

No. 70426-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

J.H.,

Appellant.

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DIVISION ONE

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. Because the evidence was insufficient to establish that J.H. was lawfully excluded from the mall, the trespass conviction should be reversed and dismissed with prejudice.

To prove that J.H. was guilty of criminal trespass in the first degree for being at the mall, the State had the burden to establish that his exclusion was lawful. RCW 9A.52.070; State v. Green, 157 Wn. App. 833, 844, 851, 239 P.3d 1130 (2010). The record establishes that the State did not present sufficient evidence on this element.

Throughout its argument, the State repeatedly asserts that J.H. was lawfully excluded from the mall for stealing. Br. of Resp't at 9, 11, 15. But where is the evidence that J.H. committed theft? The State cites no competent evidence to support its assertions on the matter.

The closest the State came at trial to presenting competent evidence that J.H. was lawfully excluded from the mall was Officer Adams' testimony. But he only remembered serving a trespass notice to J.H. that was based on an allegation of theft in 2009. RP 38, 44. This only explained why he served the trespass notice. It did not establish that J.H., in fact, stole from stores.

If Officer Adams' testimony was sufficient to prove that J.H.'s exclusion was lawful, then the defendant in State v. Green, should have lost. There, a school had issued trespass notices to a parent because the

she was allegedly disruptive. Green, 157 Wn App. at 838, 842. At the trial for criminal trespass, an attorney for the school testified that the school had limited the defendant's access to the school for being disruptive. Id. at 842. This witness, however, did not have personal knowledge concerning these disruptions. Id. 851-52. This Court held that this evidence was insufficient to prove that the defendant had been lawfully excluded for being disruptive. Id. at 852.

Here, Officer Adams is analogous to the witness for the school in Green. There, the witness had not observed the defendant being disruptive, which was the alleged legal basis for the exclusion. Here, Officer Adams did not claim to have seen J.H. steal anything. RP 44. He only had a bare recollection that J.H. had been arrested for theft and that he had served him with a no-trespass order. RP 44. He did not testify that he arrested J.H. or that he was part of the investigation that had led to J.H.'s arrest for theft. RP 44. As the State acknowledges, the "record is silent as to the specifics of that [alleged] theft." Br. of Resp't at 19.

If the witness in Green had personally served the defendant with a trespass notice after being told the defendant had been disruptive, the case would not have been decided differently. The evidence would have remained insufficient. Thus, that Adams served J.H. with the trespass notice is not a material difference.

The State points out that J.H. purportedly gave a different first name in 2011. Br. of Resp't at 12. Regardless of what J.H. called himself, this was not evidence that his exclusion from the mall was lawful. What J.H. understood or believed is not relevant to whether his presence was unlawful. State v. R.H., 86 Wn. App. 807, 812-13, 939 P.2d 217 (1997).

As the State recounts, in Green the defendant tried to challenge the lawfulness of the exclusion order before being prosecuted for criminal trespass and testified at trial in her defense. Br. of Resp't. at 13-14. The State argues this matters. Br. of Resp't at 12, 15. It does not. J.H. had no burden to prove that the exclusion was lawful; the State bore that burden. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). That J.H. did not testify cannot be held against him. Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). J.H. may raise the issue of the sufficiency of the evidence for the first time on appeal. State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998). That J.H. did not explicitly challenge the lawfulness of the exclusion order at trial is immaterial.

The State failed to prove with sufficient evidence that J.H.'s exclusion was lawful. This Court should reverse the conviction and order

it dismissed with prejudice. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); Green, 157 Wn. App. at 853.

2. Alternatively, the conviction should be reversed and remanded for a new trial because the evidence that J.H. was excluded on allegations of theft was testimonial evidence admitted in violation of J.H.’s right to confrontation.

Officer Adams’ testimony that J.H. was excluded for theft was testimonial evidence that was admitted in violation of J.H.’s constitutional right to confront those who accused him of theft. Thus, if Adams’ bare recollection concerning a possible 2009 theft is determined to be evidence sufficient to sustain the conviction, this Court should still reverse, but remand for a new trial.

Absent unavailability and a prior opportunity for cross-examination, admission of testimonial statements from an absent witness violates the confrontation clause of the Sixth Amendment. Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Absent an ongoing emergency, statements to the police accusing a person of a crime is testimonial. See Davis v. Washington, 547 U.S. 813, 829-30, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Here, Officer Adams testified that “[J.H.] was arrested for theft and . . . he had been identified as stealing from several stores” RP 44. Adams did not claim to have arrested J.H. or identified him as stealing

from stores. RP 44. The use of the passive voice in his testimony indicates that third parties accused J.H. of stealing. Adams was a mere conduit for this accusatory information. Because the accusations of theft did not come from Officer Adams, were made to establish a past fact, and were presumably made to law enforcement, this evidence was testimonial. If used as substantive evidence to prove that J.H. stole from mall stores in 2009, then the court violated J.H.'s right to confrontation.

The State's argument that the statements are not testimonial and its reliance on State v. Bellerouche, 129 Wn. App. 912, 120 P.3d 971 (2005) is misplaced. Bellerouche concerned the issue of notice and held that a trespass notice was not testimonial because it was a business record that was not prepared with an eye towards trial. Bellerouche, 129 Wn. App. at 916-17. Here, however, neither the 2009 nor the 2011 trespass notices were admitted into evidence. RP 67. And the issue here is the lawfulness of the exclusion, not J.H.'s knowledge of the exclusion. Still, even assuming the notice states that J.H. was excluded for theft, this does not make the evidence non-testimonial. The right to confrontation cannot be "evaded by having a note-taking police [officer] *recite* the . . . testimony of the declarant." Davis v. Washington, 547 U.S. at 826; accord Bullcoming v. New Mexico, 131 S. Ct. 2705, 2714, 180 L. Ed. 2d 610 (2011).

Violation of J.H.'s confrontation rights qualifies as "a manifest error affecting a constitutional right." RAP 2.5(a)(3). A showing of actual prejudice makes an error manifest. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Actual prejudice is established when the error had "practical and identifiable consequences." Id. Here, the error had practical and identifiable consequences because Adams' testimonial statement is the only evidence in the record that arguably supports the conclusion that J.H.'s exclusion from the mall was lawful. Thus, this Court may properly address the issue. State v. Kronich, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007) (reviewing confrontation clause challenge for first time on appeal as manifest constitutional error) overruled on other grounds by State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012). For the same reason that the error is manifest, the error is not harmless beyond a reasonable doubt. The conviction should be reversed.

B. CONCLUSION

Proof of the element that the exclusion was lawful ensures that people do not suffer criminal punishment for being wrongfully excluded on an unlawful discriminatory purpose. Here, there was insufficient evidence that J.H. was lawfully excluded from the mall's premises. Thus, this Court should reverse and order the charge dismissed with prejudice. If not reversed for lack of sufficient evidence, the case should be reversed

and remanded for a new trial because J.H.'s right to confrontation was violated.

DATED this 22nd day of May, 2014.

Respectfully submitted,



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