

70241-6

70241-6

No. 70241-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

CITY OF BOTHELL,

Respondent,

v.

ERIC S. LEVINE,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE  
SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 MAR 17 PM 4:52

BRIEF OF PETITIONER

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A. ASSIGNMENT OF ERROR

The admission of Giovanna Bustos's out-of-court statements to a Bothell police officer violated Eric Levine's constitutional right to confront and cross-examine the witnesses against him.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

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. Giovanna Bustos did not testify at Mr. Levine's trial for fourth degree assault, but the trial court permitted a Bothell police officer to testify that Ms. Bustos told him that Mr. Levine had assaulted her earlier that afternoon. The primary purpose of the interview was to identify the crime that had been committed and confirm Mr. Levine's identify as the perpetrator, as there was no ongoing emergency. Did the introduction of Ms. Bustos's testimonial out-of-court statements violate Mr. Levine's Sixth Amendment right to confront the witnesses against him?

C. STATEMENT OF THE CASE

Eric Levine was living in Bothell on August 4, 2008, when he received a telephone call from Giovanna Bustos excitedly asking if she

could come to his house. CP 256, 257.<sup>1</sup> The two had known each other for several years; two years earlier they were in a very brief intimate relationship but remained friends. CP 269-70, 271-72. Ms. Bustos did not have a key to Mr. Levine's house, but he would let her stay at his house for several days every month or so. CP 269, 271.

Mr. Levine told Ms. Bustos that she could not stay with him, and he did not pick up the telephone when she called him again. CP 258. Ms. Bustos left a confused message accusing Mr. Levine of following her breath and cheating with a green-eyed girl on the computer. CP 259.

Later that day when he finished taking a shower, Mr. Levine found Ms. Bustos inside his home. CP 259. She was "out of her mind" and was "talking about things that didn't exist." CP 259-60, 274-75. Mr. Levine again told Ms. Bustos that she could not stay at his house, and she eventually agreed to leave when he offered her a ride. CP 260-61.

Mr. Levine drove Ms. Bustos in his pickup truck, but she was angry and screaming at him so loudly that Mr. Levine could not concentrate on driving safely. Mr. Levine pulled onto the side of the

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<sup>1</sup> The verbatim report of proceedings of Mr. Levine's Bothell Municipal Court jury trial and sentencing on January 4 and January 5, 2012, is found at CP 149-340.

road after traveling almost a quarter of a mile, and asked Ms. Bustos to get out. CP 261-64. Ms. Bustos got out of the pickup truck only after Mr. Levine himself exited and activated the alarm. CP 263-64. Ms. Bustos then ran in the direction of a nearby house, and Mr. Levine returned to his truck and drove home. CP 256-66.

Ms. Bustos went to home of Carol Jean Cornelius and her husband and screamed for help. CP 206, 210. Ms. Cornelius assured Ms. Bustos that she was safe and called 911. CP 207, 210. One of Mr. Cornelius's crewmembers went to the front of the house and watched until aid arrived. CP 211-12.

Several Bothell police officers and medics responded to the 911 call. CP 225, 230. Police Officer John Lawson and another officer went to Mrs. Cornelius's residence, and two others went to Mr. Levine's house and placed him under arrest. CP 225-26, 229, 236-37.

Mr. Levine was charged by amended complaint in Bothell Municipal Court with fourth degree assault. CP 13. Ms. Bustos did not appear at his jury trial before the Honorable Michelle Gehlsen. CP 152. A material witness warrant was issued but never served. CP 32, 162. Prior to trial, the court ruled that Ms. Bustos's statements to Mrs. Cornelius were admissible as excited utterances. CP 167. The court

also found that statements to the police officer who responded to Ms. Cornelius's home were nontestimonial and also met the excited utterance exception to the hearsay rule. CP 173, 186-87.

Ms. Cornelius testified that a young lady she did not know ran up to her house on August 4 screaming "help me." CP 206, 210. The woman was shaking, appeared very frightened, and had a little bit of blood in her ear and a scratch or blood on her neck. CP 207. The woman told Mrs. Cornelius that she was hit in the ear. CP 207. Mrs. Cornelius got the impression that the woman had either jumped or been pushed out of a car. CP 207. Mrs. Cornelius called 911 and related what the woman told her, adding the woman was "kind [of] hysterical." CP 207-08.

