

NO. 35789-5-II

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

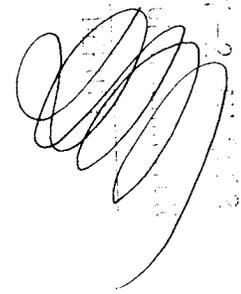
STATE OF WASHINGTON,

Respondent,

v.

STEVEN KIE CHANG,

Appellant.



STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO
JAN 13 2015
10:10 AM

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

The Honorable John R. Hickman, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
B. STATEMENT OF THE CASE.....	2
1. PROCEDURAL HISTORY	2
2. SUBSTANTIVE FACTS.....	3
<i>a. The prosecutor’s improper closing argument.....</i>	<i>6</i>
<i>b. Comment on Chang’s exercise of constitutional rights.....</i>	<i>9</i>
C. ARGUMENT.....	11
1. USE OF TESTIMONIAL STATEMENTS OF A NON- TESTIFYING WITNESS TO PROVE AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSES VIOLATED CHANG’S CONSTITUTIONAL RIGHT OF CONFRONTATION.	11
2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED CHANG A FAIR TRIAL.....	17
3. THE STATE FAILED TO PROVE CHANG WAS IN POSSESSION OF THE STOLEN ITEMS.	23
4. THE IMPERMISSIBLE COMMENT ON CHANG’S EXERCISE OF A CONSTITUTIONAL RIGHT DENIED HIM DUE PROCESS.	28
D. CONCLUSION	34

TABLE OF AUTHORITIES

Washington Cases

<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988)	18, 19
<u>State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	22
<u>State v. C.J.</u> , 148 Wn.2d 672, 63 P.3d 765 (2003)	13
<u>State v. Callahan</u> , 77 Wn.2d 27, 459 P.2d 400 (1969).....	24, 26
<u>State v. Carneh</u> , 153 Wn.2d 274, 103 P.3d 743 (2004)	28
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956).....	19
<u>State v. Chapin</u> , 118 Wn.2d 681, 826 P.2d 194 (1992)	23
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978).....	22
<u>State v. Clark</u> , 139 Wn.2d 152, 985 P.2d 377 (1999).....	12
<u>State v. Copeland</u> , 130 Wn.2d 244, 922 P.2d 1304 (1996).....	18
<u>State v. Crediford</u> , 130 Wn.2d 747, 927 P.2d 1129 (1996).....	23
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	22
<u>State v. Davis</u> , 154 Wn.2d 291, 111 P.3d 844 (2005), <u>aff'd by Davis v. Washington</u> , 126 S. Ct. 2266 (2006).....	16
<u>State v. Davis</u> , 16 Wn. App. 657, 558 P.2d 263 (1977).....	24, 26
<u>State v. Davis</u> , 86 Wn. App. 414, 937 P.2d 1110, <u>review denied</u> , 133 Wn.2d 1028 (1997).....	29
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	18, 28
<u>State v. French</u> , 101 Wn. App. 380, 4 P.3d 857 (2000), <u>review denied</u> 142 Wn.2d 1022 (2001)	21
<u>State v. Green</u> , 94 Wn. 2d 216, 616 P.2d 628 (1980).....	23
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	28, 31

<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	23
<u>State v. Harris</u> , 14 Wn. App. 414, 542 P.2d 122 (1975), <u>review denied</u> , 86 Wn.2d 1010 (1976).....	28
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	23
<u>State v. Huson</u> , 73 Wn.2d 660, 440 P.2d 192 (1968), <u>cert. denied</u> , 393 U.S. 1096 (1969);	19
<u>State v. Jones</u> , 68 Wn. App. 843, 845 P.2d 1358 (1993), <u>review denied</u> 122 Wn.2d 1018 (1994).....	29
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993).....	33
<u>State v. Liles</u> , 11 Wn. App. 166, 521 P.2d 973, <u>review denied</u> , 84 Wn.2d 1005 (1974).....	27
<u>State v. Partin</u> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	24
<u>State v. Ransom</u> , 56 Wn. App. 712, 785 P.2d 469 (1990).....	19
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	18
<u>State v. Reeder</u> , 46 Wn.2d 888, 285 P.2d 884 (1955).....	19, 20
<u>State v. Rodriguez</u> , 65 Wn. App. 409, 828 P.2d 636, <u>review denied</u> , 119 Wn.2d 1019, 838 P.2d 692 (1992).....	27
<u>State v. Romero</u> , 113 Wn. App. 779, 54 P.3d 1255 (2002).....	29
<u>State v. Ross</u> , 141 Wn.2d 304, 4 P.3d 130 (2000).....	29
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	28, 30, 31
<u>State v. Shafer</u> , 156 Wn.2d 381, 28 P.3d 87 (2006).....	14
<u>State v. Smith</u> , 189 Wash. 422, 65 P.2d 1075 (1937).....	18
<u>State v. Stephans</u> , 47 Wn. App. 600, 736 P.2d 302 (1987).....	19
<u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993).....	19
<u>State v. Suarez-Bravo</u> , 72 Wn. App. 359, 864 P.2d 426 (1994).....	18

