

67478-1

67478-1

No. 67478-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

HECTOR R. HURTADO,

Appellant.

---

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The admission of Jennifer Vera's out-of-court statement to an emergency room nurse that her boyfriend assaulted her violated Mr. Hurtado's right to confront the witnesses against him under the Sixth Amendment to the United States Constitution.

2. The admission of Ms. Vera's out-of-court statement to an emergency room nurse that her boyfriend assaulted her violated Mr. Hurtado's right to confront the witnesses against him under article 1, section 22 of the Washington Constitution.

3. Ms. Vera's statement that her boyfriend assaulted her was inadmissible hearsay.

4. The admission of Mr. Hurtado's personal telephone calls from the King County Jail violated his right to privacy under article I, section 7 of the Washington Constitution.

5. The trial court erred by admitting a copy of a 911 call in the absence of any identification of the parties who are speaking.

6. The trial court erred by finding on the Judgment and Sentence that the jury found the crime of second degree assault was a crime of "domestic violence" when the jury did not make such a finding.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment confrontation clause prohibits the introduction of testimonial hearsay unless the declarant is unavailable to testify and the defendant had the prior opportunity to cross-examine the declarant. An emergency room nurse testified that another nurse told her that Ms. Vera said her boyfriend hit her in the face with his fists, and the court also admitted the emergency room records that include the that information. A police officer was present with Ms. Vera at the hospital. Neither Ms. Vera nor the nurse who heard her statement and entered it in the medical records testified at trial, the State offered no explanation for their absence, and Mr. Hurtado had no opportunity to cross-examine either witness. Did the introduction of Ms. Vera's statement that her boyfriend assaulted her violate Mr. Hurtado's Sixth Amendment right to confront the witnesses against him?

2. Article I, section 22 protects the right of a criminal defendant to "meet the witnesses against him face to face" and is more protective of the right to confrontation than the federal constitution. Ms. Vera's out-of-court statement that her boyfriend hit her in the face with his fists would not have been admitted as substantive evidence at the time of the passage of the Washington

Constitution. Was Mr. Hurtado's article I, section 22 right to meet the witnesses against him face-to-face violated when the State introduced Ms. Vera's out-of-court statement that her boyfriend assaulted her even though Mr. Hurtado did not have the opportunity to cross-examine her or the nurse to whom she made the statement?

3. ER 803(a)(4) creates a hearsay exception for statements made for medical diagnosis and treatment that permits the introduction of a patient's hearsay statements about the cause of an injury but not statements attributing fault. Ms. Vera told an emergency room nurse that her boyfriend assaulted her, but neither Ms. Vera nor the nurse testified at trial. Did the trial court abuse its discretion in admitting Ms. Vera's hearsay statements identifying her assailant to an emergency room nurse?

4. Article I, section 7 protects against governmental invasion into a person's private affairs without authority of law. Telephone calls are private affairs, and parents have a privacy interest in the rearing of their children. The county jail routinely and without individualized suspicion, a search warrant or any court authority, recorded telephone calls made with Mr. Hurtado's PIN number. Six of those telephone calls were introduced at trial, and some

contained discussions of his child's health and development. Did the admission of the telephone conversations violate Mr. Hurtado's article I, section 7 right to privacy?

5. Recordings of telephone conversations may be admitted as evidence only if properly authenticated. While Ms. Vera apparently told the police she made the telephone call and the call originated from the address where the police found her, the State had no proof the male voice was Mr. Hurtado. Did the trial court abuse its discretion by admitting the 911 call in the absence of testimony identifying the voices?

6. Mr. Hurtado's Judgment and Sentence states that the jury found the crime of assault in the second degree, Count I, was a crime of domestic violence. The jury made no such finding, and the words, "domestic violence," were not even mentioned in the court's jury instructions. Must the "domestic violence" finding and label be stricken from the Judgment and Sentence because it may be used to elevate Mr. Hurtado's offender score and resulting punishment if he commits a new offense?

### C. STATEMENT OF THE CASE

The North King County Regional Communications Center received a 911 telephone call on the evening of December 31,

2010. No one responded to the dispatcher's questions, but parts of an apparent verbal argument between a female voice and male voice could occasionally be heard. Ex. 2; 6/7/11RP 64, 71-72.

The 911 enhanced computer system reported the call came from Jennifer Vera at a Bellevue address. 7/6/11RP 67-69. Bellevue Police Officers Rachael Neff and Andrew Hanke were dispatched to the address where they found Ms. Vera calmly standing outside smoking. 7/6/11RP 69; 7/7/11RP 7-8, 24, 33.

Ms. Vera's face was swollen and bruised, and the officers called for medics. 7/7/11RP 8-9. Inside Ms. Vera's home, the officers noticed what appeared to be drops of blood in the kitchen and on the living room carpet. 7/7/11RP 11, 34-35. Officer Neff followed the medics as they transported Ms. Vera and her eight-month-old daughter to Overlake Hospital, and the officer remained with Ms. Vera while she received medical treatment. 7/6/11RP 54; 7/7/11RP 10, 15-16.

Emergency room physician Marcus Trione testified that Ms. Vera had a broken nose. 7/7/11RP 52-53, 58-59. Although the radiologist could not determine the age of the fracture and Ms. Vera reported she had been in an automobile accident a week earlier, Dr. Trione believed the fracture was recent because he observed

crusted blood in her nostrils. 7/7/11RP 53, 55, 59-60, 64-65. Ms. Vera's face was bruised and acerated, and there were bruises on her arm and wrist. 7/6/11RP 55, 60-61.

Another Overlake nurse told nurse Venus Chenoweth that Ms. Vera said her boyfriend hit her in the face with his fists. 7/6/11RP 55, 59. This information was also included in the hospital records. Ex. 1 at 2, 5.

Hector Hurtado was waiting at a Bellevue bus stop on 148<sup>th</sup> Avenue Southeast that evening when he was arrested by the police. 7/6/11RP 42-43. Officer Hanke seized Mr. Hurtado's jacket because he noticed possible blood spots on the arm. 7/7/11RP 36-37. The King County Prosecutor charged Mr. Hurtado with assault in the second degree, and at his arraignment hearing on January 18, 2011, the court ordered Mr. Hurtado to have no contact with Ms. Vera. CP 1; Ex. 23.

Mr. Hurtado remained in custody pending trial, and the prosecutor's office obtained copies of telephone calls made from the King County Jail using Mr. Hurtado's PIN number between January 9 and February 24, 2011. Ex. 7-8; 7/6/11RP 90-91. By amended information, the King County Prosecutor charged Mr.

Hurtado with assault in the second degree, witness tampering, and two counts of misdemeanor violation of a court order. CP 14-16.

