr. Island's medical report, State's Exhibit 41, was used to refresh his recollection, but was not admitted as an exhibit for jury review. 6/30/10RP at 171.

In addition, State's witness Nicholas Sutherland, an EMT who responded to the scene, stated that Ms. Robinson told him that she had been "struck with a glass object, which had broke, if I remember correctly, and that's how she received the cuts." 6/30/10RP at 220-21. State's exhibit 42 – the EMT's written report – was apparently used by the prosecutor for questioning of Sutherland during his *voir dire* testimony taken for purposes of the hearsay ruling, but was not admitted at trial for jury review. 6/30/10RP at 204, Exhibit 42, Supp. CP ____, Sub # 98D (Exhibit list).

Finally, Nurse Aliana Morris stated that Ms. Robinson had some lacerations on her right shoulder when she checked in at Highline Hospital. 6/30/10RP at 225. Robinson told the Nurse that she had been pushed, kicked, and choked by her boyfriend, and "thrown [sic] some objects at her." 6/30/10RP at 226. Robinson stated that she lost consciousness. 6/30/10RP at 226. A piece of glass was removed from the back of her right shoulder by physician's assistant Island. 6/30/10RP at 227.

In closing argument, the State relied on the medical hearsay to establish the alleged details of the charged acts. See. e.g.,

7/1/10RP at 315-20. This reliance was necessary to overcome the defense argument that none of the physical evidence observed in the apartment provided any evidence of the specific facts required for the charge of an intentional assault with reckless infliction of harm, 7/1/10RP at 329-30, 333 (“we don’t know how she fell”), 337 (“maybe that [glass item] was just there, and it broke when she was pushed onto a couch”). 7/1/10RP at 330-33.

As argued in Mr. O’Cain’s opening brief, Confrontation Clause challenges may be manifest constitutional error that can be raised for the first time on appeal, where, as here, admission of the evidence was crucial to conviction or had observable consequences with regard to the jury’s determination of verdict. RAP 2.5(a)(3); State v. Kronich, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007).

The issue may be addressed, and admission of the complainant’s statements to various medical providers violated article 1, section 22 of the Washington Constitution. The State contends the state Confrontation Clause should not be interpreted independently of the federal clause, but that argument is contrary to State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009).

In Pugh, the Washington Supreme Court plainly stated a Gunwall¹ analysis of article I, section 22 is not necessary, as "we have already concluded that an independent analysis applies." Pugh, 167 Wn.2d at 835 (citing State v. Foster, 135 Wn.2d 441, 473, 481, 957 P.2d 712 (1998) (Alexander, J., concurring and dissenting; Johnson, J., dissenting); State v. Shafer, 156 Wn.2d 381, 391, 128 P.3d 87 (2006) (article I, section 22 is subject to an independent analysis with regard to both the scope of the confrontation right as well as the manner in which confrontation occurs)). See also State v. Martin, ___ Wn.2d ___, Slip Op. at 6 & 6 n.2 (No. 83709-1, May 19, 2011) (noting that Supreme Court has interpreted article I, section 22 independently of Sixth Amendment in context of determining admissibility of hearsay statements).

In Pugh, the court did not engage in a full Gunwall analysis but explained, instead, the court must "examine the constitutional text, the historical treatment of the interest at stake as disclosed by relevant case law and statutes, and the current implications of recognizing or not recognizing an interest." Pugh, 167 Wn.2d at 835 (citing State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d

¹ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

595 (2007)). The court explained the state provision requiring a "face to face" confrontation between the witnesses and the accused must not be interpreted literally, as doing so would eliminate all exceptions to the hearsay rule. Pugh, 167 Wn.2d at 836. Instead, in determining whether the state provision provided more protection, the court examined at length the historical treatment of the hearsay exception at issue. Id. at 836-43. Because the witness's statements would have been admissible under a hearsay exception existing when our state constitution was adopted, they did not implicate the right to confrontation under article I, section 22. Id. at 843.

Here, in contrast, the several medical providers' hearsay testimony would not have been admissible at the time our state constitution was adopted. Their admission therefore violated article I, section 22.