<u>State v. Traweek</u> , 43 Wn. App. 99, 715 P.2d 1148 (1986).....	22
---	----

Federal Cases

<u>Berger v. United States</u> , 295 U.S. 78, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1934).....	17
--	----

<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004).....	12, 13, 15, 16
--	----------------

<u>In re Winship</u> , 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)....	23
--	----

<u>Mahoney v. Wallman</u> , 917 F.2d 469 (10 th Cir. 1990).....	22
--	----

<u>Minnesota v. Olson</u> , 495 U.S. 91, 109 L. Ed. 2d 85, 94, 110 S. Ct. 1684 (1990).....	27, 29
--	--------

Other Cases

<u>State v. Rivera</u> , 268 Conn. 351, 844 A.2d 191 (2004).....	15
--	----

Statutes

RCW 9.35.020.....	2
-------------------	---

RCW 9A.56.140(1).....	3, 24
-----------------------	-------

RCW 9A.56.150.....	3
--------------------	---

RCW 9A.56.160.....	3
--------------------	---

Constitutional Provisions

Const. art. 1, § 22.....	12
--------------------------	----

Const. art. 1, § 22 (amend. 10).....	18
--------------------------------------	----

Const. art. 1, § 3.....	23
-------------------------	----

Const. art. I § 7.....	29
------------------------	----

U.S. Const. amend. XIV.....	23
-----------------------------	----

U.S. Const. amend. VI.....	12
----------------------------	----

U.S. Const., amend. IV 29

Other Authorities

RAP 2.5(a)(3) 12

Richard D. Friedman, Confrontation: The Search for Basic Principles, 86
Geo. L.J. 1011, 1042-43 (1998)..... 15

A. ASSIGNMENTS OF ERROR

1. Admission of testimonial statements of a non-testifying witness violated appellant's Sixth Amendment right of confrontation.
2. Prosecutorial misconduct in closing argument denied appellant a fair trial.
3. The state failed to prove an essential element of the charged offenses.
4. Impermissible comment on appellant's exercise of a constitutional right denied him a fair trial.

Issues pertaining to assignments of error

1. The trial court permitted a police officer to testify about statements by a non-testifying witness, ruling that the statements were not admitted for the truth of the matter asserted but just as background information. The court reversed that ruling during closing argument, permitting the prosecutor to rely on the truth of the statements as substantive evidence of appellant's guilt. Where there was no showing that the declarant was unavailable, and the defense had no prior opportunity to cross examine her, did admission of her testimonial statements violate appellant's right of confrontation?
2. Where the prosecutor disregarded the court's ruling as to the limited purpose of the out of court statements, relying on the truth of

the assertions to prove an essential element of the charges, did prosecutorial misconduct deny appellant a fair trial?

3. Appellant was convicted of identity theft and possession of stolen property based on items found in a motel room. Where the evidence showed appellant was not the registered occupant of the room, he had been in the room no more than half an hour, and the stolen items had been seen in the room before he arrived, did the state fail to prove he was in possession of the items?

4. A police officer testified that he knocked on the motel room door and announced his presence, and appellant came out of the room. In response to a question by the prosecutor, the officer then testified that appellant did not leave the door open but rather exited the room in a sliding manner and closed the door behind him. Does the state's attempt to raise an inference of guilt from appellant's exercise of his constitutional right to exclude police from the room absent a warrant require reversal?

B. STATEMENT OF THE CASE

1. Procedural History

Steven Kie Chang, appellant herein, was charged by amended information with one count of second degree identity theft, two counts of second degree possession of stolen property, and two counts of first degree possession of stolen property. CP 34-36; RCW 9.35.020; RCW

9A.56.140(1); RCW 9A.56.150; RCW 9A.56.160. The case proceeded to jury trial in Pierce County Superior Court before the Honorable John R. Hickman. Following the state's case, one count of second degree possession of stolen property was dismissed for lack of evidence, and one count of first degree possession of stolen property was reduced to third degree. 3RP¹ 166; 4RP 190. The jury entered guilty verdicts, and the court imposed standard range sentences. CP 92-95, 105; Supp. CP (Corrected Judgment and Sentence as to Count III, entered 1/31/07). Chang filed this timely appeal. CP 116.

