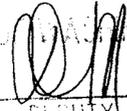


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STATE OF WASHINGTON

No. 34449-1-II

BY  DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Timothy L. Sherman,

Appellant.

Grays Harbor Superior Court

Cause No. 05-1-00587-7

The Honorable Judge David E. Foscue

Appellant's Opening Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
(360) 740-4445
FAX: 740-1650

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ASSIGNMENTS OF ERROR

1. The trial court erred by admitting hearsay contained in an incident report written by a nontestifying Sears employee.
2. The trial court erred by permitting Patrick Casey to testify to hearsay statements contained in Exhibit 3.
3. The trial court erred by finding that the incident report was a business record.
4. Mr. Sherman's constitutional right to confront the witnesses against him was violated by the admission of testimonial hearsay.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under a *de novo* standard of review, did the trial court err as a matter of law by admitting hearsay statements without an exception to the rule against hearsay? Assignments of Error Nos. 1-4.
2. Applying a *de novo* standard of review, was Mr. Sherman's constitutional right to confront witnesses violated by the erroneous admission of testimonial hearsay? Assignments of Error Nos. 1-4.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Timothy Sherman was charged with Possession of Stolen Property in the Second Degree for allegedly placing a power drill near the exit of a Sears store, and for driving the vehicle in which an alleged co-participant left the scene with the stolen drill. CP 1-2;RP (2/7/06) 4-79.

On August 16, 2005, Steve Bartosh, a loss prevention employee at Sears, completed a report about the stolen drill. RP (2/7/06) 26, 27. He was unavailable for Mr. Sherman's trial, after enlisting in the Marine Corps and being sent overseas. RP (2/7/06) 6-8. In December of 2005, Patrick Casey began work at the same Sears store as loss prevention manager. RP (2/7/06) 14. Over defense objection, he testified at trial regarding the contents of Bartosh's report. RP (2/7/06) 5-13, 42-53.

Casey testified that Bartosh indicated in his report the alleged value of the drill; this was the only evidence produced by the state to establish the value of the property. RP(2/7/06) 4-79. Casey acknowledged he did not work at Sears at the time of the incident, and that he did not have any information based on his own personal knowledge of the incident. RP(2/7/06) 53-54.

The trial court overruled numerous hearsay objections, and the jury convicted Mr. Sherman as charged. RP(2/7/06) 8-13, 42, 49, 51-52, 61-

63, 76; CP 3. Sentencing took place on 2/13/06 and this timely appeal followed. CP 3,12.

ARGUMENT

THE ERRONEOUS ADMISSION OF TESTIMONIAL HEARSAY VIOLATED MR. SHERMAN'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

The Sixth Amendment to the U.S. Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI. This provision is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 at 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV. A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139 (1990). Alleged violations of the confrontation clause are reviewed *de novo*. *State v. Medina*, 112 Wn.App. 40 at 48, 48 P.3d 1005 (2002); *U.S. v. Mayfield*, 189 F.3d 895 at 899 (9th Cir., 1999).

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). The *Crawford* court left open the definition of

testimonial hearsay, but outlined some guidance for courts struggling with the issue:

[The Confrontation Clause] applies to “witnesses” against the accused--in other words, those who “bear testimony.” 1 N. Webster, *An American Dictionary of the English Language* (1828). “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of “testimonial” statements exist: “ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” Brief for Petitioner 23; “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” *White v. Illinois*, 502 U.S. 346, 365, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); “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,” Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3. These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. *Crawford* at 51-52.

The prosecution did not meet its burden of establishing that the contents of proposed Exhibit 3 (the incident report written by a former employee) was nontestimonial. In fact, the report, written in anticipation

of criminal prosecution, falls within the core definition of testimonial statements set forth in *Crawford*. Its admission, through the testimony of Patrick Casey, violated the confrontation clause. *Crawford, supra*.

Furthermore, the report provided the only evidence of the stolen property's value. RP (2/7/06) p. 8, 52. Applying the stringent constitutional test for harmless error, the conviction must be reversed unless the prosecution establishes beyond a reasonable doubt that the jury would have reached the same result without the error. *State v. Smith*, 148 Wn.2d 122 at 139, 59 P.3d 74 (2002). Since the only evidence of the stolen property's value was contained in the testimony from the hearsay report, the prosecution cannot make this showing.

At trial, the prosecution argued that the report qualified as a "business record," apparently relying on *dicta* in *Crawford* that routine business records are nontestimonial. RP (2/7/06) 13. *Crawford*, at 56. While this may generally be true, the particular record must still be tested against the Supreme Court's definition of testimonial hearsay, otherwise a state could bypass *Crawford* by defining business records broadly. As the Supreme Court made clear, the scope of the confrontation clause does not depend on each state's rule against hearsay: "Leaving the regulation of out-of-court statements to the law of evidence would render the

Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.” *Crawford*, at 51.

Furthermore, the business record exception is only intended to cover “the products of daily, routine government and business transactions...” The exception applies only when “[c]ross-examination... serves little or no purpose [and when it is] unrealistic to expect that those who generate these records, or record custodians, would recall the details of a particular transaction or event.” *State v. Hines*, 87 Wn. App. 98 at 101, 941 P.2d 9 (1997). An incident report such as Exhibit 3 does not meet this test: it does not document a routine transaction, and cross-examination would enable the defendant to test the declarant’s observations and conclusions. *See, e.g., Hines*, at 101-102.

The report identified as Exhibit 3 was testimonial hearsay. Allowing the contents of the report to be introduced through the testimony of Patrick Casey without permitting cross-examination of the report’s author violated Mr. Sherman’s constitutional right to confrontation. The error was not harmless, because the report contained the only proof of the value of the stolen property. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Crawford*, *supra*.

CONCLUSION

For the foregoing reasons, the conviction must be reversed, and the case remanded for a new trial.

Respectfully submitted on August 14, 2006.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

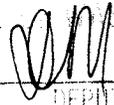
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CERTIFICATE OF MAILING

STATE OF WASHINGTON

I certify that I mailed a copy of Appellant's Opening Brief to:

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Timothy Sherman, DOC# 257112
Airway Heights
P.O. Box 1899
Airway Heights, WA 99001-1899

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway Ave Rm 102
Montesano, WA 98563

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 14, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 14, 2006.


Jodi R. Backlund, No. 22917
Attorney for the Appellant