

66694-1

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COA No. 66694-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TYSON MONTE CLARK,

Appellant.

FILED
COURT OF APPEALS
DIVISION ONE
JUL 14 2011
SEATTLE, WA

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Leroy McCullough

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In the defendant Tyson Clark's trial on a charge of second degree assault, to which he interposed a defense of self-defense and defense of others, the trial court violated Mr. Clark's confrontation rights.

2. The trial court abused its discretion in admitting evidence in violation of the hearsay rule.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court violate Mr. Clark's confrontation rights when, over objection, it allowed the emergency room (ER) physician to relate written and oral statements by the non-testifying radiologist, who diagnosed that the complainant had suffered a fracture?

2. Did the trial court's ruling permitting the ER physician's testimony also violate the hearsay rule, where the business records exception does not apply to allow hearsay evidence of another's discretionary, expert medical opinion?

3. Did the trial court violate the confrontation clause and the hearsay rule in refusing to strike various portions of the ER physician's report which stated the radiologist's medical diagnosis?

4. Is reversal required where, absent the improper evidence regarding the radiologist's diagnosis of fracture, the jury would likely have reached a different verdict, considering the weak nature of the State's other evidence of "substantial bodily harm," and where the jury likely used the fracture evidence to conclude that Mr. Clark used excessive force in self-defense?

C. STATEMENT OF THE CASE

1. **Procedural history.** Tyson Clark, age 27, and Todd Doerflinger were charged with second degree assault pursuant to RCW 9A.36.021(1)(a), after a fight involving complainant Steven Palmer at the Puerto Vallarta restaurant in Covington.¹ CP 1-2. According to the affidavit of probable cause, Mr. Palmer claimed that the defendant punched him, and then struck him in the eye or face area with his knee, following an argument or exchange of words occurring as the three men were exiting the establishment's restroom. CP 11.²

¹Mr. Doerflinger, in addition to being charged with assault of Mr. Palmer, was charged with further offenses including property destruction not brought against Mr. Clark, and entered a plea of guilty in a separate proceeding. CP 1-2; 11:30/10RP at 28. The affidavit of probable cause indicated that after the incident, Mr. Doerflinger remained in the establishment and caused a disturbance, then fled and was tracked down by police where he was found hiding in the bushes of a nearby business. CP 9-11, 13.

²Only later at trial did Mr. Palmer admit that he had swung punches at the defendant. 12/7/10RP at 120-23, 145-46; CP 4.

Mr. Clark spoke with Sheriff's deputies who encountered him a block from the restaurant. He acknowledged he had been in a fight, and waived his Miranda rights. He then told Deputy Greg Victor that Mr. Palmer had burst through the doorway of the restroom, and shoved Mr. Doerflinger down into a nearby booth or banquette. The defendant tried to push Mr. Palmer away, then Mr. Palmer struck him, and Mr. Clark punched Mr. Palmer back. CP 11.

Following trial to a jury at which the trial court gave a "first aggressor" instruction, and the standard self-defense instructions stating that a person may not use more force than necessary,³ Mr. Clark was found guilty as charged. CP 51, CP 52-75.

The trial court denied the defense motion for an exceptional sentence below the standard range, and Mr. Clark was ordered to serve a standard range term of incarceration, based on his offender score of zero. CP 83-89. Mr. Clark appeals, arguing that each of the serious evidentiary and/or constitutional errors occurring below warrants a new trial. CP 90-97.

³The jury was instructed on theories of self-defense and defense of another, based on Mr. Clark's and the defense witness's testimony that he shoved Mr. Palmer to keep him from advancing on Mr. Doerflinger, and that he punched Mr. Palmer after the complainant began swinging at him and hit him in the temple. CP 68 (Instruction 13).

2. Trial testimony of ER physician and admission of

Exhibit 13. Dr. Larry Kadeg treated Mr. Palmer in the Valley Medical Center emergency room, where the complainant stated he had been assaulted multiple times in the face. 12/1/10RP at 17, 24, 29. Considering Mr. Palmer's visible facial injuries including swelling and a superficial laceration, Dr. Kadeg was concerned that the patient might have suffered some sort of facial fracture. 12/1/10RP at 31-30-31, 33, 74. Therefore, he had a radiologist from the hospital conduct – and interpret – CT (computed tomography) scans of Mr. Palmer's facial bones. 12/1/10RP at 32.

Dr. Kadeg then testified that Mr. Palmer had suffered a nasal fracture, because this was what was opined by the radiologist in a written summary, and to Dr. Kadeg orally. 12/1/10RP at 36. According to the ER physician, the radiologist looked at the CT scans he conducted upon Dr. Kadeg's request, and submitted a report to Dr. Kadeg assessing the results. 12/1/10RP at 37-40.

When asked how he relies on radiology records, the ER physician made clear that it is the radiologist that makes the expert diagnosis by conducting the interpretation of the scan. 12/1/10RP at 39. And specifically in this case, Dr. Kadeg made clear that he relied for his testimony on the radiologist's "typed radiology report

[that I have] in front of me” as he was testifying. 12/1/10RP at 39.

He also stated he was told this by the radiologist in person.

12/1/10RP at 40.

Mr. Clark objected to Dr. Kadeg’s testimony on hearsay and foundation grounds, resulting in a sidebar. 12/1/10RP at 36, 40.

The prosecutor asked additional questions inquiring whether Dr. Kadeg relies on radiology records as part of the ordinary course of his medical practice. 12/1/10RP at 39-40. Counsel again objected several times on foundation, hearsay and confrontation grounds when Dr. Kadeg testified that the radiologist concluded the complainant had suffered a new comminuted nasal fracture.

12/1/10RP at 43-44, 48.