2. Substantive Facts

Steven Chang was charged with identity theft and possession of stolen property based on items found in a motel room he had been in before his arrest. At trial, Joseph Campbell, the front desk manager at King's Motor Inn in Fife, testified that he received a call from Maria², the front desk clerk, as he was driving to work. 3RP 76, 87. Maria reported that she had seen some suspicious items in Room 220. 3RP 77, 87. When Campbell arrived around 4:30, he and Maria went up to the room. Campbell took a step inside, where he saw digital cameras, printers, some identifications, and what appeared to be IRS or Social Security checks.

¹ The Verbatim report of Proceedings is contained in five volumes, designated as follows: 1RP—11/13/06; 2RP—11/15/06; 3RP—11/16/06; 4RP—11/20/06; 5RP—12/22/06.

² The clerk was never identified at trial by anything but her first name.

3RP 77-78. He instructed Maria to place a safety lock on the door to prevent anyone from accessing the room, then he and Maria returned to the front desk, where Campbell called the police. 3RP 78, 87.

At around 4:35 or 4:40, Chang came to the front desk, asking to be allowed in the room. 3RP 78, 88. Maria explained that Chang had been there earlier with the same request, but because he was not listed on the room registration, she could not let him in the room. 3RP 78. Heather Cromwell had rented the room at 6:52 that morning, and hers was the only name on the check-in card. 3RP 84, 86. This time, Chang had Cromwell on the phone and asked Campbell to speak with her. Campbell verified that she was the room renter, and she gave permission for Chang to enter the room. 3RP 78-79. Campbell made a copy of Chang's driver's license, then removed the safety lock and opened the room for Chang. 3RP 80-81.

Campbell again called the police, reporting that the registered guest had given Chang permission to enter the room, and he was currently inside. 3RP 81. While waiting for the police to arrive, Campbell noticed one of the two women who had been with Chang standing at the top of the stairwell, talking to Chang, who was standing by his car. The woman was holding what looked like a printer or copy machine. 3RP 82.

Police arrived at 5:06 and, after speaking with Campbell, they proceeded to Room 220. 3RP 95, 98. The officers removed Chang and

the two women from the room, identified them, and secured the room. 3RP 97-99. They called in a detective, who applied for and obtained search warrant. 3RP 112. On the bed in the room, police found a briefcase containing identifications and checks. 3RP 114, 119-25. Next to the briefcase was a plastic grocery bag containing torn up copies of a Washington driver's license with Chang's name, although the middle name, address, and date of birth differed from the copy of Chang's driver's license made by Campbell. 3RP 117, 133. On the night stand were a digital camera and a lap top computer, and on the table were a scanner/printer and some printer paper. 3RP 115. Another printer was on top of the dresser. 3RP 116. Although these items were taken into evidence, the police made no attempt to lift fingerprints from them. 3RP 129.

Douglas Koyle testified that one of the identifications found in the room contained his name and address, but not his photograph or birth date, and the number differed slightly from his driver's license. He never gave anyone permission to use his identification. 3RP 136-37. John Blair identified one of the checks found in the room as his, saying he had never received the check. One of the identifications found in the room contained his address and part of his name. 3RP 141-42. Leo Eberle identified two canceled checks found in the room as checks he had written on a business

account, which he believed were stolen from his mailbox after they had been negotiated and returned to him as canceled. 3RP 147-47. And Dale Burlingame testified that an IRS refund check found in the room belonged to him and that he had not given anyone permission to have that check. 3RP 149-50.

In closing, the defense argued that the state had failed to prove Chang was in possession of the stolen items. At best, the state had established that Chang was in the motel room where the items were found and that he knew the room renter. 4RP 225. But proximity to the stolen items was not enough to prove possession, and the fact that he had permission to be in the room for half an hour did not establish dominion and control. 4RP 228. Moreover, since Campbell had seen the camera, printer, torn IDs, and checks in the room before Chang was allowed access to the room, the state did not prove he was in constructive possession of those items. 4RP 232.

a. The prosecutor's improper closing argument

At trial, the state presented testimony from officers regarding the investigation. Campbell also testified about his role, but Maria, the front desk clerk who had reported her suspicions to Campbell, did not, and no record was made as to why she was not called as a witness.