Officer Lawson testified that police dispatch related the contents of the 911 call to him prior to his arrival at the Cornelius residence. CP 224. According to the officer, dispatch informed him that Ms. Bustos claimed her ex-boyfriend hit her, choked her, and threatened to kill her at the residence where they both lived. Id. When Officer Lawson arrived at the Cornelius's home, he contacted Ms. Bustos in order to determine if a crime had occurred. CP 225-26, 229. He asked Ms. Bustos what happened, and she stated that her ex-boyfriend came home

at 1:00, got on the computer, and got angry when she asked what he was doing. CP 230. She said he got up, yelled at her, struck her, placed his hands around her neck, and pressed on her eyes with his thumbs. CP 230-31, 242. She also claimed he threatened to kill her and would certainly kill her if she called the police. CP 237. Officer Lawson asked Ms. Bustos if Eric Levine was the ex-boyfriend, and she confirmed that he was. CP 231.

Officer Lawson observed that Ms. Bustos's neck was red with some abrasions. CP 226. He photographed her neck and then allowed the Bothell Fire Department medics to examine her. CP 231-33. The medics determined that Ms. Bustos did not need any immediate medical attention. CP 242.

Mr. Levine was convicted of fourth degree assault, and the jury found by special verdict that he and Ms. Bustos were members of the same household. CP 47-48, 325. Mr. Levine was given a suspended sentence that included ten days in jail, a domestic violence assessment, and the requirement that he have no contact with Ms. Bustos.<sup>2</sup> CP 26, 29, 31.

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<sup>2</sup> A month later, Ms. Bustos filed a motion to modify or rescind the no-contact order. CP 18-20. Her notarized statement she stated that Mr. Levine did not assault her

Mr. Levine appealed to the King County Superior Court where he argued, inter alia, that his constitutional right to confront the witnesses against him was violated by the use of Ms. Bustos's out-of-court statements at trial. CP 4, 138-45, 361-64. His conviction was affirmed in a one-sentence opinion. CP 365. This Court granted discretionary review to address the Confrontation Clause issue. Order Granting Motion for Discretionary Review (October 30, 2013).

D. ARGUMENT

**The admission of Ms. Bustos's out-of-court statements to the investigating police officer violated Mr. Levine's constitutional right to confront the witnesses against him.**

At Eric Levine's trial for fourth degree assault, the City of Bothell was permitted to elicit testimony from a police officer that Giovanna Bustos told him that her former boyfriend, Mr. Levine, yelled at her, struck her, choked her, threatened her, and pushed his thumbs into her eyes. Ms. Bustos did not testify, and Mr. Levine was never given the opportunity to cross-examine her. The introduction of this testimonial hearsay violated the confrontation clause of the United

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and she called the police because she was angry at him. CP 19-20. The no-contact order was not modified.

States Constitution. Mr. Levine's fourth 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>3</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, 557 U.S. 305, 309, 129 S. Ct. 2527, 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 Crawford, 541 U.S. at 61; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Thus, the integrity of the fact-finding

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<sup>3</sup> This "bedrock procedural guarantee" applies to the States through the Fourteenth Amendment. Crawford, 541 U.S. at 42 (citing Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)).

process is jeopardized if the right to confrontation is denied. Darden, 145 Wn.2d at 620.

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

b. Mr. Levine objected to the introduction of Ms. Bustos's out-of-court statements. When Ms. Bustos did not appear for trial, the City argued that admitting her statements would not violate the Confrontation Clause if the statements were admissible as an excited utterance, which the City asserted was a firmly rooted exception to the hearsay rule. CP 156. The trial court, however, felt the statements should also be analyzed in light of Crawford and Davis, and Mr. Levine asserted his constitutional right to confront the witness. CP 155-56, 158, 173.

The City read from the police reports of Officer Lawson and another officer as an offer of proof. CP 167-68, 170. Defense counsel argued that the circumstances of the interrogation did not demonstrate an ongoing emergency and that the interrogation addressed past facts rather than ongoing events. CP 175, 180, 187-90. The trial court, however, determined Ms. Bustos's initial statements to the officer were

nontestimonial because the officer was trying to determine if there was an emergency, what he needed to do, and who he needed to arrest. CP 186-87.

c. Ms. Bustos's statements to the police officer were testimonial.