Counsel also objected to admission of Exhibit 13, a compilation of Mr. Palmer’s medical reports from the hospital visit, which was admitted as a business record. 12/1/10RP at 52. Mr. Clark argued that the radiologist was unavailable to be cross-examined and that testimony repeating the radiologist’s interpretation of the CT scan violated his right to confrontation. 12/1/10RP at 53-56. Counsel also argued that the radiologist’s report was not a business record because it was a report based on the radiologist’s professional judgment. 12/1/10RP at 58.

The last two pages of Dr. Kadeg's report were stricken from Exhibit 13. 12/1/10RP at 62-63, 67-68. This was the radiologist's own full report, which the State agreed to remove, although noting correctly that this did not solve the defendant's remaining objections. The prosecutor claimed that no evidence had come in repeating any statements from the radiologist, but rather Dr. Kadeg had merely indicated his opinion of a fracture and noted his part reliance on the radiologist. 12/1/10RP at 64.

The trial court ruled that business records and testimony therefrom could include reliable information relied on by trustworthy sources. 12/1/10RP at 65-66. Following a recess, the doctor again testified that Mr. Palmer had suffered a nasal fracture, a conclusion reached by reliance on reading the radiologist's CT scan. 12/1/10RP at 72-73.

Exhibit 13 contains Dr. Kadeg's precis of the radiologist's conclusion of a fracture, which the defendant unsuccessfully sought to be excised. 12/1/10RP at 61-62. The document states in relevant part,

LABORATORY: CT scan of facial bones
shows comminuted old fractures noted,
comminuted fracture of the nose, nasal bones.

Supp. CP ____, Sub # 50B- (Exhibit list, exhibit 13, at page 1.), and

ASSESSMENT: Facial contusions, nasal fracture, facial laceration 1.5 cm.

(Emphasis added.) Supp. CP ____, Sub # 50B (Exhibit list, exhibit 13, at page 2.) (Attachment A).

3. Additional testimony. In his Mirandized statement taken immediately after the incident, Mr. Clark explained to Deputy Victor that he was defending himself against a physical confrontation from Mr. Palmer, which commenced when his friend, Mr. Doerflinger, somehow became involved in an argument with Mr. Palmer and other individuals. 11/15/10RP at 37, 41; 12/1/10 at 132-33. Mr. Clark's account of the incident, introduced through the Deputy who interviewed him and his own trial testimony, was consistent throughout. 12/7/10RP at 201-04, 218-19. Mr. Palmer started swinging at Mr. Clark, hitting him in the temple after several unsuccessful swings. 12/7/10RP at 203-04. Mr. Clark reacted, punching Mr. Palmer in the jaw area, and then he immediately backed off and walked away from the altercation when a patron from the restaurant stepped in to intervene. 11/15/10RP at 40-41; 12/1/10 at 132-33. Mr. Clark vigorously denied that he ever "knead" Mr. Palmer in the face. 12/7/10RP at 206.

The alleged victim, Mr. Palmer, admitted that he had been in a car accident approximately a year prior to the current incident.

12/7/10RP at 112. He had broken his nose on prior occasions.

12/1/7RP at 135. Apparently Mr. Palmer had also suffered numerous concussions as a result of playing rugby.⁴ 12/7/10RP at 112, 135.

Mr. Palmer's claimed account of the incident was that he was at the restaurant, and two males in the restroom, one of whom was Mr. Clark, seemed as if they might be verbally harassing somebody. 12/7/10RP at 86-87. He claimed he was shoved while exiting the restroom, or he had to push his way "through," Mr. Clark. 12/7/10RP at 90-91. On cross-examination Mr. Palmer admitted that it was not the defendant who had shoved him. 12/7/10RP at 120-21. Mr. Palmer also stated that the defendant was the person closest to him when he first got pushed from behind, so he may, he admitted, have thrown a punch at Mr. Clark for simply that reason. 12/7/10RP at 120-23, 145-46.

Mr. Palmer then claimed the defendant punched him in the side of the head, and then, Mr. Palmer asserted, Mr. Clark used his

⁴Admissible portions of Mr. Palmer's medical report expanded on this limited testimony, indicating "History of multiple concussions. He had multiple facial fractures requiring facial reconstruction done at Harborview Medical Center just within approximately one year ago." Supp. CP ____, Sub # 50B (Exhibit list, exhibit 13).

knee to strike him in the face, in the nose, eye, and cheek area.
12/7/10RP at 95-97.

State's witness, William Guinn, admitted that he only saw the interaction between the two men after the point in time when the defendant punched Mr. Palmer. 12/7/10RP at 24-26.

Defense witness Edward Kabba observed that Mr. Palmer started a shoving match with Mr. Clark. 12/7/10RP at 178. Mr. Kabba confirmed that Mr. Palmer was swinging at Mr. Clark, trying to hit him, multiple times before Mr. Clark hit back at Mr. Palmer with one punch. 12/7/10RP at 177, 180. Mr. Clark did not ever "knee" Mr. Palmer at any time. 12/7/10RP at 176.

D. ARGUMENT

REVERSAL IS REQUIRED WHERE THE COURT ALLOWED THE ER PHYSICIAN TO TESTIFY TO THE NON-TESTIFYING RADIOLOGIST'S MEDICAL OPINION THAT THE COMPLAINANT SUFFERED A NASAL FRACTURE.

1. The alleged assault victim's medical history included a pre-existing, serious nasal fracture or break, but the defendant was unable to cross-examine the only doctor who analyzed the victim's CT scans and concluded he had suffered new injury. Mr. Palmer's nose had been broken a year prior to the current matter, apparently as a result of a car accident, resulting in

facial reconstruction. 12/7/10RP at 112-13, 135; Supp. CP ____, Sub # 50B (Exhibit 13). The radiologist was the only doctor who ever interpreted the CT scans and concluded Mr. Palmer had suffered a fracture, presumably from the current incident.