Detective Roy Farnsworth testified that when he arrived at the motel, he spoke to the officers on the scene, who said that motel personnel had reported some suspicious activities around Room 220. 3RP 109-10. The prosecutor then asked if the officers had told him what the clerks had seen. 3RP 110. When Farnsworth started to respond with what Maria had said, defense counsel raised a hearsay objection. The court overruled the objection, stating, "I'm going to allow it not for the truth of the matter asserted but in terms of background." 3RP 110.

Farnsworth then testified that he had been told that a person had come to the motel looking to get into Room 220 to retrieve a key that had been left there by the registered guest. 3RP 110. He was not allowed into the room because he was not registered, however. He then waited outside for several minutes and eventually left. Maria had then gone up to the room to look for the key that the man had said he was trying to retrieve. 3RP 111. Farnsworth said he had been told that Maria told Campbell that she had seen digital cameras, computers, printers, falsified identifications, and various checks in the room. 3RP 111.

In closing argument, the prosecutor conceded that the main issue in the case was whether Chang was in possession of the stolen items in the motel room. 4RP 218. The prosecutor told the jury that the state's evidence established possession and started referring to the information

obtained from Maria. 4RP 218-19. When defense counsel objected that this information had not been admitted for the truth of the matter asserted but just to explain what the police did, the court overruled the objection. 4RP 219.

The prosecutor then continued. He averred that Chang had told the clerk he needed to get into Room 220 because Cromwell, his girlfriend, had locked the key in the room. After he left, the clerk went up to the room and found computers, scanners, printers, and what she believed were fraudulent IDs and checks. 4RP 219. The prosecutor argued that Chang had gone to a lot of trouble to get into the room, but no one had seen Cromwell since she checked in. 4RP 220-21. He asked why Chang did not simply retrieve the key and take it to her, if she had locked her key in the room. 4RP 221. The prosecutor argued that there was no evidence as to who had been in the room between 7:00 a.m. and 4:00 p.m., when the clerk entered the room, but it was logical to believe that Chang had possibly been in the room. 4RP 221-22. The prosecutor returned to this theme in rebuttal, arguing there was at least some evidence that it was possible Chang was in the room during the day and suggesting that maybe Chang, not Cromwell, had locked the key in the room. 4RP 239.

b. Comment on Chang's exercise of constitutional rights

Before jury selection, defense counsel argued to exclude testimony that Chang did not open the door immediately when the police knocked and announced their presence and that he refused to speak to the police and asked for an attorney. 2RP 9. The state responded that Chang's delay in answering the door was admissible but agreed that Chang's refusal to speak and his request for an attorney was not. 2RP 9. The court did not directly address defense counsel's motion. The court seemed to believe the parties were referring to the ruling made the previous week by a different judge suppressing evidence seized from Chang's car. 1RP 22; 2RP 10. After discussion of the suppression ruling, defense counsel reiterated that a comment on Chang's exercise of his right not to open the door would be improper. 2RP 11.

At trial, Officer Donald Hobbs testified that he and the other officers pounded on the door of Room 220, announcing they were police. He did that at least two times with no response. On the second or third knock, a male voice asked, "Who is it?" Hobbs heard some shuffling, then the door opened and Chang came out. 3RP 97.

The prosecutor then asked, “Was the door open when he came out?”

Hobbs replied, “What I thought was odd – I do remember this specifically – was when he came out – he came out in kind of a sliding manner. Not opening the door too much. He just barely cracked it open to slide out.” 3RP 96-97.

Sergeant Kevin Ferris was with Hobbs when he approached the motel room. When he testified that they had knocked on the door and announced that they were police, the prosecutor asked, “Did you get an immediate response when you knocked on the door?” 3RP 102. Ferris responded that it was a delayed response, and they knocked several times before Chang opened the door. 3RP 102-03. Ferris explained that after identifying Chang, the police ordered the others in the room to come out, and two women exited the room. 3RP 103. The prosecutor then asked, “Did Mr. Chang say anything to them when they exited?” 3RP 103. Ferris responded that Chang told them to close the door behind them. 3RP 104.

On cross examination, Ferris admitted that he could not force the people in the room to talk to him, and no one was required to open the door to the police. Nor could he go into the room without permission, which is why he waited until a search warrant was obtained. 3RP 105.

Following this testimony, defense counsel noted that she had previously moved to exclude evidence about Chang's delay in opening the door and his sliding out of the room. She objected again, arguing that the evidence crossed the line of impermissibly commenting on Chang's right to remain silent and his right to exclude police from the motel room. 3RP 107-08.