“[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 that 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.” Id. at 51-52. These include ex parte in-court testimony, affidavits or other “pretrial statements that declarants would reasonably expect to be used prosecutorially,” and affidavits or statements “made under circumstances which would lead an objective witness reasonably to

believe that the statement would be available for use at a later trial.”

Id.

In Crawford, the trial court admitted the defendant’s wife’s statements to the police made at the police precinct after her husband’s arrest for assault. The statements contradicted the defendant’s claim of self-defense, and the wife did not testify at trial. Id. at 38-41. The Crawford Court held that the defendant’s confrontation rights were violated by the introduction of his wife’s statement, ruling that “[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.” Id. at 52.

The Court further defined when statements to a police officers and other governments officials are testimonial in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The Davis Court addressed two cases where women reported incidents of domestic violence in a less formal setting than a police precinct. In Davis, Ms. McCottry talked to a 911 operator while her ex-boyfriend entered her home and assaulted her, and the conversation continued as he left in a car. 547 U.S. at 817-18. The 911 call was admitted even though McCottry did not appear for trial. Id. at 819. In the companion case, Hammon, police responded to the Hammon home, separated the

couple, and spoke to Amy Hammon in her living room. Id. at 819-20. Her written statement was admitted at her husband's trial, but she did not testify. Id. at 820.

In addressing these domestic violence cases, the Court concluded that statements to a police officer are testimonial when the primary purpose of the interrogation is to determine past facts and not to respond to an ongoing emergency:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is not such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 722.

The Court concluded that McCottry's statements to the 911 operator were not testimonial because she was "speaking about events as they were actually happening," there was an ongoing emergency, the 911 operators elicited the statements in order to respond and "resolve the present emergency," and the statements were not formal. Davis, 547 U.S. at 827. In contrast, Ms. Hammon's statements were testimonial and their admission violated the confrontation clause

because the police were investigating past conduct, the interrogation was relatively formal, the interrogation occurred after the incident was over, and the declarant made deliberate answers to police questioning. Id. at 829. Thus, the existence of an “ongoing emergency” at the time of an encounter between a declarant and the police “is among the most important circumstances informing the ‘primary purpose’ of an interrogation.” Michigan v. Bryant, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1143, 1157, 179 L. Ed. 2d 93 (2011) (citing Davis, 547 U.S. at 828-30; Crawford, 541 U.S. at 65).

The Bryant Court utilized the Davis test for the first time in a non-domestic violence case where “ongoing emergency” extended to the public at large. Bryant, 131 S. Ct. at 1156. In so doing, the Court reiterated that in determining if the primary purpose of an interrogation is to meet an ongoing emergency, the court must objectively decide what purpose “reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.” Id. at 1156.

The Washington Supreme Court has identified four factors utilized by the Davis Court in determining the primary purpose of the police interrogation: (1) whether the speaker was addressing events as

they were occurring, requiring police assistance, or describing past events, (2) whether the speaker was facing an ongoing emergency, (3) whether the questions and answers, viewed objectively, demonstrate that the statements were necessary to resolve a present emergency or establish what happened in the past, and (4) the level of formality of the interrogation. Koslowski, 166 Wn.2d at 418-19; State v. Ohlson, 162 Wn.2d 1, 15, 168 P.3d 1273 (2007); accord State v. Beadle, 173 Wn.2d 97, 110, 265 P.3d (2011). These factors demonstrate that the primary purpose of the police officer's interrogation was to gather past facts and not to respond to an ongoing emergency.

i. *Ms. Bustos was relating past events and not events that were occurring.* The content of Officer Lawson's questioning of Ms. Bustos and the separation from the alleged crime demonstrate Ms. Bustos was relating past facts to further the police investigation. First, Ms. Bustos's words all addressed past events. When Officer Lawson arrived at the Cornelius residence, he approached Ms. Bustos and asked "if she could tell me what happened." CP 230. Ms. Bustos then related the past events. She said that she was at Mr. Levine's house that afternoon and he came home at about 1:00 PM and began working on the computer. Id. When Ms. Bustos asked Mr. Levine what he was

doing he became angry. Id. He got up from the computer, yelled at her, struck her, placed his hands around her neck and choked her, and pressed on her eyes with his thumbs. CP 230-31. The officer then asked, “The person that did this to you is your ex-boyfriend Eric Levine?”, and Ms. Bustos said “yes.” CP 231.