The radiologist did not testify. Instead, the radiologist's expert conclusion was admitted through the ER physician, who ordered the CT scans because the victim had pain and swelling. Dr. Kadeg noted that Valley Hospital performs CT scans in facial injury cases almost routinely, and stated that although he often reviews the CT scans himself, he did not do so in this case.

12/1/10RP at 31-32, 36-37.

Q: Okay. Did you order any tests or X-rays [for] Mr. Palmer?

A: I did.

Q: And what were those that you ordered?

A: I ordered a CT scan of facial bones.

Q: And anything else?

A: That's all I have in the medical record documented.

Q: Did you do the CT scan yourself?

A: No, I did not.

Q: Did you read or review the films?

A: I can't recall if I reviewed the films or not.

12/1/10RP at 37. In addition, although Dr. Kadeg utilized a demonstrative drawing to explain the general nature of facial fractures, his trial testimony did not include any review of any CT

scans from Mr. Palmer's medical records so as to explain to the jury what in those films showed that Palmer suffered a fracture injury as a result of the alleged incident. 12/1/10RP at 41-45. No CT scan films were introduced into evidence. Supp. CP ____, Sub # 50B (Exhibit list).

Mr. Clark, over objection, was deprived of any ability to cross-examine the radiologist that issued the critical determination in the case. See 12/1/10RP at 66 ("The only remedy, I think, and I'm not telling the State how to do its case, is to get the doctor in here so he can testify"). Among the many inquiries that were precluded when the State effectively presented a critical witness who could not be cross-examined, was the basic question of how the radiologist detected a fracture, and how he determined that it was recent.

2. The right of cross-examination is enforced through the confrontation clause and the hearsay rules. The accused's ability to cross-examine a State's witness has its enforcement in both the confrontation clause and the hearsay rules. The state evidence rules of hearsay protect the right to reliable evidence, which means evidence tested by cross-examination, unless other circumstances, establishing a hearsay exception, indicate the out-

of-court statement need not be tested. As Professor Tegland has noted, the restrictions on the use of hearsay are based on considerations including,

the out-of-court declarant was not under oath when making the statement in question, the declarant's demeanor cannot be observed, the declarant is not subject to cross-examination, and the witness who is recounting the declarant's statement in court may not recount the statement accurately.

5B Karl B. Tegland, Washington Practice, Evidence Law and Practice § 801.3, at 319 (5th ed.2007). See also In re Price, 157 Wn. App. 889, 240 P.3d 188 (2010) (under the minimum due process protections of U.S. Const. amend. XIV, § 1, and Wash. Const. art. I, § 3, the right to cross-examine witnesses is enforced through the right to exclusion of hearsay absent good cause). State v. Dahl, 139 Wn.2d 678, 686, 990 P.2d 396 (1999); see generally Morrissey v. Brewer, 408 U.S. 471, 482, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Additionally, the Sixth Amendment Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004); Melendez-Diaz v. Massachusetts,

___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). Article I, section 22 of the Washington Constitution similarly provides, "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face."⁵

The purposes of the confrontation clauses are to ensure that the witness's statements are given under oath, and to permit cross-examination of the witness. State v. Price, 158 Wn.2d 630, 640, 146 P.3d 1183 (2006). "[T]he 'principal evil' at which the clause was directed was the civil-law system's use of ex parte examinations and ex parte affidavits as substitutes for live witnesses in criminal cases." State v. Jasper, 158 Wn. App. 518, 526, 245 P.3d 228 (Div. 1, 2010), review granted, 170 Wn.2d 1025 (2011), quoting State v. Lui, 153 Wn. App. 304, 314, 221 P.3d 948 (2009), review granted, 168 Wn.2d 1018, 228 P.3d 17 (2010). Such a practice denies the defendant a chance to test his accusers' assertions "in the crucible of cross-examination." Crawford v. Washington, 541 U.S. at 61.

Under the Sixth Amendment and Crawford, if testimonial hearsay is at issue, the Confrontation Clause requires witness

⁵An alleged violation of the Confrontation Clause is subject to *de novo* review. Lilly v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); State v. Kirkpatrick, 160 Wn.2d 873, 881, 161 P.3d 990 (2007).

unavailability and a prior opportunity for cross-examination in order for an out-of-court testimonial statement to be admissible without offending the confrontation right. Crawford, 541 U.S. at 61-62.

Thus after Crawford, state evidence rules no longer govern confrontation clause questions, and testimonial hearsay of witnesses who are not cross-examined may not be admitted. Crawford, 541 U.S. at 61-62; State v. Jasper, 58 Wn. App. 518; United States v. Cromer, 389 F.3d 662, 679 (6th Cir.2004).

3. The confrontation clause was violated under Melendez-Diaz v. Massachusetts, State v. Jasper and under the reasoning of State v. Lui. In the case of Melendez-Diaz v. Massachusetts, the U.S. Supreme Court applied the Crawford rule to statements prepared by expert, forensic witnesses. Melendez-Diaz, 129 S.Ct. at 2540. The Court found that the certificate of a laboratory analyst asserting that a tested substance was “cocaine” was a testimonial statement and could not be repeated by a trial witness without violating confrontation. Melendez-Diaz, 129 S.Ct. at 2540. The Court rejected various arguments that the statements of scientific experts should be treated differently from the statements of other witnesses. Melendez-Diaz, at 2532-42.

The present case is analogous. Although the radiologist's expert statement, that Mr. Palmer suffered a "fracture" from the assault, was admitted through a testifying witness as opposed to a certificate, the ER physician merely repeated the radiologist's conclusion. 12/1/10RP at 37. And as argued infra, considering common knowledge among the medical professionals at Valley Hospital, the radiologist reasonably would have known that this statement was available for use in a criminal prosecution. 12/1/10RP at 22.