C. ARGUMENT

1. **USE OF TESTIMONIAL STATEMENTS OF A NON-TESTIFYING WITNESS TO PROVE AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSES VIOLATED CHANG'S CONSTITUTIONAL RIGHT OF CONFRONTATION.**

The trial court allowed the prosecutor, during closing argument, to rely on testimonial statements Maria made to Campbell in order to prove Chang was in constructive possession of items on which the charges were based. 3RP 219. Because Maria did not testify at trial, was not shown to be unavailable, and had not been subject to cross examination previously, the use of her statements violated Chang's Sixth Amendment right of confrontation.

As an initial matter it should be noted that this issue may be raised for the first time on appeal. While defense counsel objected to admission of Maria's statements and to the prosecutor's use of them in closing argument, counsel did not argue that use of the statements violated

Chang's right of confrontation. 3RP 110; 4RP 219. Nonetheless, a violation of the Confrontation Clause of the Sixth Amendment is a manifest error affecting a constitutional right which may be raised directly on appeal. RAP 2.5(a)(3); State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999).

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI; see also Const. art. 1, § 22. Confrontation is a fundamental bedrock protection in a criminal case and requires evidence to be tested by the adversarial process. Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004). The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross examination." Crawford, 541 U.S. at 61. Thus, the state may offer out-of-court testimonial statements at trial only if the declarant is unavailable as a witness and the defendant has had the prior opportunity to cross examine the declarant. Id. at 59. Admission does not depend on whether the statements fall within a hearsay exception. The only method for satisfying the Confrontation Clause is cross examination. Id. at 59.

In this case, the court permitted Detective Farnsworth to testify to statements purportedly made by Maria to Campbell, who told Sergeant Farris, who reported them to Farnsworth. 3RP 110. Defense counsel objected that these statements were hearsay, but the court overruled the objection, saying they were admitted not for the truth of the matter asserted, but to provide background information regarding the police investigation. Id. Although Maria did not testify at trial, use of her statements solely for this purpose did not violate Chang's right of confrontation. See Crawford, 541 U.S. at 59, n.9 (Confrontation Clause does not bar use of testimonial statements for purposes other than establishing truth of matter asserted). But when the court reversed its prior ruling and allowed the prosecutor to rely on Maria's statements for their truth in his closing argument, Chang's constitutional right to confront Maria as a witness was violated. See 4RP 219.

The prosecution must either present, or demonstrate the unavailability of, a witness whose testimonial statements it wishes to use against the defendant. State v. C.J., 148 Wn.2d 672, 696, 63 P.3d 765 (2003); see also Crawford, 541 U.S. at 45. The state did neither in this case. Maria was not called as a witness, and no record was made as to her availability. Moreover, the statements relied on by the prosecutor were testimonial.

Crawford did not definitively explain the scope of “testimonial evidence.” 541 U.S. at 68 (“We leave for another day an effort to spell out a comprehensive definition of ‘testimonial.’”). But the Court set out the “core class of ‘testimonial’ statements”, which includes not only formal affidavits and confessions to police officers, but also “pretrial statements that declarants would reasonably expect to be used prosecutorially.” Id. at 51. The Clause’s “common nucleus” includes “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial.” Id. at 52.

The Court in Crawford noted that “[a]n 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.” Id. at 51. Whether the statement is given to a government official is only one factor to consider in determining if the statement is testimonial, however. State v. Shafer, 156 Wn.2d 381, 393-94, 128 P.3d 87 (2006)³ (Chambers, J., concurring, citing Crawford, 541 U.S. at 51-54). Here, while Maria’s statements were not made to a government official, they also were not merely casual remarks to an acquaintance.

³ Cert. denied, Shafer v. Washington, 127 S. Ct. 553 (2006).

The evidence showed that Maria had called Campbell, her front desk manager, because she had seen some suspicious items in one of the motel rooms. When Campbell arrived, he looked in the room and agreed that the items inside were suspicious. He had Maria place a safety lock on the door to prevent anyone from accessing the room, and when they returned to the front desk, Campbell called the police. Chang then came in, seeking to enter the room. 3RP 76-78. It was after these actions that Maria made the statements so heavily relied upon by the prosecutor, that Chang had been to the front desk earlier in the day asking to be let into the room because Cromwell had locked her key inside. 3RP 78, 110.

As the Court explained in Crawford, statements are embraced by the Confrontation Clause when a reasonable person would think they might be used in a criminal investigation. Crawford, 541 U.S. at 52; see State v. Rivera, 268 Conn. 351, 844 A.2d 191, 202 (2004) (finding Supreme Court interpreted “testimonial” to include statements made under circumstances where a reasonable person would know they would be available for use by the police or prosecution); see also Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1042-43 (1998) (defining a testimonial statement as one made when the declarant “anticipates that the statement will be used in the prosecution or investigation of a crime”). Certainly Maria was aware of the possibility

that her statements would be used in the investigation or prosecution of a crime. She had reported her suspicions of criminal activity to her manager, who agreed with her suspicions and called the police. She made the statements in issue to provide further information regarding the suspected criminal activity. Under the circumstances, Maria would reasonably expect her statements to be used prosecutorially, and they were therefore testimonial.