Officer Lawson did not inquire about Ms. Bustos’s health or the location of Mr. Levine. Instead, he asked her what happened in the past. Like the statements made by Mrs. Hammon in Davis, the interrogation here involved a recitation of events that happened in the past.

In addition, Ms. Bustos’s conversation with the officer occurred up to thirty minutes after the alleged assault. According to Ms. Bustos, the purported assault occurred sometime after 1:00 PM. CP 230. After that, she and Mr. Levine apparently got into his pickup truck and drove to the area of the Cornelius residence. CP 223-24, 267. Ms. Bustos then appeared at the Cornelius home and Mrs. Cornelius called 911. CP 206, 210. Officer Lawson arrived at the Cornelius residence about five or six minutes after he was dispatched there at 1:34. CP 226.

The contents of Ms. Bustos's conversation with Officer Lawson demonstrate that she was describing past events and not requesting police assistance for an ongoing crime.

ii. Ms. Bustos was not discussing an ongoing emergency.

Ms. Bustos was not in danger at the time she was questioned by Officer Lawson. The statements were not made at the scene of the crime, but at a residence that was blocks away, Mrs. Cornelius's home. Ms. Cornelius told Ms. Bustos that she was safe, and Mr. and Mrs. Cornelius even had one of their crewmen stand at the end of the road to further protect her. CP 211-12. He waited until the aid car arrived and did not see anyone following Ms. Bustos. CP 212. In addition, two police officers and medics from the Bothell Fire Department were on the scene, and another two police officers went to Mr. Levine's residence. CP 225, 226, 230. Ms. Bustos also told the officer that she did not believe Mr. Levine was in the area. CP 225.

In addition, Ms. Bustos was no longer near Mr. Levine's home, the alleged scene of the crime. Officer Lawson testified that Mr. Levine resided at 23409 39<sup>th</sup> Ave. S.E. in Bothell, but that he was dispatched to the Cornelius's home in the 3300 block of 234<sup>th</sup> Street S.E. CP 223, 225. The officer claimed the two addresses were within a

couple of blocks, but Mr. Levine estimated he drove about a fourth of a mile before pulling over.<sup>4</sup> CP 223, 267. Mrs. Cornelius's residence was on a gravel road about a block from the main street. CP 206, 211-12, 215-16. Thus, Ms. Bustos was no longer near the scene of the alleged assault or near the purported assailant.

The complainant's medical condition is also relevant in determining if the officers are responding to an ongoing emergency. Bryant, 131 S. Ct. at 1159. Ms. Bustos was not seriously injured and did not require immediate medical attention. Officer Lawson, for example, questioned Ms. Bustos and took pictures of her neck before allowing the medics to attend to her. CP 231-32. He observed only red marks and scratches. CP 229. The photos were taken about five minutes after the officer arrived. CP 233. The medics did not treat Ms. Bustos, but examined her and confirmed she did not require emergency medical attention. CP 242. Thus, as in Davis, there was no medical emergency despite some injuries. Davis, 547 U.S. at 818, 820; compare Bryant, 131 S. Ct. at 1156, 1163-64 (victim had been shot,

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<sup>4</sup> A search on Google Maps shows the two addresses are 0.6 miles apart by road. On de novo review, this Court may take judicial notice of a map. ER 201; RAP 9.11; State v. Nichols, 161 Wn.2d 1, 5 n.1, 162 P.3d 1122 (2007); Vail v. McGuire, 50 Wash. 187, 189, 96 P. 1042 (1908).

perpetrator was at large, police did not know if the threat was limited to the victim).

Based upon its reading of Ohlson, *supra*, the trial court believed there was an ongoing emergency because the police had not located Mr. Levine at the time of Ms. Bustos's conversation with Officer Lawson. CP 190. In fact, two police officers went to Mr. Levine's residence at the same time two officers went to Mrs. Cornelius's home. CP 226. Unlike Ohlson, this case involved a domestic violence situation and thus had a "narrower zone of potential victims than cases involving threats to public safety." Bryant, 131 S. Ct. at 1158. There was no reason to believe Mr. Levine was a threat to anyone other than Ms. Bustos, who was safe at the Cornelius home. Nor was there as weapon involved as in Bryant. Bryant, 131 S. Ct. at 1159; compare Davis, 547 U.S. at 830-32 (perpetrator used hands)