Similarly, in the Washington case of State v. Jasper, 58 Wn. App. 518, supra, the Court of Appeals found a confrontation violation in allowing into evidence the affidavit of a records custodian which stated that "[a]fter a diligent search, our official record indicates that the status on February 14, 2005 was: Personal Driver License Status: Suspended in the third degree." State v. Jasper, 58 Wn. App. at 231, 234. This Court reasoned that, in creating the affidavit, the affiant searched the DOL database, analyzed Jasper's record, and drew a conclusion from that information. The affidavit was therefore not merely a certificate of authenticity of existing public records. Jasper, at 535.

As in Jasper, in the present case, cross-examination of the

radiologist was precluded, and would be far from "an empty formalism." State v. Jasper, 534 (rejecting State's argument that cross-examination of the records custodian would be pointless).

However, in the case of State v. Lui, supra, the Court of Appeals rejected an argument that confrontation was violated by admission of a pathologist's testimony as to the cause of a victim's death, where he partially based his opinion on an autopsy performed by a non-testifying pathologist. State v. Lui, 153 Wn. App. at 318-25. Division Three reasoned that the testifying pathologist was not merely acting as a surrogate for the pathologist who had conducted the autopsy, and the defendant had the opportunity to cross-examine the testifying witness as to the basis of his independently-reached opinion, which he came to using his own significant expertise to interpret and analyze the underlying data, rather than merely reciting the contents of the autopsy. State v. Lui, 153 Wn. App. at 319-22. Division Three held that the confrontation clause, as applied by Melendez-Diaz, "does not preclude a qualified expert from offering an opinion in reliance upon another expert's work product." Lui, 153 Wn. App. at 318-19.

State v. Lui's confrontation clause analysis is likely incorrect, to the extent that it finds that the use of out-of-court statements by

others to show the basis for a testifying witness's expert conclusion avoids confrontation error. See Crager v. Ohio, ___ U.S. ___, 129 S.Ct. 2856, 174 L.Ed.2d 598 (2009) (ordering remand in light Melendez-Diaz where DNA analyst was permitted to state conclusions reached by non-testifying analyst, even where testifying witness also reached independent opinion); People v. Williams, 939 N.E.2d 268 (2010), cert. granted, ___ S.Ct. ___, 2011 WL 2535081 (No. 10-8505, June 28, 2011) (granting review of case where forensic scientist's analysis of DNA sample was deemed not "hearsay" in violation of confrontation clause if admitted simply to show underlying facts and data relied upon by testifying expert⁶); Commonwealth v. Durand, 457 Mass. 574, 585, 931 N.E.2d 950 (2010) (substitute medical examiner may not testify to autopsy).

In any event, that is not what occurred here. The radiologist's report was not cited by the testifying witness as merely a factor in an independent medical assessment made by himself that Mr. Palmer had sustained a fracture from the assault. Rather,

⁶ The Supreme Court's webpage frames the issue in Williams as: "Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause." <http://www.supremecourt.gov/qp/10-08505qp.pdf>.

Dr. Kadeg, the ER physician, testified for all practical purposes as a conduit to introduce the out-of-court medical diagnosis reached by the non-testifying radiologist. Dr. Kadeg's assessment of Mr. Palmer's injuries, and his conclusion regarding a fracture, was based solely on the radiologist's report.

When Kadeg, the ER physician, was asked when he started developing "some idea of what the injury might be," the physician referred immediately to the CT scan. 12/1/10RP at 31. Dr. Kadeg did not reach a conclusion that Mr. Palmer had suffered a nasal fracture, and then merely testify that this opinion was shaped or supported by the radiologist's interpretation of the CT scan. Rather, the physician suspected the possibility of a facial fracture because the victim presented with swelling and pain in that area, so a CT scan was ordered. The radiologist was then the medical professional who determined that Mr. Palmer had suffered a fracture, and it was his diagnosis that was proffered to the jury as the import of the testifying physician's testimony.

In addition, irregardless if the ER physician also concluded "on his own" that Mr. Palmer had suffered a fracture, where he did not himself review the CT scan films, but instead the radiologist's conclusion of a new fracture was admitted into evidence, Mr. Clark

was unable to cross-examine any witness who reviewed the scans, to allow the jury to assess the accuracy of the fracture conclusion. 12/1/10RP at 66 (defense counsel's argument that "[t]he only remedy, I think, and I'm not telling the State how to do its case, is to get the doctor in here so he can testify"). This violated Mr. Clark's hearsay rights, and also his confrontation rights, because the ER physician related "testimonial" hearsay.

4. A reasonable person in the radiologist's position would anticipate that his statement would be available for use in investigating or prosecuting a crime. The complainant's presentation at Valley Hospital was as that of an "assault" victim. As the ER physician repeatedly noted, Mr. Palmer claimed that his injuries were suffered when he was assaulted by being struck in the face by a person, and that is partly how the physician determined what medical professionals were necessary to assess and detect any internal injury. See, e.g., 12/1/10RP at 27, 29, 30, 32, 35-36. Assault is a criminal offense.⁷ RCW 9A.36.021.

⁷King County Sheriff's Deputy Jeremy Davy interviewed Mr. Palmer immediately after the incident, at Valley Hospital in the same room where he was being treated. CP 6-7 (Certificate for Determination of Probable Cause). The Deputy's interview of Mr. Palmer was interrupted "by medical staff's need to take him to Catscan" for a possible facial fracture. CP 7.

