

COURT OF APPEALS

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DM

NO. 34449-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

TIMOTHY L. SHERMAN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID FOSCUE, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

The State acknowledges the facts outlined in the appellant's brief to be correct. The appellant was tried and convicted as described. Patrick Casey, the Loss Prevention Manager of Sears department store in Aberdeen, Washington, testified as to records that were kept by his employer. (RP at 4). A person that originally contributed to these records, Steve Bartosh, was not called at trial. (RP at 43). The content of the records was admitted, over objection of the appellant, as business records.

ARGUMENT

The appellant's only objection to the trial proceeding is that information was admitted in violation of his Sixth Amendment right to confront a witness against him. Particularly, the value of the item that the appellant is accused of stealing. This information was kept by Sears in its records. Patrick Casey testified to this information at trial, from records he obtained as the Loss Prevention Manager of the store.

Cited as controlling is *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). Crawford was convicted of Assault for the stabbing of a man who allegedly attempted to rape his wife. *Id.* at 41. A recorded police interview of his wife, who was present at the time of the crime, was admitted at trial. *Id.* at 40. The defendant's wife did not testify, do to Washington State's marital privilege. *Id.*

In a detailed opinion, outlining much of the history of the common law right of confrontation, the Supreme Court held that the admission of

the wife's statements were in violation of the confrontation clause of the United States Constitution. This holding was specific as to its importance. The Court held that when evidence is testimonial in nature, the defendant's right of confrontation was absolute. *Id.* at 61. Confrontation was defined as a "a prior opportunity to cross-examine". *Id.*

The Court recognized that not all hearsay would be testimonial in nature. It acknowledged that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial. *Id.* at 56. As example, the Court cited business records. *Id.* The Court declined to define testimonial statements, but gave certain examples of statements that would qualify. Among them are "affidavits, depositions, prior testimony, or confessions." *Id.* at 52. Also cited by the Court was a statement from the brief of the National Association of Criminal Defense Lawyers: "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.*

After *Crawford*, Washington courts have addressed the application of the holding to business records. In *State v. N.M.K.*, 129 Wn.App. 155, 118 P.3d 368 (2005), Division I of the Court of Appeals ruled that the admittance of the lack of business records of the Department of Licensing was not barred by the holding of *Crawford*. *Id.* The evidence at issue was the statement of the department that "'after a diligent search of computer files there is no document or other evidence... to indicate that... the [DOL]

had issued a valid license to' N.M.K.'" *Id.* at 163. The Court ruled that *Crawford* made clear that business records were not testimonial. *Id.* Division III agreed with this analysis in *State v. Kronich*, 131 Wn.App. 537, 128 P.3d 119 (2006).

After *N.M.K.*, Division I ruled that certain business records are not testimonial, even when such records appear to be kept, in part, for future litigation. *State v. Bellerouche*, 129 Wn.App. 912, 120 P.3d 971 (2005). *Bellerouche* was a juvenile that had been permanently trespassed from an apartment building. *Id.* at 914. At his fact finding, for the crime of criminal trespass, evidence of the notice of trespass was admitted against him. *Id.* The notice read: "The below named person has been informed that he /she is forbidden to enter the above listed property. To enter such property may result in prosecution under RCW 9A.52 and related municipal code section(s). A violation by entry upon the listed property may result in a fine, imprisonment, or both. THIS NOTICE IS VALID PERMANENTLY." *Id.* The court ruled that the notice was kept as a business record in the normal course. It recognized that the notice was also kept for the purpose of litigation, but stated that this fact did not make it testimonial in nature. *Id.* at 917.

This Court has ruled that the description of "business record" does not automatically exclude evidence from being "testimonial." *State v. Hopkins*, 134 Wn.App. 780, 142 P.3d 1104 (2006). The evidence at issue in *Hopkins* was records of a sexual assault examination, of the victim,

performed by a nurse after a referral from law enforcement. *Id.* at 1106. The nurse did not testify at trial. *Id.* The nurse's supervisor testified as to the contents of the report. *Id.* This Court questioned whether the report was a business record, and stated that even if so, it was testimonial in nature. *Id.* at 1109. The Court reasoned that the nurse's interview of the victim would lead an "objective witness to believe that the statements would be available for use at a later trial" *Id.* The Court cited that such medical providers are required to report such information to law enforcement; that, in this case, the victim was referred to the hospital by law enforcement, and that information was provided to the victim about future litigation. *Id.* The Court ruled that statements made to the nurse by the victim were "testimonial," and that their admittance was in violation to the defendant's right of confrontation.

What is clear from the holdings of all of the cases cited above is that "testimonial" statements are something more than any statement that may end up as evidence. There must be a obvious connection between the gathering of the statement and the ultimate criminal litigation. And, that connection must be made by a state agent, or the equivalent, who is intimately involved in bringing the litigation to fruition. As the Supreme Court quoted in *Crawford*: "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." *Crawford* at 51.

In the case at bar, the objectionable evidence is testimony of value of the item stolen. This information was contained in a theft report maintained by the victim of the crime, Sears. Information as to value of the product sold by the store are kept for a number of reasons. In this case the information was kept to document a loss of inventory. The information would be turned over to law enforcement if requested, but such loss must be explained in the store's accounting regardless. The information was not gathered at the bequest of law enforcement, but there was a potential that it might be used in the future at trial. As this Court has stated, this fact does not make the evidence "testimonial."

CONCLUSION

The conviction must be affirmed.

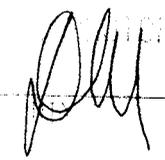
DATED this 27 day of November, 2006.

Respectfully Submitted,

By: 

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WSBA #33270

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DECLARATION OF MAILING

DECLARATION

I, Randi M. Toyra hereby declare as follows:

On the 27th day of November, 2006, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund; Backlund & Mistry; 203 East Fourth Avenue, Suite 404; Olympia, WA 98501 and to Timothy Sherman; #257112; Airway Heights Correctional Center; P.O. Box 1899; Airway Heights, WA 99001-1899, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

