

No. 31879-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ANDRE ROACH HOPKINS,

Appellant.

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

The Honorable Katherine Stolz

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STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION TWO

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REPLY BRIEF OF APPELLANT

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## A. ARGUMENT

### ADMISSION OF M.'S HEARSAY STATEMENTS VIOLATED ANDRE HOPKINS'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

1. M.'s statements were "testimonial" and should have been excluded. The State in its response correctly states that only admission of "testimonial" hearsay violates a defendant's right to confrontation under the Sixth Amendment. Brief of Respondent at 12-13; *Davis v. Washington*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006); *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In looking to the statements of M. admitted here, the State claims her statements to her mother, grandmother, and CPS worker were not testimonial, thus admissible. Brief of Respondent at 12-16. The State's argument must be rejected under the objective test adopted by the *Crawford* Court to determine whether a statement is "testimonial."

In *Crawford*, the Court emphasized that historically, the Confrontation Clause referred to those who "bear testimony" against an accused. *Crawford*, 541 U.S. at 51. The Court did articulate several formulations of the core class of testimonial statements, which included "statements that were made under circumstances which would lead an objective witness reasonably to

believe that the statement would be available for use at a later trial[.]” *Id.* 51-52. “A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to authorities or not.” Richard D. Friedman, *Confrontation*, 86 Geo.L.J. 1011, 1042-43 (1998), also cited as authority in *Cromer v. United States*, 389 F.3d 662, 673-74 (6<sup>th</sup> Cir. 2004). Professor Friedman urged this broad definition because it “is necessary to ensure the adjudicative system does not effectively invite witnesses to testify in informal ways that avoid confrontation.” Friedman, *Confrontation*, 86 Geo.L.J. at 1043.

This test turns on whether a *reasonable person* would believe his or her statements would be used at a later trial. *Crawford*, 541 U.S. at 51-52. Under this test, all of M.’s hearsay statements would be rendered inadmissible. M. was claiming sexual abuse by Mr. Hopkins, facts that surely would lead a reasonable person to believe their statements would end up being available for use at a later criminal trial.

The State’s reliance on the Washington Supreme Court’s decision in *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006) is misplaced because *Shafer* ignored the *reasonable person* test of *Crawford*. The *Shafer* Court found as a matter of law that “it defies

logic to think that T.C., as a three-year-old child, or any reasonable three-year-old child, would have an expectation that her statements about alleged sexual abuse could be used for prosecutorial purposes.” *Shafer*, 156 Wn.2d at 390 n.8. But as Justice Sanders in dissent said so pithily,

[A] ‘reasonable person’ cannot have the *subjective* expectations of a three year old child . . . An “objective” test that considers subjective characteristics is no objective test at all.

*Shafer*, 156 Wn.2d at 400 (Sanders J, dissenting)(emphasis in original).

But *Shafer* does have some application to the case at bar, which the State notably ignores. In *Shafer*, the majority noted,

Of the testimonial statements identified as such in *Crawford*, the common thread binding them together was some degree of involvement by a government official, whether that person was acting as a police officer, as a justice of the peace, or as an instrument of the court.

*Id.* at 389, *citing Crawford*, 541 U.S. at 53.

Under this determination of “testimonial,” M.’s statements to CPS qualify as the type of inadmissible hearsay that violates the Confrontation Clause. CPS is a government agency, and as such, M.’s statements to the CPS worker were statements to a “government official” and should have been excluded.

2. The error in admitting M.'s in admissible hearsay was not harmless error. An error admitting hearsay evidence in violation of the Confrontation Clause is not harmless error unless the State can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) . "Under that standard, an error of constitutional magnitude is harmless only if the State can prove beyond a reasonable doubt that the jury would have reached the same result in the absence of the error." *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003).

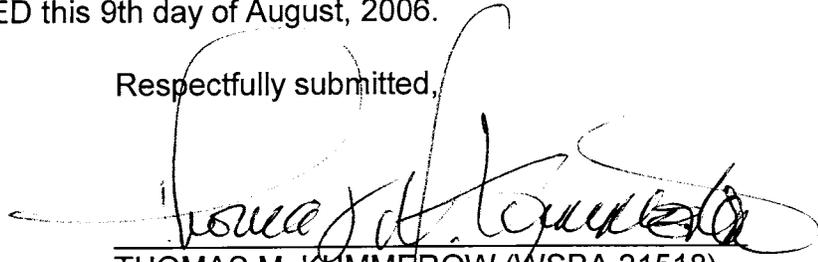
Here, it is clear the jury would not have reached the same result same absent the error. The *only* evidence regarding the sexual abuse of M. came from her own mouth through the testimony of her mother and grandmother as well as the CPS worker. Yet M. did not testify, the State instead relying on her hearsay testimony. Mr. Hopkins was denied the opportunity to confront M., in violation of the Confrontation Clause. Since M.'s hearsay statements were the only evidence, the error in admitting those statements cannot be deemed harmless and Mr. Hopkins's convictions must be reversed.

B. CONCLUSION

For the reasons stated in the previously filed opening brief as well as the instant reply brief, this Court must reverse Mr. Hopkins's convictions and remand for a new trial where M.'s hearsay statements are excluded.

DATED this 9th day of August, 2006.

Respectfully submitted,



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