

NO. 34632-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK EARL,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 JUN 22 11:11:13
BY [Signature]

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

The Honorable D. Gary Steiner, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. Under Crawford v. Washington,¹ and its progeny, does a testimonial statement contained in a business record implicate the protections of the Confrontation Clause?

2. Under Crawford v. Washington and its progeny, is a statement testimonial when 1) it is made by a teenager in response to questions from a health care provider and 2) that provider believes herself to be questioning the teenager at the request of a deputy prosecutor?

3. Under the so-called "Blakely Fix" legislation, Laws of 2005, ch. 68, did the court lack authority to empanel a jury to find aggravating factors to support an exceptional sentence when the trial began the very day the statute was enacted?

B. ARGUMENT

1. **TESTIMONIAL STATEMENTS CONTAINED WITHIN BUSINESS RECORDS REQUIRE THE ABILITY TO CROSS-EXAMINE THE DECLARANT.**

The State overstates the extent of agreement regarding testimonial hearsay statements contained in what would otherwise be admissible business records. Many of the cases cited by the State conclude that statements within business records may be testimonial despite their inclusion

¹ 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

in what would otherwise be an admissible business or public record. See, e.g., Rollins v. State, 392 Md. 455, 461, 497, 897 A.2d 821 (2006); State v. Cao, 175 N.C. App. 434, 626 S.E.2d 301 (2006); Commonwealth v. Verde, 444 Mass. 279, 283-84, 827 N.E.2d 701 (2005). Additionally, the declaration in United States v. Lee that business records are not testimonial is dicta, since the issue in that case was the admissibility of statements to co-conspirators. United States v. Lee, 374 F.3d 637, 643-45 (8th Cir. 2004). The court in Lee did not consider whether testimonial statements could implicate the Confrontation Clause despite their inclusion in a business record. Id.

Additionally, in many of the cases cited by the State the defendant's Confrontation Clause rights were protected by other means. For example, in Commonwealth v. Verde, the laboratory report on the weight of the drugs at issues was held not testimonial. 444 Mass. at 284. However, in that case, the substance itself was available for the defendant's expert to weigh and analyze. Id. The defendant could, therefore, independently verify or contradict the findings. In United States v. Ellis, the disputed document was the result of a blood and urine test for alcohol. United States v. Ellis, 460 F.3d 920 (7th Cir. 2006). Although it was determined not to be testimonial, in that case the arresting officer, who did testify at trial,

witnessed the lab technician draw the blood and witnessed the defendant urinate in a cup. Id. at 922. Thus, the defendant's right to confront witnesses was to some degree protected because the officer who had personally witnessed these draws was available for cross examination at trial. Id.

None of this protection was provided to Earl. Unlike in Ellis, no one who testified at trial witnessed the blood draw asserted to be from K.G. and her daughter. RP 177, 464; 460 F.3d at 922. Nor was there any way for Earl to independently verify or controvert the statements regarding the blood draw, as in Verde. RP 177, 464; Verde, 444 Mass. at 284. Given the absence of other circumstances protecting the defendant's rights, the court should be more concerned that Earl was denied the opportunity to cross examine the authors of the statements found in the chain of custody form.

Another concern is that in many of the cases cited by the State, the business records involved were clearly kept for reasons entirely unrelated to any criminal prosecution. See, e.g., United States v. Baker, 458 F.3d 513, 515 (6th Cir. 2006) (postal records are not testimonial); United States v. Hagege, 437 F.3d 943, 946 (9th Cir. 2006) (foreign bank records are not testimonial); State v. Norman, 203 Or. App. 1, 125 P.3d 15 (2005)

(certification of accuracy of breath analysis machine not testimonial when first certification occurred before defendant was even arrested). Unlike postal or bank records, the blood draws from K.G. and Winter Star were immediately and clearly related to the investigation and occurred at police behest. RP 466, 475-76. It is this involvement of law enforcement that creates the potential for prosecutorial abuse that the Crawford court was concerned about. See Crawford, 541 U.S. at 56 n.7.

The State's distinction between incriminatory and non-incriminatory statements is semantic. Given the immense probative value of DNA and other biological testing, even business records can be incriminatory. A defendant's right to confront witnesses is violated when he has no opportunity to cross examine anyone with personal knowledge of how the sample for a biological test was gathered and processed. See Crawford v. Washington, *supra*.

2. K.G.'S STATEMENTS TO THE PUBLIC HEALTH NURSE WERE NOT SOLELY FOR THE PURPOSE OF MEDICAL DIAGNOSIS AND TREATMENT BUT ALSO ANTICIPATED CRIMINAL PROCEEDINGS.

Whether the focus is on K.G.'s perspective as the declarant or McMahan's motive in questioning, the statements are testimonial. K.G. was almost certainly aware of the prosecutorial value of her statements, and McMahan understood herself to be asking questions at the request of the

prosecutor. RP 283. At the time of these statements, K.G. was not a small child, as were many of the declarants in cases cited by the State. See, e.g., State v. Blue, 717 N.W.2d 558 (N.D. 2006); In re T.T., 351 Ill. App. 3d 976, 815 N.E.2d 789, 287 Ill. Dec. 145 (2004); State v. Bobadilla, 709 N.W.2d 243, 252 (Minn. 2006). As a seventeen-year-old, she must have been very aware her statements could be used in a criminal prosecution. RP 111. Jolene Lapointe, who requested that McMahon question K.G. about the father of her child, relayed the information to Detective Johns that she had heard A.G. was raped. RP 373-74. Her involvement with law enforcement was, therefore, not non-existent as the State implies.