Although no witness identified the voices in the telephone calls, the jury heard six of them at trial; parts of three conversations were translated from Spanish to English for the jury.<sup>1</sup> 7/6/11RP 112-17, 121-27; Ex. 4-6. In some of the conversations, a male voice says that an unidentified woman needs to leave town before his trial so that she will not be forced to come to court. Ex. 4 at 3; Ex. 5 at 2; Ex. 6 at 3-4. In other conversations the male caller talks to a woman about personal matters, including the health and development of their child. Ex. 7, call 2/14/11 at 1:45-4:30; call 2/24/11 at 13:20-15:45.

After a jury trial before the Honorable Michael Heavey, the jury convicted Mr. Hurtado as charged. CP 39, 41-43. This appeal follows. CP 111-24.

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<sup>1</sup> Although Exhibit 7 contains sixteen telephone calls, only six were admitted into evidence: those on January 11, January 13, January 14 at 15:39, February 3, February 14, and February 24 at 09:58, 2011. 7/6/11RP 112-17, 121-23, 127; 2/7/11RP 15-16; Ex. 8.

D. ARGUMENT

1. MR. HURTADO'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS VIOLATED WHEN THE STATE INTRODUCED MS. VERA'S OUT-OF-COURT STATEMENT THAT HER BOYFRIEND ASSAULTED HER

The State was permitted to elicit testimony that Jennifer Vera told an emergency room nurse, with a police officer present, that her boyfriend hit her in the face with his fists. The State did not call Ms. Vera or the nurse to whom she made the statement as witnesses. Instead, the State was permitted to introduce her accusatory statement through another nurse and the medical records. Because Ms. Vera was available as a witness and Mr. Hurtado was never given the opportunity to cross-examine her or the nurse who questioned her, the introduction of this testimonial hearsay violated the confrontation clause of the United States Constitution. In light of the absence of direct evidence tying Mr. Hurtado to the assault, Mr. Hurtado's second degree assault conviction must be reversed and remanded for a new trial.

a. The Sixth Amendment guarantees the accused the right to confront and cross-examine the witnesses against him. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the

witnesses against him.”<sup>2</sup> U.S. Const. amend. VI. “A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” Melendez-Diaz v. Massachusetts, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2527, 2531, 174 L.Ed.2d 314 (2009); Crawford v. Washington, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). “Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); accord State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Thus, the integrity of the fact-finding process is jeopardized if the right to confrontation is denied. Darden, 145 Wn.2d at 620.

This Court reviews Mr. Hurtado’s confrontation clause challenge de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

b. Ms. Vera’s statement to the emergency room nurse was testimonial. An emergency room nurse questioned Ms. Vera when she arrived at Overland Hospital with Officer Neff. 7/6/11RP 59;

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<sup>2</sup> This guarantee applies to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

7/7/11RP 15-16; Ex. 1 at 4, 7. That nurse, however, was not identified or called as a witness. Instead, a different nurse, Venus Chenoweth, testified that the first nurse told her that Ms. Vera was assaulted by her boyfriend and was accompanied by a police officer. 7/6/11RP 55. Ms. Chenoweth was also told the boyfriend had hit Ms. Vera in the face with his fists. Id. Ms. Chenoweth testified she then questioned Ms. Vera herself, and Ms. Vera confirmed she was struck in the face. Id. at 56.

Mr. Hurtado objected to the introduction of Ms. Vera's out-of-court statement on the grounds that the admission would violate his right to confront the witnesses against him. 7/5/11RP 45; 7/6/11RP 22-23. The court ruled the statements were not testimonial because they were not made to a police officer and because they were made for purposes of medical diagnosis and treatment. 7/6/11RP 25. Counsel renewed the objection when the evidence was admitted. 7/6/11RP 551-52, 55, 74; 7/7/11RP 49.

The United States Supreme Court has not addressed under what circumstances statements to medical personnel are testimonial for purposes of Confrontation Clause analysis. Lower courts have reached divergent results when deciding whether statements to medical personnel describing criminal activity are

testimonial. Jeffrey L. Fisher, What Happened – And What is Happening – to the Confrontation Clause, 15 J.L. Pol’y 587, 619 (2007) (hereafter What Happened); compare State v. Bennington, 264 P.3d 440, 451 (Kan. 2011) (victim’s statements to sexual assault nurse in presence of law enforcement officer who also asked questions as well as her answers on a sexual assault questionnaire were testimonial); State v. Sandoval, 137 Wn.App. 532, 537, 154 P.3d 271 (2007) (victim’s statements to doctor that defendant hit and kicked her not testimonial). This Court should find Ms. Vera’s statement that she was assaulted by her boyfriend, made in the presence of a law enforcement officer, was testimonial and subject to Sixth Amendment protection.

i. The United States Supreme Court has not provided a definitive definition of what statements are “testimonial” for purposes of the Confrontation Clause. “[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused . . .” Bruton v. United States, 391 U.S. 123, 138, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (Stewart, J., concurring). In Crawford, the United States Supreme Court announced the Confrontation Clause forbids the introduction of “testimonial” hearsay against the accused unless the declarant is unavailable

and the defendant had the prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 54. The Crawford Court, however, declined to provide a definitive definition of what qualifies as a “testimonial” statement, instead offering examples of the “core class of testimonial statements,” such as “pretrial statements that declarants would reasonably expect to be used prosecutorially.” Id. at 51-52, 68.

In Davis, the Court provided a generalized test for addressing statements made to government agents such as the police or 911 operators who are responding to a call for help. Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The court differentiated between testimonial and non-testimonial statements based upon whether the questions were designed to respond to an on-going emergency or establish past events potentially relevant to later criminal prosecution. Davis, 547 U.S. at 822. The Bryant Court expanded on the Davis test, reiterating that courts must look to the “primary purpose” of the interrogation by objectively analyzing the circumstances of the encounter and the statements and actions of the parties. Michigan v. Bryant, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1143, 1155-56, 179 L.Ed.2d 93 (2011).

The Court also addressed laboratory test results prepared for purposes of investigation and prosecution of crimes, finding these fell within the “core class of testimonial statements” described in Crawford. Melendez-Diaz, 129 S.Ct. at 2532 (addressing “certificates of analysis” stating the weight of bags taken from the defendant and that the seized substance contained “Cocaine”); accord Bullcoming v New Mexico, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2705, 2716-17, 180 L.Ed.2d 610 (2011) (confrontation clause requires analyst who conducted blood alcohol test and wrote report to testify and be available for cross-examination; report is testimonial).

The Court, however, has not addressed statements to individuals who are not law enforcement officers and thus has provided little guidance to lower courts addressing whether out-of-court statements to medical personnel are testimonial.

ii. A reasonable person in Ms. Vera’s position would know a statement made in the presence of a police officer could be used against Mr. Hurtado in investigating and prosecuting the alleged crime. In the absence of definitive guidance from the United States Supreme Court, Washington courts look at whether a reasonable person in the declarant’s position would know her statement would be used against the defendant in determining if an

out-of-court statement to a person who is not a law enforcement officer is testimonial.<sup>3</sup> State v. Shafer, 156 Wn.2d 381, 389-90, 128 P.3d 87, cert. denied, 549 U.S. 1019 (2006).