Ohlson is also distinguishable on other grounds. In that case two children reported that a stranger drove his car by them twice, making obscene gestures and yelling racial slurs, and then returned about five minutes later and tried to hit them with his car. Ohlson, 162 Wn.2d at 5. The Ohlson Court's decision that the children's statements

to the responding police officer was based in part upon the defendant's return to the scene and the danger that he might return again. Id. at 17.

iii. The questions and answers do not demonstrate that the primary purpose of the interrogation was to resolve an ongoing emergency. “The statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.” Bryant, 131 S. Ct. at 1160; accord Davis, 547 U.S. at 827. Because police officers act as both first responders and investigators, they may have the simultaneous purposes of addressing an ongoing emergency and investigating past actions when interrogating witnesses. Id. Crime victims may similarly have mixed motives in speaking to the police. Id.

In the present case, Officer Lawson testified that knew what Ms. Bustos had reported to the 911 operator, but he wanted to talk to her in person to determine if a crime had occurred and, if so, what kind of a crime it was. CP 224, 225-26. After contacting Ms. Bustos, the uniformed officer asked Ms. Bustos what happened, not whether she was injured or required medical attention. CP 222, 230. Ms. Bustos responded by telling the officer what had happened in the past. CP

230-31. The officer asked if Mr. Levine was the person who did that, she responded in the affirmative. CP 231.

Officer Lawson related that Ms. Bustos was scared and “somewhat hysterical” when he began talking with her, but that she calmed down “so that I could get the information that I needed.” CP 234. He did not ask Ms. Bustos any questions about her medical condition or her safety.

This conversation shows that Officer Lawson was confirming the information he learned Ms. Bustos had reported to 911, that Mr. Levine had assaulted her at a different location earlier that afternoon. In fact, the Officer testified that Ms. Bustos “confirm[ed]” that it was Mr. Levine and that he was her ex-boyfriend. CP 231, 239. The officer then took photographs of Ms. Bustos’s injuries before allowing the fire department medics to attend to her. CP 231.

iv. *The statements were akin to formal interrogation.*

The Supreme Court also examines the formality of the out-of-court statements in the determining the primary purpose of the interrogation. Bryant, 131 S. Ct. at 1166. This interrogation did not occur in a formal setting like a police precinct, but it was nonetheless relatively formal.

The interrogation did not occur at or near the crime scene. It was at home of Mr. and Mrs. Cornelius. The Corneliuses and their employee, two police officers, and fire department medics were present, so the setting was safe and calm.

Ms. Bustos's statements were not a spontaneous cry for help, but rather a response to the officer's questions. See State v. Reed, 168 Wn. App. 553, 560, 569-71, 278 P.3d 203, rev. denied, 176 Wn.2d 1009 (2012) (statements nontestimonial where domestic violence victim ran up to police car and spontaneously exclaimed that she had been attacked). Officer Lawson asked Ms. Bustos what happened and she responded. CP 230. The record does not show what other questions were asked and how Ms. Bustos answered, but Officer Lawson followed up with at least one specific question to confirm the information he had from dispatch concerning Mr. Levine's identity as the alleged perpetrator. CP 231.

The Washington Supreme Court's decision in Koslowski demonstrates that Ms. Bustos's statements to Officer Lawson were testimonial. In Koslowski, police officers quickly responded to Ms. Alvarez's home and found her still on the telephone with the 911 operator. Koslowski, 166 Wn.2d at 414. When the officers entered

Ms. Alvarez's home, she was quite upset, and she showed them where she had been up and forced her to lie on the floor. Id. When the officers questioned her, Ms. Alvarez described how three men driving by had approached her as she unloaded her groceries, forced her into her house with a possible gun, tied her up, and stole her property. Id. at 415.

After reviewing the four factors identified in Davis, the Koslowski Court ruled that Ms. Alvarez's statements to the police were testimonial. Koslowski, 166 Wn.2d at 430-31. As in Mr. Levine's case, Ms. Alvarez was speaking about past events, not events that were currently happening, even though they were fairly recent. Id. at 422. Additionally, Ms. Alvarez was safe, and there was no reason to believe the men would return to harm her. Id. A reasonable listener would also understand that Ms. Alvarez was not facing an ongoing emergency. Id. at 423. Her responses to the police officers' inquiry also yielded testimonial information, and the mere fact that the suspects were still at large and possibly armed was not sufficient to find the statements nontestimonial. Id. at 487-89. Finally, although the interrogation was not formal due to Ms. Alvarez's emotional state, "a certain level of formality occurs whenever police engage in a question-

answer sequence with a witness.” Id. at 429. Thus, the State did not establish that the primary purpose of the interrogation was to respond to an ongoing emergency. Id. at 430.