The confrontation clause specifically prohibits the admission of testimonial hearsay. Crawford, 541 U.S. at 68. Generally, a statement is “testimonial” if a reasonable person in the declarant's position would anticipate that his statement would be available to be used against a person in investigating or prosecuting a crime. Davis v. Washington, 547 U.S. 813, 822-23, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (statements are testimonial when the circumstances objectively indicate that the statement is "potentially relevant to later criminal prosecution"). Medical personnel at Valley Hospital making diagnostic statements regarding an “assault” would reasonably anticipate that their determinations are available for use in a possible criminal case. See State v. Hopkins, 134 Wn. App. 780, 791, 142 P.3d 1104 (2006) (statements of non-testifying nurse-practitioner that child reported sexual abuse were “testimonial” where practitioner forwarded report to law enforcement in accord with reporting law).

In addition, the ER physician made clear that, as a Valley Hospital employee, he knows that medical records are available for possible criminal cases. During direct examination, the physician's testimony established that doctors at Valley Hospital understand generally that their diagnostic determinations in medical reports are

available to be referred to, not just for purposes of return hospital visits, but for purposes of “court case[s].”

Q: Are those records relied upon by the Valley Medical Center?

A: Yes

Q: How so?

A: They are basically, from Valley Medical’s perspective, I don’t know, I guess, the technical term, but they are stored. And so if a patient were to, say, return, have a return visit, we would be able to access those records if we needed to refer to that record. For instance, for a court case, it is available.

(Emphasis added.) 12/1/10RP at 22. Dr. Kadeg had worked at Valley Medical Hospital for 25 years. 12/1/10RP at 18. His testimony spoke to an understanding by medical personnel at that facility that their medical records are certainly available for criminal cases. Indeed, this was confirmed specific to this case, by Detective James Allen, who obtained Mr. Palmer’s medical records from Valley Medical pursuant to a standard procedure with hospitals.⁸ 12/1/10RP at 94-95.

⁸Detective Allen’s testimony confirmed his usual investigative procedure with the Hospital, which he followed in this case, in which he obtains the

documentation regarding the actual injuries sustained by a person, the case file, so we will – a person will sign a release for the medical records regarding that particular incident. You will forward that on to the appropriate hospital, and they will send you a copy of the medical records.

12/1/10RP at 94-95.

The Valley Hospital radiologist was unavailable for cross-examination to confirm if he 'subjectively' shared all of this institutional awareness. However, the standard is that testimonial statements include:

statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

(Emphasis added.) Jasper, 158 Wn. App. at 527 (citing Crawford, 541 U.S. at 51–52). The testimony below regarding general knowledge at the Hospital that medical determinations are available for later court cases, which is only confirmed by the Hospital's release of records to the Sheriff's Office Detective in the case, established that the radiologist's diagnosis was "testimonial" under the United State's Supreme Court's reasonable person standard. Testimonial hearsay of witnesses who are not cross-examined may not be admitted at a criminal trial. Crawford, 541 U.S. at 61-62. Confrontation was violated.

5. The radiologist's diagnosis also violated the hearsay bar of ER 802, failing to meet the "business records" exception because it was an opinion reached by exercise of professional judgment.⁹ The trial court also abused its discretion in admitting evidence when it allowed Dr. Kadeg's hearsay testimony, repeating the radiologist's written and verbal opinion that Mr. Palmer had suffered a fracture. Pursuant to State v. Hopkins, along with In re Welfare of J.M., the radiologist's statement of his medical diagnosis was not admissible under the hearsay exception for "business records" because it was a statement of an opinion reached by the radiologist's discretionary professional judgment, as opposed to a statement reflecting the entry of an objective, easily-ascertained fact.

Under ER 803(a)(6) and the Uniform Business Records as Evidence Act, chapter 5.45 RCW (referenced in ER 803(a)(6)), business records are admissible as evidence of an act, condition, or event.¹⁰ RCW 5.45.020. Importantly, this rule

⁹The appellate court reviews a trial court's decision to admit evidence under the "business records" exception to the hearsay rule for a manifest abuse of discretion. State v. Ziegler, 114 Wn.2d 533, 538, 789 P.2d 79 (1990).

¹⁰ER 803(a)(6) provides in pertinent part:

was not adopted to permit evidence of the recorder's opinion, upon which other persons qualified to make the same record might have differed. Nor was it intended to admit into evidence conclusions based upon speculation or conjecture.

Young v. Liddington, 50 Wn.2d 78, 83, 309 P.2d 761 (1957).

“Progress notes, evaluations, test results, and reports by nontestifying witnesses are, then, not admissible as business records.” In re Welfare of J.M., 130 Wn. App. 912, 924, 125 P.3d 245 (2005).

For example, in J.M., the Court of Appeals found ineffective assistance of counsel in a failure to object to psychiatric diagnoses made by non-testifying expert witnesses, which were related through trial witnesses' testimony. On review, the psychological diagnoses were deemed not within the "business records"

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) Records of Regularly Conducted Activity. (Reserved. See RCW 5.45.).

ER 803(a)(6). RCW 5.45.020 provides as follows:

Business records as evidence

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of

exception to the hearsay rule, because they involved conclusions requiring a high degree of skill of observation, analysis, and professional judgment. In re Welfare of J.M., 130 Wn. App. at 923. As the Court explained, the “business records” exception only permits the introduction of routine notations made in the course of business operations, such as shop-book or ledger entries and the like:

What such records have in common is that cross-examination would add nothing to the reliability of clerical entries: no skill of observation or judgment is involved in their compilation. [Citing New York Life Ins. Co. v. Taylor, 147 F.2d 297, 301 (D.C.Cir.1944)]. The records at issue here were hardly routine clerical notations of the occurrence of objective facts. The evidence documented in these records involved a high degree of skill of observation, analysis, and professional judgment. The business records exception does not, then, apply. Moreover, the business records exception does not, nor should it, allow for the admission of expert opinions for which the opportunity to cross-examine would be of value - like psychiatric diagnoses.