The proper test to be applied . . . is whether a reasonable person in the declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. The inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement was made.

Id. at 390 n.8; see Crawford, 541 U.S. at 52. De novo review using this test shows that Ms. Vera's statements to the emergency room nurse were testimonial.

Ms. Vera apparently dialed 911, but she never spoke to the dispatcher and never asked for medical or police assistance. Ex. 2. She was standing calmly outside her home when the Bellevue police officers arrived, interviewed her, and called medics who transported Ms. Vera to the emergency room. 7/7/11RP 8-9, 24.

Importantly, a Bellevue Police Officer followed the aid car and stayed with Ms. Vera during her visit to the emergency room, leaving her side only when Ms. Vera was taken for a CT scan. 7/7/11RP 15-16, 53. Thus, a reasonable person in Ms. Vera's

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<sup>3</sup> In light of Davis and Bryant, this test is no longer applied to statements made to law enforcement. State v. Beadle, 173 Wn.2d 97, 109, 265 P.3d 863 (2011).

position would know that her statement could be used in investigating and prosecuting the case.

Additionally, the information Ms. Vera relayed to the nurse resembled testimony in a criminal prosecution, as it described what happened in the past and identified Ms. Vera's boyfriend as her attacker. If Ms. Vera's statements had been made in response to questioning by the police officer, it clearly would be considered testimonial. See People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675, 688 (2008); David J. Carey, Reliability Discarded: The Irrelevance of the Medical Exception to Hearsay in Post-Crawford Confrontation Clause Jurisprudence, 64 N.Y.U. Ann. Sur. Am. L. 653, 690 (2009) (hereafter Reliability Discarded) (declarant's identification of her assailant should not be treated differently merely because given to doctor and not police officer). Ms. Vera's statement that her boyfriend assaulted her by hitting her in the face is testimonial.

An Illinois court found a woman's statements to her doctor that she was "tied and raped" were testimonial. Spicer, supra. There the victim was unavailable to testify and her statements to her doctor fit within the medical diagnosis exception to the hearsay rule. Spicer, 884 N.E.2d at 685. The Spicer Court noted that the

statement was testimonial because the victim was relating past events, was safe in the hospital and not trying to address a current emergency, and was upset but not frantic. Id. at 687. Since the victim had been transported to the hospital by the police, the court could find no reason to distinguish between “a note-taking policeman” and “a note-taking doctor.” Id. at 688.

Commentators on the confrontation clause also view statements to medical personnel describing past crimes as testimonial. Professor Friedman, for example, posits a crime victim’s description of the crime, whether made to authorities or to a private party, is normally testimonial. Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L. J. 1101, 1042-43 (1998). Professor Fisher agrees that description of past events as part of an interview with medical personnel is testimonial:

When a person submits to a detailed and structured interview with someone who is trying, at least in part, to discern whether they have been criminally harmed, that should be all we need to know. The declarant is not under any immediate threat and is narrating purely past events. Furthermore, the evidentiary product that results is functionally equivalent to testimony on direct examination. Even if certain snippets of medical interviews – such as descriptions of physical symptoms – are nontestimonial, descriptions, as Davis puts it, of “how potentially criminal past events began and progressed” and

especially who perpetrated them, must be considered testimonial.

Fisher, What Happened, 15 J.L. & Pol'y at 622 (quoting Davis, 547 U.S. at 829-30). Ms. Wilson's description of the assault and who assaulted her were testimonial statements.

iii. The historical treatment of statements to medical personnel demonstrates Ms. Vera's statement that her boyfriend struck her with his fists was testimonial. The Crawford Court returned to the original principles of Sixth Amendment jurisprudence to determine the scope of the Sixth Amendment. Crawford, 541 U.S. at 50, 60-61. At the time of the drafting of the Sixth Amendment, doctors were permitted to give their opinions as to medical conditions, but hearsay statements to physicians were not admissible. The only exception was for spontaneous expressions of pain and suffering, which were viewed as more reliable than the patient's later testimony in court. Carey, Reliability Discarded, 64 N.Y.U. Ann. Surv. Am. L. at 679-80. Moreover, the Confrontation Clause was intended to strengthen the right of confrontation as it existed at the time of the writing of the Constitution, not replicate common law. Crawford, 541 U.S. at 47-

51 (citing objections to draft of constitution that did not include confrontation clause); Id. at 682-83.

Ms. Vera's statement naming her boyfriend as the person struck her in the face would not have been admitted in a criminal trial in colonial America, and it is the kind of testimonial statement forbidden by the Sixth Amendment.

iv. *This Court's prior opinions are distinguishable.*

This Court has previously found a domestic assault victim's statements to a physician were not testimonial because (1) they were made for diagnosis and treatment, (2) the speaker did not expect the statements would be used a trial, and (3) the doctor was not working with the State. Sandoval, 137 Wn.App. at 537 (citing State v. Moses, 129 Wn.App. 718, 729-30, 119 P.3d 906 (2005), rev. denied, 157 Wn.App. 1006 (2006)); see State v. Saunders, 132 Wn.App. 592, 603, 132 P.3d 743 (2006) (statements to physician not testimonial because speaker would not believe statements would be used in future prosecution), rev. denied, 159 Wn.2d 1017 (2007). These cases do not control the analysis for this case, however, as they do not address the situation where a police officer is present during the medical interview. Sandoval, 137 Wn.App. at 538.

Moreover, this Court's analysis in Sandoval appears to be based more upon the reasons for the hearsay exception for statements made for purposes of medical diagnosis and treatment – reliability – than Crawford's requirement that the statements be testimonial and abandonment of the reliability standard. Crawford, 541 U.S. at 67 (overruling Roberts v. Ohio, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)); Carey, Reliability Discarded, 64 N.Y.U. Ann. Sur. Am. L. at 656 (2009) (arguing courts should not grant special status to statements to medical personnel that seek to establish a past fact; "it is far from clear whether any medical exception is appropriate after Crawford and Davis."). Ms. Vera's statement that her boyfriend attacked her was made in the presence of a police officer in response to a nurse's questions about past events. The out-of-court statement was testimonial.

c. The State did not demonstrate that Ms. Vera or the nurse she talked to were unavailable to testify. Testimonial statements may be admitted at trial only if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 68. Neither prong is met here. The State listed Ms. Vera as a potential witness on its trial memorandum. SuppCP \_\_\_\_ at 2 (State's Trial Memorandum, sub. no. 50C,

7/5/11). The State did not, however, call Ms. Vera as a witness or offer any explanation for her absence. The State did not request a material witness warrant. In light of the witness tampering charge, the prosecutor's decision not to call Ms. Wilson appears to have tactical.