Mr. Levine’s case is similar to Koslowski. Ms. Bustos described an assault that occurred in the past. She was in a different and safe location from where the assault allegedly occurred. There was no indication that Mr. Levine knew where Ms. Bustos was or that he would try to find her, and the police were at his residence at the time of the interrogation. Nor did Ms. Bustos require immediate medical attention. Ms. Bustos did not spontaneously cry for help, but answered the officer’s questions. The City cannot demonstrate that the primary purpose of Officer Lawson’s’ interrogation of Ms. Bustos was to respond to an ongoing emergency. The statements were testimonial.

d. Mr. Levine did not have the opportunity to cross-examine Ms. Bustos. The admission of testimonial hearsay violates a criminal defendant’s constitutional right to confront witnesses unless the defendant had an opportunity to cross-examine the declarant and the declarant is unavailable to testify. Crawford, 541 U.S. at 68. There is no evidence that Mr. Levine was ever offered the opportunity to cross-examine Ms. Bustos.

e. The violation of Mr. Hill's confrontation right was not harmless beyond a reasonable doubt, and his conviction must be reversed. When constitutional error is identified on appeal, the conviction must be reversed unless the government can demonstrate beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Koslowski, 166 Wn.2d at 431. In determining harm associated with a violation of the confrontation clause, courts may consider factors such as the importance of the testimony to the government's case, whether the testimony was cumulative, the presence of corroborating or contradicting evidence, the extent of cross-examination permitted, and the overall strength of the prosecution's case. Van Arsdall, 475 U.S. at 684; State v. Jasper, 117 Wn.2d 96, 117, 271 P.3d 876 (2012).

To convict Mr. Levine of fourth degree assault, the jury had to conclude beyond a reasonable doubt that he assaulted Ms. Bustos by intentionally touching or striking her in a manner that was harmful or offensive. CP 39-40 (Jury Instructions 4-5); RCW 9A.36.041(1).

Without Officer Lawson's testimony relating Ms. Bustos's out-of-court statements, the evidence of an assault is far from persuasive.

Mrs. Cornelius testified that Ms. Bustos was scared, had a little bit of blood in her ear and a scratch on her neck, and claimed she was hit in the ear, but she offered no information about who struck her. CP 207-08, 213. Although Officer Lawson related what dispatch told him Ms. Bustos reported to 911, Ms. Cornelius testified that she was the one who called 911, and Officer Lawson did not hear the call. CP 207, 224. Mrs. Cornelius said she told the 911 operator what Ms. Bustos told her, and that information did not include identification of Mr. Levine.

The City cannot demonstrate beyond a reasonable doubt that the jury would have convicted Mr. Levine of fourth degree assault absent the testimonial statements admitted in violation of his constitution right to confront the witnesses against him. Mr. Levine's conviction must be reversed and remanded for a new trial. Jasper, 174 Wn.2d at 120; Koslowski, 166 Wn.2d at 433.

E. CONCLUSION

Ms. Bustos did not testify at trial, and the introduction of her testimonial statements to Officer Lawson violated Mr. Levine's Sixth Amendment right to confront and cross-examine the witnesses against him. Mr. Levine's conviction for fourth degree assault must be reversed and remanded for a new trial.

DATED this 17<sup>th</sup> day of March 2014.

Respectfully submitted,



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Elaine L. Winters – WSBA #7780  
Washington Appellate Project  
Attorney for Petitioner

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

CITY OF BOTHELL,	)	
	)	
Respondent,	)	
	)	NO. 70241-6-I
v.	)	
	)	
ERIC LEVINE,	)	
	)	
Petitioner.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] CITY OF BOTHELL RHONDA GEIGER ASSISTANT CITY ATTORNEY 18305 101 <sup>ST</sup> AVE NE BOTHELL, WA 98011	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ERIC LEVINE PO BOX 534 DUVALL, WA 98019	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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STATE OF WASHINGTON  
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**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF MARCH, 2014.

X \_\_\_\_\_ 

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