The State takes issue with Mr. O'Cain's historical analysis of the medical treatment exception to the hearsay rule. The State contends that, rather than excluding medical hearsay statements, the early cases draw a distinction between statements made by a patient to a treating physician, which were admissible as

substantive evidence, and statements made to a physician solely for the purpose of qualifying the physician as an expert witness who would render an opinion at trial, which were not admissible as substantive evidence. The State misreads the early cases.

Contrary to the State's argument, the early cases show that historically, hearsay statements to medical providers were not admissible as substantive evidence of guilt. As Professor Tegland explains:

Under prerule Washington law, statements of past symptoms and statements relating to medical history, even though made to a treatment physician, were inadmissible as independent substantive evidence. Such statements were admissible, but only for the limited purpose of supporting the physician's medical conclusions.

5C Karl B. Tegland, Washington Practice: Evidence Law and Practice, § 803.19 at 66-67 (5th ed. 2007).

In Smith v. Ernst Hardware Co., 61 Wn.2d 75, 77, 377 P.2d 258 (1962), for example, appellant offered the medical testimony of her treating physician, who testified that appellant related to him the history and causation of her sinus condition. In holding the statements were inadmissible, the court explained, "[i]t is the rule in this state that a doctor who treats a patient and later becomes a

witness may, in relating his medical conclusion, testify relative to statements made to him by his patient, as an exception to the hearsay rule." Id. at 79 (citing Hinds v. Johnson, 55 Wn.2d 325, 347 P.2d 828 (1959); Petersen v. Dep't of Labor and Indus., 36 Wn.2d 266, 217 P.2d 607 (1950)). But although such hearsay statements were admissible, they were admissible for only the "limited purpose" of supporting the doctor's medical conclusion. Smith, 61 Wn.2d at 79. They were "not evidence which establishes the fact of the patient's condition" or the causal relationship between the patient's condition and the accident. Id. (citing Kraettli v. North Coast Transp. Co., 166 Wash. 186, 6 P.2d 609 (1932); Poropat v. Olympic Peninsula Motor Coach Co., 163 Wash. 78, 299 P. 979 (1931); Estes v. Babcock, 119 Wash. 270, 205 P. 12 (1922)). Since the causal relationship between the accident and the sinus condition was not otherwise established in the case, the court affirmed the trial court's decision to grant a new trial. Smith, 61 Wn.2d at 80.

Similarly, in Estes, the issue was whether the court erred in permitting a physician to testify as to statements made to him by the plaintiff regarding her condition, upon which he based his

opinion. Estes, 119 Wash. at 274. The court explained, "[s]uch evidence is admissible for the purpose of affording the jury some means of determining the weight to be given to the opinion of the physician, but not as evidence tending to prove the actual condition of the patient at the time." Id. The court described this as "the general rule." Id.; see also Petersen, 36 Wn.2d at 269 ("universal rule" is that physician who treats a patient may later become a witness and testify as to his medical conclusions, which may be based substantially on patient's hearsay statements regarding his or her subjective symptoms); Kraettli, 166 Wash. at 190-91 (purpose of admitting plaintiff's statements to physicians was to determine what weight to give to physicians' opinions as to cause of her condition); Poropat, 163 Wash. at 83-84 ("statements made by an injured party to his physician are not evidence tending to prove the actual condition of the patient" but are admissible for limited purpose of "showing the situation upon which the physicians based their opinions") (citing Estes, 119 Wash. 270).

The current exception for statements to medical providers is much broader than the earlier common law exception. See Tegland, Washington Practice, supra, § 803.19 at 66 ("The prerule

cases defined a rule of much narrower admissibility."). ER 803(a)(4) allows admission of hearsay statements to medical providers attributing causation if the statements are "reasonably pertinent to diagnosis or treatment."