The burden is on the State to show the witness is unavailable. State v. DeSantiago, 149 Wn.2d 402, 410-11, 68 P.3d 1065 (2003). To demonstrate unavailability for purposes of the confrontation clause, the State must show a "good faith effort" to obtain the witness's presence at trial. DeSantiago, 149 Wn.2d at 411. The State must therefore "avail itself of whatever procedures exist to bring a witness to trial." State v. Smith, 148 Wn.2d 122, 133, 59 P.3d 74 (2002) (quoting State v. Goddard, 38 Wn.App. 509, 513, 685 P.2d 674 (1984)).

The State did not exercise good faith or use any established procedure to procure Ms. Vera's presence at trial and made no showing that she was not available to testify. Additionally, the State did not call the nurse to whom Ms. Vera allegedly said she was hit by her boyfriend. Again, no reason was given for this absence.

d. The State cannot demonstrate the introduction of Ms. Vera's testimonial statement was harmless beyond a reasonable

doubt. When the defendant's constitutional right to confront witnesses is violated, the appellate court must reverse unless the State demonstrates the error is harmless beyond a reasonable doubt. Koslowski, 166 Wn.2d at 431. Thus, the State must demonstrate that there is no reasonable probability that the outcome of the trial would have been different if the error had not occurred. Smith, 148 Wn.2d at 139. The appellate court utilizes the "overwhelming untainted evidence" test to make this determination. Koslowski, 166 Wn.2d at 139.

The evidence connecting Mr. Hurtado to the assault on Ms. Vera was his presence at a neighborhood bus stop on the evening after the assault, the police officer's opinion that there appeared to be blood on Mr. Hurtado's jacket, and the confusing telephone calls recorded by the King County Jail. The bus stop, however, was on the same street as Mr. Hurtado's residence. 7/6/11RP 42; 7/7/11RP 26. The jacket was never tested to determine if the spots the officer observed were human blood, let alone Ms. Vera's, and the jacket did not appear to be blood-stained when it was introduced in court. 7/7/11RP 38, 40. Finally, there is no direct evidence Mr. Hurtado was speaking about or to Ms. Vera during the telephone calls. Ex. 7.

The State cannot demonstrate beyond a reasonable doubt that Mr. Hurtado would have been convicted without Ms. Vera's testimonial statement that she was assaulted by her boyfriend. Mr. Hurtado's conviction must be reversed and remanded for a new trial. Koslowski, 166 Wn.2d at 432.

2. MR. HURTADO'S STATE CONSTITUTIONAL RIGHT TO MEET THE WITNESSES AGAINST HIM FACE-TO-FACE WAS VIOLATED BY THE ADMISSION OF MS. VERA'S OUT-OF-COURT STATEMENT THAT HER BOYFRIEND ASSAULTED HER

The Washington Constitution provides criminal defendants the right to confront and cross examine the witnesses against him. Const. art. I, § 22. In relevant part, article I, section 22 states, "[I]n criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face." This constitutional provision is different than the Sixth Amendment and provides greater protection for the right to confrontation. State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (2009); State v. Foster, 135 Wn.2d 441, 473-74, 481, 957 P.2d 712 (1998) (Alexander, J., concurring in part, dissenting in part); 135 Wn.2d at 481-94 (Johnson, J., dissenting).<sup>4</sup>

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<sup>4</sup> In Foster, five justices agreed that the state confrontation clause is more protective than the federal confrontation clause: the one-justice concurrence/dissent and the four-justice dissent. Foster, 135 Wn.2d at 473

Once the Washington Supreme Court has determined that a particular provision of the state constitution has an independent meaning using the factors outlined in State v. Gunwall, 106 Wn.2d 54, 64, 720 P.2d 808 (1986), courts need not reconsider whether to apply a state constitutional analysis in a new context. State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). Since the Supreme Court has established that article I, section 22's confrontation clause provides greater protection than the Sixth Amendment, no further Gunwall analysis is necessary. Pugh, 167 Wn.2d at 835.

Construction of the state constitution is a question of law that is reviewed de novo. Pugh, 167 Wn.2d at 835. In interpreting a state constitutional provision, courts look to "whether the unique characteristics of the state constitutional provision and its prior interpretations" compel a particular result. Id. (quoting City of Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)). This includes an analysis of the text of the constitutional provision,

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(Alexander, concurring in part and dissenting in part) ("I join the dissent in its conclusion that an analysis independent of the Sixth Amendment confrontation right is required."); at 482 (Johnson, C., dissenting) ("I would hold Wash. Const. art. I, § 22 has a different meaning than the Sixth Amendment."). The concurrence/dissent created a plurality that the conviction should be affirmed.

the historical treatment of the issue, and the current implications of recognizing or not recognizing a state constitutional interest. Id.

The language of article I, section 22 demanding “face to face” confrontation is not read literally, and some hearsay statements have been introduced in Washington criminal trials. Pugh, 167 Wn.2d at 835-36. Historically, however, patients’ statements to medical providers have not been admitted as evidence in this state. The modern hearsay exception for statements made for medical diagnosis and treatment did not become part of Washington’s evidence law until 1978, when the Rules of Evidence were adopted by the Washington Supreme Court. Karl B. Tegland, 5C Washington Practice: Evidence Law and Practice at 5, n.3 (2007) (Judicial Council Task Force on Evidence Comment, ER 803(a)(4)).

Prior to the last quarter of the Twentieth Century, a patient’s description of past symptoms and medical history to a treating physician was not admissible in Washington as substantive evidence. A physician could only testify as to his medical conclusion, which might be based in part upon the patient’s description. Petersen v. Dept. of Labor & Industries, 36 Wn.2d 266, 269, 217 P.2d 607 (1950); Kraettli v. North Coast Transp. Co., 166

Wash. 186, 189-94, 6 P.2d 609 (1932); Task Force Comment (5C Wash. Prac. at 5 n.3) (citing Smith v. Ernst Hardware Co., 61 Wn.2d 75, 377 P.2d 258 (1962) and Kennedy v. Monroe, 15 Wn.App. 39, 547 P.2d 899 (1976)); Tegland, 5C Wash. Prac. at 66. A patient's statements to her physician concerning her condition were "admissible for the purpose of affording the jury some means of determining the weight to give to the opinion of the physician, but not as evidence tending to prove the actual condition of the patient at the time." Kraettli, 166 Wash. at 191 (quoting Estes v. Babcock, 119 Wash. 270, 274, 205 P. 12 (1922)).