Because there was no showing that Maria was unavailable as a witness, and because Chang had no prior opportunity to cross examine her, the use of her testimonial statements to prove an essential element of the offenses violated Chang's right of confrontation. See Crawford, 541 U.S. at 68 (where testimonial evidence is at issue, Sixth Amendment demands unavailability and a prior opportunity for cross examination). A violation of the confrontation clause is subject to harmless error analysis and requires reversal unless the state proves the error was harmless beyond a reasonable doubt. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), aff'd by Davis v. Washington, 126 S. Ct. 2266 (2006). Constitutional error is harmless only where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt. Id. at 305. The court's error in this case was not harmless.

Without the improperly admitted statements, the evidence was insufficient to establish that Chang was in possession of any of the items in the motel room. The evidence showed he had been in the room for a half-hour at most, and Campbell had seen all the items on which the charges were based in the room before Chang was permitted to enter it. See 3RP 77. Moreover, Chang was not registered in the room and had to obtain specific permission from the registered guest to gain access. 3RP 79, 84. In order to establish constructive possession, the state needed to rely on Maria's statements that Chang had earlier asked to be let in the room to retrieve a key, suggesting that Chang had been the one to leave the key in the room and that he was in control of the room and its contents. Because the untainted evidence does not overwhelmingly establish constructive possession, the constitutional error is not harmless, and Chang's convictions must be reversed.

2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED CHANG A FAIR TRIAL.

As a quasi-judicial officer, a prosecutor is duty bound to act impartially in the interests of justice. "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1934). A

prosecutor who acts as a heated partisan, seeking victory at all costs, violates the duty entrusted to him by the people of the state whom he is supposed to represent. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10). Reed, 102 Wn.2d at 145. A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48). When the defendant establishes misconduct and resulting prejudice, reversal is required. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

The prosecutor in this case committed misconduct by basing his closing argument on the truth of Maria's out of court statements, despite the court's previous ruling that the statements were not admitted for the truth of the matter asserted. A prosecutor's flagrant violation of the court's in limine rulings may alone be sufficient to require reversal. State v. Easter, 130 Wn.2d 228, 242 n.11, 922 P.2d 1285 (1996); State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App.

14, 22, 856 P.2d 415 (1993) (prosecutor's violation of motion in limine excluding evidence of defendant's prior drug-related offense was "flagrantly improper"); State v. Ransom, 56 Wn. App. 712, 713 n.1, 785 P.2d 469 (1990) (citing State v. Stephans, 47 Wn. App. 600, 736 P.2d 302 (1987)).

By ignoring the court's limitation on the use of Maria's statements, the prosecutor was essentially testifying that the statements were true. Such conduct by the prosecutor is highly improper. Belgarde, 110 Wn.2d at 507 (conviction reversed where the prosecutor "testified" during closing argument regarding a political organization he claimed was responsible for terrorist incidents, when there was no evidence to support that argument); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968) (it was improper for a prosecutor to argue, without supporting evidence, that the defendant was trying to frame the victim's ex-husband for murder) cert. denied, 393 U.S. 1096 (1969); State v. Case, 49 Wn.2d 66, 68-70, 298 P.2d 500 (1956) (no evidence supported prosecutor's argument that incest victims often reported belatedly; argument constituted misconduct). By misleading the jury in this way, the prosecutor violates his duty to provide the defendant a fair trial. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

In Reeder, the defendant was charged with second degree murder. He admitted shooting the victim but claimed self defense and temporary

insanity. When cross examining the defendant, the prosecutor held in his hand a complaint in a divorce action filed by the defendant's first wife, and he asked the defendant whether his wife said in the complaint that the defendant had threatened him with a gun on a number of occasions. The defendant denied ever threatening her with a gun. The court allowed the question and answer to stand, in light of the insanity plea, but it did not permit the divorce complaint to be read and refused to admit it in evidence. Reeder, 46 Wn.2d at 891. In closing argument, however, the prosecutor repeated three times that the defendant had threatened his first wife with a gun. Id. at 892.