(Emphasis added.) In re Welfare of J.M., at 923-24; see also 5C Karl B. Tegland, Washington Practice, Evidence Law and Practice § 803.37, at 96 (5th ed.2007) (rule was not intended to allow

information, method and time of preparation were such as to justify its admission.

hearsay admission of "reports reflecting the exercise of skill, judgment and discretion").

Thus under ER 803(a)(6) and the Business Records Act, routine entries are deemed reliable despite being hearsay because they are either generally correct or incorrect in an objective sense, and not a matter of opinion or judgment.

But the expert diagnosis of a medical professional, such as a radiologist determining that a CT scan "shows" a new fracture, is not the routine recording of an objective clerical act. See State v. Hopkins, supra, 134 Wn. App. 780, 791, 142 P.3d 1104 (2006). In Hopkins, in addition to also finding a confrontation violation, the Court of Appeals concluded that a nurse-practitioner's report determining that child abuse had occurred did not fit the business records exception to the hearsay rule:

[Nurse-practitioner] Young's methodology of gathering K.R.'s medical history is potentially very significant. It may be that Hopkins could establish in cross that Young may have used a suggestive interview method. Accordingly, without Young's testimony to establish the reliability of the information gathered in the interview, the business records exception is not applicable. Where the preparation of a report requires the exercise of the declarant's skill and discretion, the business record exception does not apply. In re Welfare of J.M., 130 Wn. App. 912, 924, 125 P.3d 245 (2005).

(Emphasis added.) State v. Hopkins, at 789-90. The emphasized language is particularly applicable in the present case, where Mr. Palmer had previously sustained serious nasal fractures or a break, and cross-examination was crucial to assessing the accuracy of the radiologist's (apparent) conclusion that the victim suffered a fracture from the immediately recent incident.

However, there was no such opportunity to question the radiologist to assess how he determined there was a new fracture on the CT scans. How does a radiologist determine from a CT scan whether a particular reading shows a fracture, and what the age of that fracture is? The business records exception does not apply in this case where the radiologist was reporting a conclusion that involved a complex determination, made by a professional exercising his or her discretionary judgment. The hearsay rule was violated. ER 802; ER 803(a)(6); see also State v. Wicker, 66 Wn. App. 409, 413, 832 P.2d 127 (1992) (under the business records exception, an expert witness may testify only to acts, conditions or events, not to conclusions in the form of opinions or causal statements).

The case of State v. Garrett, 76 Wn. App. 719, 722, 887 P.2d 488 (1995), is distinguishable, and the Court's analysis in that

matter supports Mr. Clark's argument. This Court of Appeals rejected the appellant's argument that a testifying physician could not relate facts observed by the original treating doctor regarding a child's possible sexual abuse. Garrett, at 724-25. The Court distinguished Wicker, noting that that case held that a lab technician could not state his fellow technician's opinion as to whether the fingerprints obtained from the crime scene indeed matched the defendant's. In the case before the Court, however, the physician merely related another's observations; the Court stated: "Contrary to Garrett's interpretation, Wicker stands for the proposition that a witness may not give another expert's opinion contained in a business record; however, it does not preclude the witness from testifying about facts recorded by other professionals." Garrett, at 725 n. 5.

Similarly, State v. Ziegler, supra, 114 Wn.2d 533, 538-39, 789 P.2d 79 (1990), involved a report of a medical test that either showed or did not show a particular result, much like authentication of the existence of a record. The Court held that a laboratory test indicating the alleged victim had the Chlamydia virus was admissible as business records. The Court reasoned that this was in the vein of routine records compiled by

the attendants, nurses, physicians, X ray technicians, laboratory and other hospital employees who collaborated to make the hospital record of the patient. It is not necessary to examine the person who actually created the record so long as it is produced by one who has the custody of the record as a regular part of his work or has supervision of its creation.

Ziegler, 114 Wn.2d at 538. This is very different from the present case. The un-examinable witness in this case was not the X-ray or CT scan “technician,” nor a witness who records that a specific chemical test for a virus was positive or negative. See also State v. Sellers, 39 Wn. App. 799, 805-07, 695 P.2d 1014 (1985) (lab report of victim's blood type admissible as business records) (cited by State at 12/1/10RP at 65). The radiologist’s conclusions and report in this case were expert opinions, requiring the exercise of professional judgment on a matter of difficult ascertainment, as to which cross-examination was critical for assessing reliability, and accuracy. The radiologist’s conclusions were not properly introduced under the business records exception and thus violated the hearsay bar. ER 802 (hearsay is not admissible).

6. Absent the erroneously admitted fracture diagnosis, the remaining untainted evidence of “substantial bodily harm” was far from overwhelming, requiring reversal of the second degree assault conviction. Admission of evidence in violation of the “bedrock” right of confrontation requires reversal unless the State proves beyond a reasonable doubt the unfronted evidence did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (“The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt”); United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5th Cir. 2008) (harmless error analysis following confrontation violation requires court to assess whether possible jury relied on testimonial statement when reaching verdict); see also Fields v. United States, 952 A.2d 859 (D.C. 2008) (finding improperly admitted drug analysis not harmless when government could not prove it did not contribute to the verdict obtained).

Notably, constitutional error is presumed to be prejudicial,

and it is the State that bears the burden of proving that the error was harmless. State v. Stephens, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980).

Reversal is required in this case, because absent the fracture diagnosis, any evidence of “substantial bodily harm” was not overwhelming, and the diagnosis played much more than an insignificant part in the prosecution’s proof. Second degree assault requires proof of “substantial bodily harm.” RCW 9A.36.021(1)(a). “Substantial bodily harm” is defined as

bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

RCW 9A.04.110(4)(b).