Thus, prior to the adoption of ER 803(a)(4) in 1979, a treating physician could relate a patient's description of symptoms only to show the basis for his expert opinion. The patient's statements were not admissible as substantive evidence, nor would a medical treatment provider relate a patient's description of a crime or identification of the perpetrator of a crime. Robert H. Aronson, The Law of Evidence in Washington § 803.09, at 803-13 (4<sup>th</sup> Ed. 2008) (FRE Advisory Committee Note to Fed.R.Evid. 803(a)(4)).<sup>5</sup> As the Advisory Committee to the Federal Rules of

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<sup>5</sup> Washington's evidence rules were patterned after the Federal Rules of Evidence, and the comments of the drafters of the federal rules are therefore persuasive. State v. Sua, 115 Wn.App. 29, 40, 60 P.3d 1234 (2003).

Evidence explained, “Thus, a patient’s statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light.” Id.

This rule was consistent with the common law at the time of the adoption of Washington’s Constitution. A hearsay exception existed for a person’s exclamation of pain and terror at the time of an injury, similar to the current exception for excited utterances. Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues § 271, pp. 202-03 (9<sup>th</sup> Ed. 1884). This exception did not extend to the patient’s hearsay statements as to the cause of her injury.<sup>6</sup> Id. at 202 n.4. As one respected commentator of the day noted, a doctor could not testify as to his patient’s description of the cause of an injury because the physician “would merely repeat what the patient said.” John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law, § 688, p. 784 (1909).

The Washington Supreme Court has long held that article I, section 22’s guarantee of due process includes the right to meet the witnesses in open court and cross-examine them. State v.

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<sup>6</sup> Similarly, although an exception existed for the “fact of complaint” of a sexual assault to demonstrate the prosecutrix made a timely report, this exception could not be used to identify the perpetrator, and it did not extend to a non-sexual assault. Wharton, Treatise at § 273, pp. 204-05.

Stentz, 30 Wash. 134, 142, 70 P. 241 (1902) (“This means that the examination of such a witness shall be in open court, in the presence of the accused, with the right of the accused to cross-examine such witness as to facts testified to by him.”). As demonstrated above, Washington courts in 1889 would not have permitted a nurse to relate another nurse’s report of a patient’s out-of-court statement identifying her boyfriend as her assailant. Instead, only her description of her pain would be admissible, and solely to explain the doctor’s expert opinion as to the nature of her injuries.

Ms. Vera’s hearsay statements to the nurse are also included in her emergency room records, Exhibit 1, which were admitted as business records. 7/6/11RP 50-52; Ex. 1 at 2 (“assault by a male”), 5 (“Pt was assaulted by her boyfriend this morning.”). The Uniform Business Records as Evidence Act was enacted in Washington in 1947. Medical records were not routinely admitted as evidence prior to the Act, let alone at the time of the enactment of article I, section 22. See, State v. Rutherford, 66 Wn.2d 851, 853-54, 405 P.2d 719 (1965) (as late as 1965, the court quoted extensively from 5 Wigmore, Evidence § 1530 (3<sup>rd</sup> ed. 1940) to

support the admission of regularly-kept business records), cert. denied, 384 U.S. 267 (1966).

Although the State subpoenaed Ms. Vera as a witness, they made little effort to secure her presence at Mr. Hurtado's trial. Mr. Hurtado thus never had the opportunity to cross-examine her and the jury was never able to evaluate her demeanor and credibility. The admission of Ms. Vera's statements to a nurse through the testimony of a different nurse and hospital reports violated Mr. Hurtado's state constitutional right to confront the witnesses against him. As argued in section 1 above, the State cannot demonstrate the error is harmless beyond a reasonable doubt, and his conviction must be reversed.

### 3. MS. VERA'S IDENTIFICATION OF HER BOYFRIEND AS HER ASSAILANT WAS INADMISSIBLE HEARSAY

Ms. Vera's identification of her boyfriend as her assailant was not admissible under ER 803(a)(4). Mr. Hurtado objected to the testimony and portions of the medical records on this basis, referring the trial court to State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003). 7/6/11RP 55; 7/7/11RP 49, 51-52, 68, 70-71, 72-73. Mr. Hurtado's conviction must be reversed because the trial court abused its discretion in admitting the identification.

a. Ms. Vera's attribution of fault was not admissible as a statement for medical diagnosis and treatment. "Hearsay" is a statement, other than one made while testifying at trial, offered in evidence to prove the truth of the matter asserted. ER 801(c). Unless a rule or statute provides otherwise, hearsay is not admissible at trial. ER 802. Statements made for purposes of medical diagnosis or treatment are not subject to the general rule that hearsay is inadmissible. ER 803(a)(4). The rule exempts:

Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Id. The rule is premised on the theory that it is in a patient's self interest to give accurate information to a medical treatment provider in order to receive appropriate treatment. Tegland, 5C Wash. Prac. at 5 n.3 (Judicial Council Task Force on Evidence Comment, ER 803(a)(4)).

ER 803(a)(4) permits hearsay statements as to the cause of injury but not statements attributing fault. Redmond, 150 Wn.2d at 496; accord, Aronson, The Law of Evidence in Washington § 803.03 at 803-12 (Advisory Committee's Note, Fed. R. Evid.

803(a)(4)). Thus, Ms. Vera's statement that she was struck in the face with a person's fists was admissible because the statement assisted the medical personal in diagnosing and treating her. Her identification of her boyfriend as the assailant, however, was inadmissible. Id.

Dr. Trione testified that he did not need to know who assaulted Ms. Vera in order to diagnose and treat her: "Strictly medical, it doesn't matter to me who assaulted her." 7/7/11RP 50. He and Ms. Chenoweth added that they wanted to know if the patient was released to a safe environment "from a social standpoint." 7/7/11RP 50; accord, 7/6/11RP 53. If the patient needed assistance, they would refer her to the hospital social worker, but Ms. Vera reported she had a safe place to return to. 7/6/11RP 54; 7/7/11RP 48. The medical personnel treating Ms. Vera thus did not need to know who assaulted her in order to diagnose and treat her injuries, and the attribution of fault was inadmissible.

In addition, Ms. Vera's statement was double hearsay in this case, as the State did not call the witness to whom she made the statements to testify. Ms. Chenoweth testified that another nurse relayed this information to her. 7/6/11RP 55.

b. Ms. Vera's attribution of fault was not admissible as a business record. Ms. Vera's report that she was assaulted by her boyfriend was also not admissible as part of her medical records. The Uniform Business Records as Evidence Act permits the introduction of regularly-maintained business records to show the events, conditions, or conduct occurring at the time the records were made.<sup>7</sup> RCW 5.45.020; ER 805; State v. White, 72 Wn.2d 524, 530, 433 P.2d 682 (1967). Not everything contained within admissible business records, however, is automatically admissible. Redmond, 150 Wn.2d at 496-97 (trial court should have redacted hearsay statements attributing fault to defendant from medical records); White, 72 Wn.2d at 531 (hearsay statement describing defendant's criminal acts not admissible).