But even under the modern rule, only neutral statements of causation ("I was hit by a car") would normally be admissible, with statements attributing fault ("... driven by Jane Andrews, who was drunk and ran a red light") being inadmissible. Tegland, Washington Practice, *supra*, at § 803.23 at 73-74. Thus, in State v. Redmond, 150 Wn.2d 489, 497, 78 P.3d 1001 (2003), the Washington Supreme Court held that hearsay statements to medical personnel that Johnson was accosted in the parking lot, that he was taken from his automobile, and that his head was slammed against the roof of the car, were inadmissible.

The modern rule has also expanded over time and resulted in inconsistent court decisions. See Robert H. Aronson, The Law of Evidence in Washington, at § 803.04[5][c] (4th ed. 2010) (and cases cited) (explaining that the principle underlying the hearsay exception for statements to medical providers requires excluding most statements of causation and fault, and noting conflicting

holdings of cases applying the exception in that regard); Robert R. Rugani, Jr., The Gradual Decline of a Hearsay Exception: The Misapplication of Federal Rule of Evidence 803(4), The Medical Diagnosis Hearsay Exception, 39 Santa Clara L. Rev. 866, 879 (1999) (noting practice of permitting admission of hearsay statements as to fault made to medical providers has "expanded the scope of the medical diagnosis hearsay exception"). This expansion in application has rendered the hearsay exception for statements to medical providers a "less firmly rooted hearsay exception" and has undermined its reliability. Rugani, The Gradual Decline of a Hearsay Exception, *supra*, at 891-92.

In order to safeguard the reliability of statements admitted under the exception and ensure consistency in application of the rule, this Court should hold admission of hearsay statements to medical personnel such as those outlined above violate article I, section 22, where the defendant has no opportunity to cross-examine the declarant.

Finally, the error was not harmless. Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error analysis. Chapman v. California, 386

U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). Independently, a constitutional error may be "so unimportant and insignificant" in the setting of a particular case that the error is harmless beyond a reasonable doubt. State v. Wells, 72 Wn.2d 492, 500, 433 P.2d 869 (1967) (emphasis omitted) (quoting Chapman, 386 U.S. at 21-22).

Here, there is more than a reasonable possibility that admission of Ms. Robinson's repeated hearsay statements to three medical providers influenced the jury's verdict. Indeed, the medical hearsay was crucial to any finding by the jury that Mr. O'Cain intentionally assaulted Ms. Robinson, and recklessly caused harm. Physician's assistant David Island stated that Ms. Robinson told him she was "thrown onto a [glass] table," which broke. 6/30/10RP at 175. The EMT stated that Ms. Robinson told him that she had been "struck with a glass object, which had broke . . . and that's how she received the cuts." 6/30/10RP at 220-21. And finally, Robinson told the Nurse that she had been pushed, kicked, and

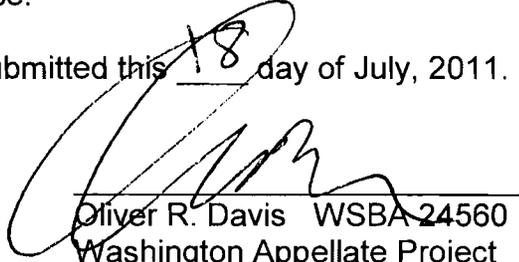
choked by her boyfriend, and he had “thrown [sic] some objects at her.” 6/30/10RP at 226. All of this should have been excluded.

The remaining untainted evidence that the defendant intentionally assaulted Ms. Robinson and recklessly caused harm was far from overwhelming, if not insufficient entirely. Absent the medical hearsay, the jury would have been provided solely with the 911 claim that there had been a fight or an assault, and that Ms. Robinson – in her own words on the call – had “fell on some glass” or that she had been cut by a decorative item that was on a table. Without Ms. Robinson's statements to the three medical providers, the jury would likely have concluded Ms. Robinson's 911 statements did not rise to the level of proof beyond a reasonable doubt of second degree assault as charged, which required an intentional assault that recklessly caused substantial bodily harm. Therefore, the conviction for second degree assault must be reversed.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. O'Cain respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 18 day of July, 2011.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 65735-6-I
)	
JAMES O'CAIN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF JULY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANN MARIE SUMMERS, DPA	(X)	U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF JULY, 2011.

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