The Supreme Court held that the prosecutor's repeated references to excluded evidence constituted reversible misconduct. The prosecutor knew the complaint was not in evidence and knew the court had specifically excluded it. While attorneys are permitted to argue reasonable inferences from the evidence, they may not mislead the jury by references to matters outside the evidence. This is especially true for a prosecutor, who is a quasi-judicial officer with a duty see that the defendant in a criminal prosecution receives a fair trial. Id. at 892. Although no objections were made to the prosecutor's arguments, the Court reversed, finding the harm had already been done and could not have been cured by an instruction to disregard the statements so flagrantly made. Id. at 893.

Here, just as in Reeder, evidence was admitted for a limited purpose at trial, and the prosecutor blatantly ignored that ruling during closing argument. Like the divorce complaint in Reeder, Maria's statements were admitted to provide background but were specifically not admitted for the truth of the matter asserted. Nonetheless, during closing argument the prosecutor repeatedly referred to the contents of Maria's statements as though they were established facts, using them to prove an essential element of the charged offenses. 4RP 219-22, 239. The prosecutor's statements were unsupported by the evidence as admitted, and his misleading argument constitutes misconduct.

If prosecutorial misconduct directly violates a constitutional right, it is subject to the constitutional harmless error standard. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000), review denied 142 Wn.2d 1022 (2001). Here, the prosecutor's misconduct violated Chang's constitutional right of confrontation. See § C.1, supra. As addressed above, the state cannot prove this error was harmless beyond a reasonable doubt, and reversal is required.

Even under the non-constitutional standard, however, the misconduct requires reversal. Prosecutorial misconduct cannot be deemed harmless unless the record shows that the jury would have reached the same result regardless of the misconduct. State v. Charlton, 90 Wn.2d

657, 664, 585 P.2d 142 (1978). In determining whether prosecutorial misconduct is harmless, appellate courts will consider whether the trial court sustained an objection and whether a curative instruction was given. State v. Traweek, 43 Wn. App. 99, 108, 715 P.2d 1148 (1986), disapproved on other grounds in State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

Here, as soon as the prosecutor mentioned the contents of Maria's statements, defense counsel objected, referring to the court's earlier ruling that the statements were not admitted for the truth of the matter asserted. 4RP 219. Inexplicably, the court overruled the objection. Id. The court's failure to sustain counsel's objection implicitly informed the jury that the argument was proper and should be taken into consideration. The official imprimatur placed upon the prosecutor's improper argument obviously amplified their potential prejudicial effect on the jury. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (court's ruling lent "aura of legitimacy" to prosecutor's misconduct); accord Mahoney v. Wallman, 917 F.2d 469, 473 (10th Cir. 1990) (finding prejudice where court overruled defense counsel's objections and failed to admonish prosecutor).

Without the improper argument, the state's case had serious weaknesses. There was no evidence Chang was in actual possession of the items in the room, there was no fingerprint evidence connecting him to

the items, Chang had been in the room for at most 30 minutes, and the items were in the room before he got there. It is reasonably likely that the prosecutor's misconduct affected the jury's verdict, and reversal is required.

3. THE STATE FAILED TO PROVE CHANG WAS IN POSSESSION OF THE STOLEN ITEMS.

In every criminal prosecution, the state must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). On appeal, a reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Chang was convicted of one count of identity theft⁴ and three counts of possession of stolen property⁵. These convictions required the

⁴ “ No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1).

state to prove Chang was in possession of the various items discovered in the motel room. See 4RP 218⁶. Because there was no evidence that Chang was in actual physical possession of any of the items on which the charges were based, the state had to prove those items were under his dominion and control, i.e. constructive possession. See State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). The state did not meet that burden.

Whether a person has dominion and control over contraband, and thus constructive possession, is determined by examining the totality of the situation. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Mere proximity is insufficient to show dominion and control. Temporary residence, personal possessions on the premises, or knowledge of the presence of the item, without more, are also insufficient. State v. Davis, 16 Wn. App. 657, 659, 558 P.2d 263 (1977).

In Davis, police officers entered a house with a search warrant. A party was in progress at the time, and about 20 people were present, including the owner and a permanent resident of the house. The

⁵ “‘Possessing stolen property’ means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1).

⁶ Although these offenses could be established by means other than possession, there was no evidence as to any alternative means, and the parties agreed that the case turned on whether the state could prove possession. See 3RP 160-61; 4RP 218

defendant's vehicle was parked outside, and he was found asleep in a bedroom normally occupied by the homeowner. Although the police found marijuana in the house, none was found in the room where the defendant was sleeping, on his person, or in any of his belongings. The defendant had stayed at that house on occasion and kept a sleeping bag there. He also had a pile of clothes in the room where he was found during the search. Davis, 16 Wn. App. at 658-59.