The Redmond Court found the trial court abused its discretion by failing to redact statements that the victim was accosted and dragged by "an ex-student" and then accosted by "another male." Redmond, 150 Wn.2d at 497. The trial court here

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<sup>7</sup> RCW 5.45.020 reads:

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

abused its discretion by admitting the portion of Ms. Vera's hearsay statements identifying her boyfriend as the person who hit her and stating she was assaulted by a male and by not redacting this statement from her medical records.

c. Mr. Hurtado's assault conviction must be reversed. This Court must reverse if, within reasonable probabilities, the outcome of the trial court would have been materially affected if the error had not occurred. State v. Ferguson, 100 Wn.2d 131, 136-37, 667 P.2d 68 (1983). Whether Mr. Hurtado was the person who assaulted Ms. Vera was not clearly proven at trial, and the hearsay statements were the only direct evidence to establish that point. Without the hearsay statements identifying her boyfriend as Ms. Vera's assailant, a reasonable jury would not have convicted Mr. Hurtado of second degree assault. His conviction must be reversed.

4. THE ADMISSION OF RECORDINGS OF MR.  
HURTADO'S JAIL TELEPHONE CONVERSATIONS  
VIOLATED THE WASHINGTON CONSTITUTION

a. Mr. Hurtado had a privacy interest in his telephone conversations that is protected by the Washington Constitution. Article I, section 7 of the Washington State Constitution provides that "no person shall be disturbed in his private affairs, or his home

invaded, without authority of law." It is well settled that the protections guaranteed by article I, section 7 are greater than those provided by the Fourth Amendment to the United States Constitution. State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002) (citing McCready, 123 Wn.2d at 267). No further Gunwall analysis is thus necessary. State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).

The Washington Supreme Court has previously recognized a privacy interest in telephone records. Gunwall, 106 Wn.2d 54. In Gunwall, the police attached a pen register<sup>8</sup> to the defendant's telephone line pursuant to a court order obtained without any evidentiary showing. Information gleaned from the pen register and telephone records led to information that was the basis for the defendant being charged and convicted of delivering, possessing, and conspiring to deliver cocaine. In a pretrial motion, the

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<sup>8</sup> "Pen register" means a device that records or decodes electronic or other impulses that identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached, but such term does not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

RCW 9.73.260(1)(d).

defendant sought to suppress the evidence derived from the pen register and telephone records as violative of article I, section 7 of the Washington Constitution.<sup>9</sup> The trial court refused to suppress, but the Washington Supreme Court reversed, finding the Washington Constitution provided greater protection which barred the installation of the pen register without a warrant or court order:

[W]e conclude that when the police obtained the defendant's long distance telephone records, and when they placed a pen register on her telephone line or connections, all without the benefit of the issuance of any valid legal process, they unreasonably intruded into her private affairs without authority of law and in violation of Washington Const. at. 1, § 7.

Gunwall, 106 Wn.2d at 68-69.

Regarding the pen register, the Court noted:

The pen register is comparable in impact to electronic eavesdropping devices in that it is continuing in nature, may affect other persons and can involve multiple invasions of privacy as distinguished from obtaining documents in a single routine search using a conventional search warrant. We conclude that a pen register intercept comes within the definition of "private communication transmitted by telephone", therefore, it may only be installed pursuant to the stricter requirements of our state statutes controlling electronic eavesdropping.

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<sup>9</sup> The defendant conceded that the Fourth Amendment did not prohibit the installation of a pen register without a warrant or court order nor was there a reasonable expectation of privacy in telephone billing records. Gunwall, 106 Wn.2d at 64-65.

Id. at 69 (citing RCW 9.73.030-.140; State v. O'Neill, 103 Wn.2d 853, 874-75, 700 P.2d 711 (1985)).

The King County Jail routinely records all telephone calls placed by jail inmates, with the exception of calls placed to their attorneys. 7/6/11RP 88. Jail sergeants then provide copies of specific telephone calls upon request. 7/6/11RP 89. Here the jail provided copies of Mr. Hurtado's telephone calls to the King County Prosecutor without a warrant or other court order. 7/6/11RP 90-91; Ex. 7. Although Gunwall involved a pen register, the outcome must be the same as recording telephone conversations is an even more intrusive invasion of privacy than merely recording telephone numbers as a pen register does. As a consequence, the recording of Mr. Hurtado's telephone calls and provision of them to the prosecutor without a warrant was without "authority of law" and violated article I, section 7.

In addition, Mr. Hurtado's right to privacy in his telephone conversations was even greater in the telephone calls on January 14 and February 14 because he discussed his daughter's health and development with the child's mother. A parent has the fundamental liberty interest in raising his children that is protected by both the state and federal constitutions. U.S. Const. amend.

XIV; Const. art. I, §§ 3, 7; Troxel v. Granville, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (right to parent is oldest liberty interest recognized by Court); Pierce v. Society of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534, 45 S.Ct. 571, 69 L.Ed.2d 1070 (1925) (parents have liberty interest in directing “upbringing and education” of their children); In re Custody of Smith, 137 Wn.2d 1, 13-15, 969 P.2d 21 (1998), aff’d sub. nom. Troxel, 530 U.S. 57 (2000). “The family entity is the core element upon which modern civilization is founded,” and courts “zealously guard” the integrity of the family unit. Smith, 137 Wn.2d at 15.

A parent’s constitutionally protected right to rear his or her children without state interference has been recognized as a fundamental “liberty” interest protected by the Fourteenth Amendment and also as a fundamental right derived from the privacy rights inherent in the constitution. Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.

Id. at 15.

b. Decisions of the Washington Supreme Court reinforce the policy of protecting citizens from random, suspicionless searches of individuals’ private affairs such as that conducted by the King County Jail. In Jorden, the Supreme Court ruled that random

searches of motel room registries without any individualized or particularized suspicion violated article I, section 7. State v. Jorden, 160 Wn.2d 121, 130, 156 P.3d 893 (2007). The Court was extremely troubled that information contained in the motel registry potentially revealed intimate details of a person's life, thus intruding into the person's private affairs. Id. at 129. In barring such searches, the Court noted:

We hesitate to allow a search of a citizen's private affairs where the government cannot express at least an individualized or particularized suspicion about the search subject or present a valid exception to a warrantless search. A random, suspicionless search is a fishing expedition, and we have on many occasions indicated displeasure with such practices.

Id. at 130 (citing Jackson, 150 Wn.2d at 267 (attaching GPS device to suspect car violated art. I, § 7 where done without search warrant); In re Personal Restraint of Maxfield, 133 Wn.2d 332, 341, 945 P.2d 196 (1997) (suspicionless disclosure of power records violated Washington Constitution as without authority of law); State v. Young, 123 Wn.2d 173, 186-87, 867 P.2d 593 (1994) (use of thermal imaging device on residence without search warrant invaded person's private affairs and conducted without authority of law); City of Seattle v. Mesiani, 110 Wn.2d 454, 455, 755 P.2d 775 (1988) (random suspicionless sobriety checkpoints invalidated

under art. I, § 7 as they lacked particularized and individualized suspicion).