3. LAWS OF 2005, CH. 68, THE SO-CALLED "BLAKELY FIX" DOES NOT APPLY TO EARL BECAUSE HIS TRIAL WAS BEGUN BEFORE THAT LAW WAS ENACTED ON APRIL 15, 2005.

The so-called "Blakely Fix" legislation, authorizing courts to empanel juries to find aggravating factors supporting imposition of exceptional sentences, does not apply when trial began before the enactment of the law. State v. Pillatos, 159 Wn.2d 459, 474, 480, 150 P.3d 1130 (2007). The Blakely fix was enacted on April 15, 2005, to be effective immediately. See Laws of 2005, ch. 68, § 7; Pillatos, 159 Wn.2d at 468. The session law was filed at 5:19 p.m. on April 15, 2005. Laws of 2005, ch. 68. By its terms, it applies to all pending criminal matters where trials

have not yet begun or pleas have not yet been accepted. See Laws of 2005, ch. 68, § 4(1); Pillatos, 159 Wn.2d at 470. Neither the statute, nor the legislative history, nor any published Washington case addresses the question of what date determines the beginning of trial for purposes of this legislation.

The law does not apply because, for speedy trial purposes, Earl's trial had already begun when it was enacted. See State v. Carlson, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996). For purposes of speedy trial rules, the trial begins when preliminary motions are heard and disposed of. State v. Carlson, supra; State v. Andrews, 66 Wn. App. 804, 810, 832 P.2d 1373 (1992). The hearing and disposition of motions by the trial judge after a case is assigned or called for trial is considered a "customary and practical phase of the trial." Carlson, 128 Wn.2d at 820; Andrews, 66 Wn. App. at 810. Therefore, Earl's trial began at the latest when preliminary motions were heard on April 15, 2005. 1RP 1-6; Carlson, 128 Wn.2d at 820; Andrews, 66 Wn. App. at 810. Moreover, an order was already entered continuing trial on March 14, 2005, indicating that for speedy trial purposes, the trial had begun well before April 15. CP 39. Another order continuing trial was entered on April 15, 2005. CP 40. Because a "customary and practical phase of the trial" had begun on or

before April 15, 2005, laws of 2005, ch. 68, by its terms, does not apply to Earl. See 1RP 1-6; Carlson, 128 Wn.2d at 820; Pillatos, 159 Wn.2d at 470.

If the court concludes the statute is ambiguous, either as to when trial begins or whether the statute applies to a trial beginning the very day the statute was enacted, the exceptional sentence must be reversed under the rule of lenity. See, e.g., State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005). In criminal cases, the rule of lenity is a basic and required limitation on the court's power of statutory interpretation whenever the meaning of a statute is not plain. In re Personal Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). The rule of lenity requires interpretation in favor of the defendant absent legislative intent to the contrary. Jacobs, 154 Wn.2d at 601. The Legislature's intent was that this statute be effective immediately to conform to the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). See Laws of 2005, ch. 68, §§ 1, 7; Pillatos, 159 Wn.2d at 468. This intent does not clarify whether the statute should be applied to a trial which began the same day the statute was enacted, nor what event should be used to determine the beginning of trial. Under the rule of lenity, this ambiguity in the sentencing statute must

be resolved in favor of Earl. See, e.g., Jacobs, 154 Wn.2d at 601; Hopkins, 137 Wn.2d at 901; In re Post-Sentencing Review of Charles, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). The empanelment of a jury to find aggravating factors was therefore unauthorized by any existing law, and Earl's exceptional sentence should be reversed.

C. CONCLUSION

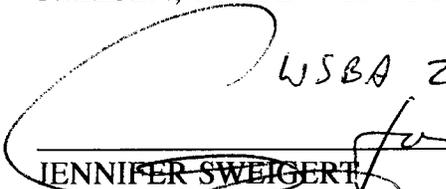
For the foregoing reasons and for the reasons stated in the Appellant's Opening Brief, this Court should reverse Earl's conviction. Alternatively, the Court should reverse Earl's exceptional sentence.

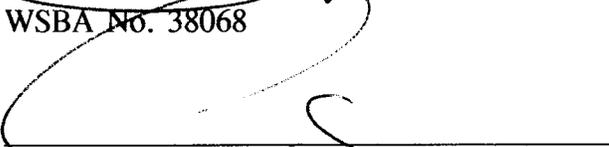
DATED this 21st day of June, 2007.

Respectfully submitted,

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

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|---------------------|---|--------------------|
| STATE OF WASHINGTON |) | |
| |) | |
| Respondent, |) | |
| |) | |
| vs. |) | COA NO. 34632-0-II |
| |) | |
| FRANK CHESTER EARL, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF JUNE 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF JUNE 2007.

x Patrick Mayovsky