Here, Mr. Palmer indicated he did not lose consciousness. 12/1/10RP at 29-30. He had only moderate swelling in his right eye area, a half-inch superficial cut to his lower eyelid, and moderate swelling in his nose. 12/1/10RP at 30-31.

This may barely meet a sufficiency standard, even in comparison to a case such as State v. McKague, 159 Wn. App. 489, 503-04, 246 P.3d 558 (2011) (substantial bodily harm proved where victim had concussion, eye swelling and partial shutting,

check abrasion, head laceration, and yellowing of eye bruise, and where victim was so dizzy he could not walk, was disoriented, and neck pain persisted for two to three months).

However, it does not constitute “overwhelming” evidence. In the context of constitutional error, the untainted evidence alone must be so overwhelming that it necessarily leads to a finding of the defendant's guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Only where the error is “unimportant and insignificant” in the setting of a particular case is a constitutional error harmless beyond a reasonable doubt. State v. Wells, 72 Wn.2d 492, 500, 433 P.2d 869 (1967) (quoting Chapman, 386 U.S. at 21–22).

Here, the radiologist's fracture diagnosis was critical to the prosecutor's securing of a guilty verdict, not “insignificant.” It established a categorical portion of the applicable injury definition (“a fracture of any bodily part”), and the remaining evidence was weak or worse. Indeed, as shown by his medical report, Mr. Palmer denied even temporary loss of “function.” Supp. CP ____, Sub # 50B) (Exhibit list, exhibit 13) (stating Mr. Palmer “denies loss of consciousness” and complains of “moderate facial pain, denies any headache, denies numbness, tingling or weakness”) (also

stating that Mr. Palmer “[d]enies any neck pain, back pain, chest pain, shortness of breath, numbness, tingling, or motor weakness”).

Given this paucity of other evidence, it is unsurprising that the prosecutor in closing argument aggressively used the fracture diagnosis to argue that substantial bodily harm was categorically proved. The prosecutor told the jury that Mr. Palmer’s eye was swollen for four or five days, but argued,

But if you’re still not convinced, well, you got a fracture, that Dr. Kadeg came in – I’m going to go over his testimony. Steven Palmer’s nose was shattered because of the strikes he felt by the defendant, so there is no question Steven Palmer suffered substantial bodily harm.

12/8/10RP at 23. The State repeatedly emphasized the nasal fracture. See 12/8/10RP at 23 (“he’s got a broken nose”). And it is telling that the prosecutor referred to the fracture diagnosis as being the determination of the radiologist made after a “live CT read,” not the conclusion of the admitting ER physician (who did not review the CT films at the time, or at trial). This was a purposeful emphasis by the prosecutor on the special, authoritative medical expertise of the (non-testifying) medical witness.

12/8/10RP at 29. Thus the very nature of the evidence that rendered it inadmissible, was emphasized by the prosecutor to secure Mr. Clark’s conviction.

7. The hearsay error also requires reversal under the nonconstitutional error standard, including for the additional reason that the fracture diagnosis likely spurred the jury to reject Mr. Clark's self-defense claim on ground that an unnecessary amount of force was used. The reversible nature of the confrontation error, with regard to the State's proof of severity of injury discussed above, pertains also to the hearsay error. The standard is that nonconstitutional error in admitting hearsay evidence requires reversal if it is reasonably probable that the error materially affected the trial's outcome. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Considering the degree to which the prosecutor relied on the alleged fracture to attempt to convince the jury that the defendant caused injury that categorically met the severity required for a strike-level assault crime, it is reasonably probable that the jury would have reached a different decision absent the hearsay error, and reversal of the conviction is required under the Neal standard.

Additionally, applicable to both constitutional and nonconstitutional error is the problem that this was a self-defense case – one in which the prosecutor argued that *even if* there was

an initial self-defense justification, the defendant used excessive force.¹¹

The trial court's evidentiary error went squarely to the "necessary force" issue in Mr. Clark's self-defense claim. As the prosecutor argued, the jury could find Mr. Clark guilty even if it believed he initially acted in self-defense:

But look very carefully. It's about the second paragraph at the end where it says what you get to do for lawful use of force. But remember, part of that is about the force is not more than is necessary.

12/8/10RP at 43. The prosecutor then argued to the jury extensively that Mr. Clark used excessive force, in particular arguing about only "some force" being permissible, and about "proportionality." 12/8/10RP at 42-43. Specifically, the prosecutor asked the jury to conclude that excessive force was used, as shown by the fracture, which proved that the defendant "kneed" the complainant:

Is a knee in the face necessary or is a broken nose a reasonable response or amount of force okay to do that? Obviously, you know the answer's no. But he shoved your friend. Is that then okay to just go and break a guy's nose, or did the defendant take his free shot,

¹¹The instructions informed the jury that the defendant was permitted, if he was defending himself or his friend, to use only "force that is not more than necessary". CP 52 (Instruction 13).

say, oh boy, I get to act and really whup this guy.

12/8/10RP at 43-44. This theme continued at length in closing.

12/8/10RP at 43 (arguing that a defendant can use “some force” but not “an unreasonable amount of force”).

It is absolutely critical to note that the prosecutor’s argument centered on one of the most disputed issues at trial. Mr. Clark readily admitted that he punched Mr. Palmer in the jaw, but vigorously denied ever “kneeing” him in the face, 12/7/10RP at 206, which was confirmed by an independent witness. 12/7/10RP at 176. The State in closing, above, connected the fracture diagnosis with that second, more serious allegation, contending that it showed that the knee-strike indeed occurred, and that this was excessive force even in self-defense.

Notably, the jury would not likely have rejected Mr. Clark’s self-defense argument on a “first aggressor” theory, considering that the alleged victim was not even sure if “their” (the two defendants’) slurs in the restroom were directed at him, considering that he was not sure if it was even Mr. Clark who he claimed pushed him, and considering that an independent witness, Mr. Kabba, confirmed Mr. Clark’s testimony that a person clearly associated with the complainant had much earlier approached Mr.