These cases stress the need to protect a citizen's private affairs and allow searches only with the authority of law supported by an individualized and particularized suspicion. The listening and recording of telephone calls by the King County Jail invades the private affairs of both inmates and innocent family members and friends, as these telephone calls could potentially "reveal intimate details of one's life." Jorden, 160 Wn.2d at 129.

Mr. Hurtado retained privacy rights even though he was an inmate of the King County Jail. See Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."). High school students similarly have limited privacy rights when they are on school grounds or involved in school activities, but this does not mean they have no privacy rights. York v. Wahkiakum School District No. 200, 163 Wn.2d 297, 307-09, 178 P.3d 995 (2008). Article I, section 7 does not permit urinalysis testing of high school without "authority of law." Id. at 310-16. Similarly, article I, section 7 does not permit the warrantless recording of Mr. Hurtado's intimate telephone conversations.

c. Mr. Hurtado's conviction should be reversed because their was not legitimate reason to record the telephone calls and they should not have been admitted as evidence. This Court has found the defendant's privacy rights were not violated by the recording of his jail telephone calls because such recordings were necessary to maintain jail security, order and discipline. State v. Archie, 148 Wn.App.198, 204, 199 P.3d 1005, rev. denied, 166 Wn.2d 1016 (2009); State v. Haq, \_\_\_ Wn.App. \_\_\_, 2012 WL 279477 at ¶¶ 76-80 (No. 64839-0, 1/30/12). Here, however, no such reason for the recording of all jail telephone calls was provided. In fact, the jail sergeant did not even listen to any of the calls to determine if there was a threat to jail security. 7/6/11RP 101. Instead, the jail provides copies of any jail telephone call to the King County Prosecutor or any individual simply upon request. 7/6/11RP 88.

Mr. Hurtado's telephone calls include conversations about his child with the child's mother. They address day care, the child's illness, and her developmental milestones, such as learning to clap and stand. Ex. 7, call 2/14/11 at 2:00 -4:30, 7:30-8:00; call 2/24/11 at 8:10, 13:20-15:40. The conversations were thus protected by Mr. Hurtado's right to privacy in raising his child. The jail, however,

recorded these conversations without a search warrant or any other court authorization. The recording was not based upon any individualized and particularized suspicion, and they were not used to monitor jail security. The recording of Mr. Hurtado's telephone calls was thus conducted without authority of law in violation of article I, section 7.

The introduction of Mr. Hurtado's telephone conversations is not harmless. In the absence of testimony from Ms. Vera, the telephone calls mentioned were the sole basis for the witness tampering and two misdemeanor violation of a no-contact order convictions. 7/11/11RP 45, 50-51. These convictions must therefore be reversed and remanded for a new trial.

**5. THE TRIAL COURT ERRED BY ADMITTING A 911  
CALL IN THE ABSENCE OF EVIDENCE  
AUTHENTICATING THE VOICES**

The trial court admitted a 911 call made from the residence where Ms. Vera was located by the police. No witness, however, testified that the voices heard on the recording were those of either Ms. Vera or Mr. Hurtado, and the jury was not able to hear their voices as neither testified at trial. The 911 call was thus inadmissible.

Someone called 911 on December 31 but did not respond when the 911 dispatcher took the call. Ex. 2 at 0:00 – 0:30; 7/6/11RP 64. The call is difficult to hear, but it seems to contain parts of an angry conversation between a man and a woman; the woman’s voice can be heard saying she will say whatever she wants if it concerns her daughter. Ex. 2 at 1:00 – 3:00. According to the King County Regional Communications Center records custodian, their computer system identified the call as coming from Ms. Vera at the address where the police located Ms. Vera. 7/6/11RP 67-68.

Mr. Hurtado objected to the admission of the 911 call on various grounds. 7/6/11RP 8-12, 65. He specifically argued the call was inadmissible because the voices were not authenticated. 7/6/11RP 8-10, 65.

Tangible evidence, such as a recording, is admissible only if it is authenticated by its proponent.<sup>10</sup> ER 901; State v. Jackson, 113 Wn.App. 762, 54 P.3d 739 (2002). The proponent must produce sufficient evidence of both authentication and identification. State v. Williams, 136 Wn.App. 486, 500-01, 150

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<sup>10</sup> ER 901(a) provides, “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

P.3d 111 (2007). For example, the proponent may authenticate a recording with a witness who has personal knowledge of the recorded events and who has reviewed the tape, asserts the recording accurately portrays those events, and identifies the voices on the tape. Jackson, 113 Wn.App. at 769. This Court also held a 911 call was properly admitted even though the 911 caller did not testify. There, however, the trial court heard the 911 caller talk in court and thus could compare her voice with the voice heard in the call, the caller admitted making the call, and the address given during the 911 call was the caller's address. Williams, 136 Wn.App. at 501.

The State did not produce sufficient evidence to authenticate the 911 call in this case. The trial court ruled that the 911 call was properly authenticated only because the police located Ms. Vera at the address from which the computer reported the call originated from and she allegedly told the police that she called 911.

6/7/11RP 10-11.

No witness, however, testified that either Ms. Vera or Mr. Hurtado's voices could be heard on the recording. Ms. Vera and Mr. Hurtado also did not testify, so the judge and the jury could not determine if their voices were the voices heard on the recording.

The fact that Ms. Vera may have told the police that she called 911 and the computer indicated the call came from her address does not establish that Mr. Hurtado was the male voice heard on the recording. The trial court thus abused its discretion.

The 911 call established some type of argument in Ms. Vera's residence before the police arrived and found her injured. The introduction of the 911 call thus materially affected the outcome of Mr. Hurtado's trial, and his convictions must be reversed.

6. THE PORTIONS OF THE JUDGMENT AND SENTENCE STATING THERE WAS A JURY FINDING THAT MR. HURTADO'S SECOND DEGREE ASSAULT CONVICTION WAS A CRIME OF DOMESTIC VIOLENCE AND SO LABELING IT MUST BE STRICKEN

The jury was never asked to determine if the second degree assault was a crime of domestic violence. The court nevertheless noted on Mr. Hurtado's Judgment and Sentence that the jury made a finding that the assault was a crime of domestic violence. CP 98-99. The court also found Mr. Hurtado was found guilty of "ASSAULT IN THE SECOND DEGREE – DOMESTIC VIOLENCE." CP 98. The reported jury finding and designation of second degree

assault as a crime of domestic violence must be stricken as they are not based upon a jury verdict or finding.

Due process requires the jury find beyond a reasonable doubt any fact that increases the defendant's potential punishment. U.S. Const. amends. VI, XIV; Blakely v. Washington, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This principle applies to every fact that increases the maximum penalty faced by the defendant. Blakely, 542 U.S. at 303; Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 Ed.2d 556 (2002); Apprendi, 530 U.S. at 482-83.

Washington's Constitution also protects these due process rights and provides even greater protections for jury trials than does the federal constitution. Const. art. I §§ 21, 22; State v. Williams-Walker, 167 Wn.2d 889, 895-86, 225 P.3d 913 (2010); State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (Recuenco III). Under the Washington Constitution, the sentencing court is bound by the jury's factual determinations. Williams-Walker, 167 Wn.2d at 897. The court cannot substitute its judgment by imposing sentence based upon a fact not found by the jury, even if it is supported by the evidence presented at trial. Id. at 888-90.

When the court does so, the error cannot be harmless, as it is never harmless for the court to sentence the defendant for a crime not found by the jury. Id. at 899-900; Recuenco III, 163 Wn.2d at 442.

In Recuenco III, the defendant was convicted of second degree assault, and the jury found on a special verdict form asking if he was armed with a deadly weapon. Recuenco III, 163 Wn.2d at 431-32. The sentencing court, however, imposed a 36-month enhancement for committing a crime with a firearm rather than the 12-month enhancement authorized by the jury's deadly weapon finding. Id. The Recuenco III Court found that the trial court lacked authority to sentence Recuenco for the additional two years that corresponded to the firearm enhancement in the absence of a jury finding that the defendant was armed with a firearm. Id. at 440.

The error in this case occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. The trial court simply exceeded its authority in imposing a sentence not authorized by the charges.

Id. at 442.

The court similarly exceeded its authority by stating that the jury found Mr. Hurtado's conviction for second degree assault was a crime of domestic violence. The jury was informed that, in order

to convict Mr. Hurtado of second degree assault, it had to find only three elements beyond a reasonable doubt: (1) that Mr. Hurtado intentionally assaulted Ms. Vera between December 30 and December 31, 2010; (2) that he recklessly inflicted substantial bodily harm, and (3) that the acts occurred in Washington. CP 77; RCW 9A.36.021(1)(a). The jury was never asked to determine if Mr. Hurtado and Ms. Vera met the definition of family or household members or if the crime was a crime of domestic violence.<sup>11</sup> CP 60-90; RCW 10.99.020. In fact, the words “domestic violence” are not found anywhere in the court’s instructions to the jury or the verdict form. CP 39.

The court nonetheless checked a box on the Judgment and Sentence form declaring that there was a special verdict or jury finding that the assault, count 1, was a “domestic violence offense as defined in RCW 10.99.020.” CP 98-99.

Washington’s domestic violence statute, RCW 10.99, is designed to remind courts that crimes involving family members should be enforced in an even-handed manner. RCW 10.99.010; State v. O.P., 103 Wn.App. 889, 891-92, 13 P.3d 1111 (2000). The

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<sup>11</sup> A pattern special verdict form asking the jury if the defendant and the alleged victim were family members is easily accessible. Washington Supreme Court Committee on Jury Instructions, 11A Washington Practice: Washington Pattern Jury Instructions Criminal, WPIC 190.11 (2008).

statute does not require or even authorize a court to find sua sponte that the defendant committed a crime of domestic violence, as was done in Mr. Hurtado's case.

This Court has ruled in prior cases that the Sixth Amendment does not prohibit the court from labeling a conviction “domestic violence” without a jury finding beyond a reasonable doubt, reasoning that such a finding does not authorize an exceptional sentence or increase potential punishment. State v. Winston, 135 Wn.App. 400, 406, 144 P.3d 363 (2006); State v. Felix, 125 Wn.App. 575, 578-81, 105 P.3d 427, rev. denied, 155 Wn.2d 1003 (2005). More recently, however, the Legislature amended the Sentencing Reform Act so that a domestic violence finding subjects an offender to greater punishment should he commit a new offense. 2010 Laws of Washington Ch. 274, §§ 402, 403 (effective June 10, 2010) (codified at RCW 9.94A.030(20), (39); RCW 9.94A.535(1)(i), (3)(h)(i); RCW 9.94A.525(21)). Now, when an offender is sentenced for a crime where domestic violence was “plead and proven,” prior convictions where domestic violence was “plead and proven” after August 2011 will count as two rather than one point in determining the SRA offender score and resulting standard sentence range. RCW 9.94A.525(21). Here, the

Judgment and Sentence states that the jury found the second degree assault was a crime of domestic violence when the jury did not do so.

In Williams-Walker, the trial court imposed a firearm enhancement even though the jury found the defendants were armed with a deadly weapon, not specifically a firearm. Williams-Walker, 167 Wn.2d at 901. The court emphasized that the sentencing court must look to the jury's findings to determine the applicable enhancement, and "if the jury makes no finding, no sentence enhancement may be imposed." Id. at 901-02. In so doing, the court made it clear that the trial court is bound by any finding or lack of finding made by the jury. Williams-Walker, 167 Wn.2d at 901-02.

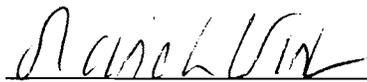
While a domestic violence finding was not a sentencing enhancement in this case, the court's erroneous notation will lead to increased punishment should Mr. Hurtado be convicted of a new crime involving domestic violence. This Court must vacate the portion of the Judgment stating the jury found the second degree assault conviction was one of domestic violence and referring to the crime as "assault in the second degree – domestic violence." CP 89-99.

E. CONCLUSION

The trial court admitted Ms. Vera's out-of-court statement that her boyfriend assaulted her in violation of Mr. Hurtado's right to confront witnesses under the Sixth Amendment, under article I, section 22, and contrary to the rules of evidence. The admission of recordings of Mr. Hurtado's telephone calls without a warrant or other court order violated article I, section 7 as well as his right to privacy in raising his daughter. Additionally, the court erred by admitting a 911 call in the absence of proper authentication of the voices on the recording. Mr. Hurtado's convictions for second degree assault, witness tampering, and two counts of violation of a court order must therefore be reversed.

In the alternative, this Court must strike the portion of Mr. Hurtado's Judgment and Sentence designating the assault conviction, Count 1, as a crime of domestic violence and incorrectly stating the jury found it was a crime of domestic violence.

Respectfully submitted this 21<sup>st</sup> day of February 2011.

  
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Washington Appellate Project  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67478-1-I
v.	)	
	)	
HECTOR HURTADO,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21<sup>ST</sup> DAY OF FEBRUARY, 2012, 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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 STATE OF WASHINGTON  
 2012 FEB 21 PM 4:56

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APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] HECTOR HURTADO	(X)	U.S. MAIL
14508 SE 24 <sup>TH</sup> ST APT B-105	( )	HAND DELIVERY
BELLEVUE, WA 98007	( )	_____

**SIGNED** IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2012.

X \_\_\_\_\_ 

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