Clark's party with aggressive actions, including finger-jabbing.

12/7/10RP at 201-04; 12/7/10RP at 173-74.

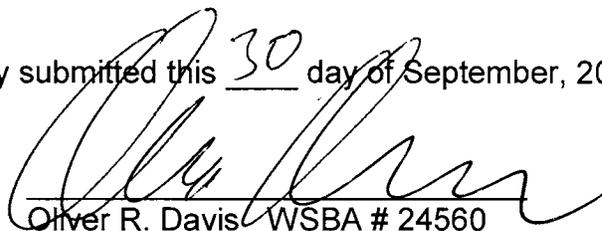
Rather, it is reasonably likely under Neal that the jury rejected Mr. Clark's self-defense claim based on use of force that was more than necessary under Instruction 13, a theory for which the State skillfully employed the improperly admitted evidence that the expert radiologist had diagnosed a fracture.

Whether judged under a constitutional, or nonconstitutional error standard, it is clear the jury used the improperly admitted "fracture" diagnosis not only as proof of the required injury, but also to reject Mr. Clark's self-defense claim on ground that causing a fracture demonstrated a non-proportional use of force, even if the jury believed he was defending himself. Reversal is required.

E. CONCLUSION

Based on the foregoing, the appellant Mr. Clark respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 30 day of September, 2011.



Oliver R. Davis WSBA # 24560
Attorney for Appellant
Washington Appellate Project - 91052

ATTACHMENT A

State v. Tyson Monte Clark, Court of Appeals No. 66694-1

VALLEY MEDICAL CENTER
RENTON, WASHINGTON NAME: PALMER, STEPHEN C LOC: ER,,

HOSP. NO: 0000935127 BD: 05/07/1986
ACCT: 0925500005 PHYS: LAWRENCE J KADEG, MD

ED REPORT

DATE OF VISIT: 09/12/2009

CHIEF COMPLAINT: Assault, facial pain.

HISTORY OF PRESENT ILLNESS: This is a 20-year-old male who was a victim of an assault. He apparently was hit multiple times in the face. He denies loss of consciousness. He was brought in by friends for evaluation. Patient complains of moderate facial pain, denies any headache, denies numbness, tingling, or weakness.

PAST MEDICAL HISTORY: History of multiple concussions. He had multiple facial fractures requiring a facial reconstruction done at Harborview Medical Center just within approximately one year ago.

CURRENT MEDICATIONS: Concerta.

ALLERGIES: NO KNOWN ALLERGIES.

Last tetanus immunization was less than 5 years ago.

SURGERIES: Surgical reconstruction to his face, also tonsillectomy.

SOCIAL: Patient does smoke, alcohol on occasion, denies recreational drug abuse.

REVIEW OF SYSTEMS: Denies any neck pain, back pain, chest pain, shortness of breath, numbness, tingling, or motor weakness.

OBJECTIVE: BP is 145/85, pulse 65, respiratory rate 22, temperature is 98.3, O2 sat 98%. GENERAL: Well-nourished male who is alert. HEENT: There is a moderate right periorbital swelling. There is approximately a 1.5 cm laceration to the lower eyelid horizontally oriented, full-thickness but barely full-thickness. EYES: Pupils equal, round, and reactive to light. The patient is vision intact to eyes bilaterally. TMs without hemotympanum. OROPHARYNX: No obvious dental trauma is noted. The patient has slight tenderness to the maxillary ridge on the right. NECK: There is old scarring from his old injuries. The nose is moderately diffusely swollen. There is no septal hematoma. NECK: Soft, supple, nontender. NEUROLOGIC: Cranial nerves II through XII intact. Motor strength symmetric. No obvious lateralizing signs. CHEST: Clear. No chest wall tenderness. ABDOMEN: Soft, nontender.

LABORATORY: CT scan of facial bones shows comminuted old fractures noted, comminuted fracture of the nose, nasal bones.

ER PROCEDURE: Patient's laceration was prepped, was liberally irrigated, closed with simple interrupted 6-0 Ethilon with good approximation.

ED REPORT

ASSESSMENT: Facial contusions, nasal fracture, facial laceration 1.5 cm.

PLAN: Follow up with Dr. Santos, ENT referral, 3 to 5 days for recheck. Routine discharge instructions. Percocet p.r.n. pain. Return to the emergency room p.r.n. any concerns or problems.

LJK/dt
D: 09/12/2009 05:58:20 EST
T: 09/12/2009 14:42:23 EST
128472/6850584/6211804/0/dt

Signed: LAWRENCE J KADEG, MD
09/21/2009 21:21 PDT

09/12/09
VALLEY MEDICAL CENTER
EMERGENCY DEPARTMENT
BY GINGER BARBER
10/10/09

Dictated by: LAWRENCE J. KADEG, MD

C:
DAVID Q. SANTOS, MD

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66694-1-I
v.)	
)	
TYSON CLARK,)	
)	
Appellant.)	

2011 SEP 30 PM 4:55
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **OPENING 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:

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| APPELLATE UNIT | () | HAND DELIVERY |
| KING COUNTY COURTHOUSE | () | _____ |
| 516 THIRD AVENUE, W-554 | | |
| SEATTLE, WA 98104 | | |
|
 | | |
| [X] TYSON CLARK | () | U.S. MAIL |
| (NO VALID ADDRESS) | () | HAND DELIVERY |
| C/O COUNSEL FOR APPELLANT | (X) | RETAINED FOR |
| WASHINGTON APPELLATE PROJECT | | MAILING ONCE |
| | | ADDRESS OBTAINED |

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2011.

x _____
[Signature]

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