The defendant was convicted of possession of marijuana, but the Court of Appeals reversed, holding the evidence was insufficient to establish the defendant had dominion and control over the premises. Id. at 659. The Court held that, as a matter of law, constructive possession of marijuana found in the house could not be based merely on the defendant's presence in the house. While dominion and control of the premises could be inferred from circumstances such as payment of rent or possession of keys, the fact that he was spending the night and had some personal possessions with him was not enough to show dominion and control over the premises and thus constructive possession of the drugs found therein. Id.

As in Davis, constructive possession in this case could not be based merely on Chang's presence in the motel room. Moreover, unlike in Davis, the state here did not even present evidence that Chang had any

personal belongings in the room. Chang did not have a key to the room, and he was not registered as a guest at the motel. Only Cromwell's name was on the registration for the room, and Chang required her specific permission in order to enter. His mere presence in the room for half an hour after receiving that permission was not sufficient to establish dominion and control over objects which were in the room before he arrived. See Davis, 16 Wn. App. at 659; Callahan, 77 Wn.2d at 28-29 (Even though defendant was sitting at desk next to drugs and admitted handling the drugs earlier in the day, the evidence was insufficient to establish constructive possession.).

In an attempt to establish constructive possession, the state argued that it was possible Chang had been in the room earlier in the day. 4RP 221-22. 239. The basis for this argument was the prosecutor's speculation that Chang, and not Cromwell, had locked a key inside the room. 4RP 219, 221-22. As discussed above, this argument was improper because it focused on evidence presented in violation of Chang's constitutional right of confrontation. See §§ C.1 and C.2, supra.

The prosecutor also argued that Chang exercised control over the room by answering the door when the police knocked and telling the women to close the door when they left the room. 4RP 223. Contrary to the state's assertion, Chang's actions indicated merely a desire for privacy,

the right to which exists even without dominion and control. See Minnesota v. Olson, 495 U.S. 91, 98-99, 109 L. Ed. 2d 85, 94, 110 S. Ct. 1684 (1990) (guest has legitimate expectation of privacy in host's home, subject to host's ultimate right to control premises); State v. Rodriguez, 65 Wn. App. 409, 414-15, 828 P.2d 636, review denied, 119 Wn.2d 1019, 838 P.2d 692 (1992) (same).

The prosecutor further argued that Chang's dominion and control could be inferred from the fact that the police did not find women's belongings in the room. 4RP 223. This is not a reasonable inference from the evidence but rather sheer speculation and conjecture. Detective Farnsworth testified that he did not recall seeing any luggage in the room, and there were not a lot of clothes lying around. 3RP 125. Further, Farnsworth said that there could have been personal items belonging to a woman in the room, but he was focused solely on items of evidentiary value. 3RP 131-32.

"When substantial evidence is present, the drawing of reasonable inferences therefrom and the doing of some conjecturing on the basis of such evidence is permissible and acceptable. . . . If, however, the necessity for conjecture results from the fact that the evidence is merely scintilla evidence, then the necessity for conjecture is fatal." State v. Liles, 11 Wn. App. 166, 171, 521 P.2d 973, review denied, 84 Wn.2d 1005 (1974). The

fact that Farnsworth did not remember whether there were women's belongings in the room provides no more than a scintilla of evidence from which no permissible inference of dominion and control can be drawn. See State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975), review denied, 86 Wn.2d 1010 (1976).

Because the state failed to prove Chang had dominion and control over the motel room or its contents, his convictions must be reversed and the charges dismissed.

4. THE IMPERMISSIBLE COMMENT ON CHANG'S EXERCISE OF A CONSTITUTIONAL RIGHT DENIED HIM DUE PROCESS.

The Washington Supreme Court has recognized that “[t]he State can take no action which will unnecessarily ‘chill’ or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right.” State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006) (quoting State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984)). It is therefore improper for a prosecutor to invite a jury to infer guilt from a defendant's exercise of a constitutional right or privilege. Gregory, 158 Wn.2d at 806; State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996). See also State v. Carneh, 153 Wn.2d 274, 289, 103 P.3d 743 (2004) (“[T]he State may not invite a jury to infer guilt from a criminal defendant's exercise of his

constitutional right to remain silent or his exercise of a statutory privilege.”); State v. Romero, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002) (“The State may not use a defendant’s constitutionally permitted silence as substantive evidence of guilt.”).

Both the state and federal constitutions protect a citizen’s right against unreasonable searches and seizures by police. U.S. Const., amend. IV; Wash. Const. art. I § 7; State v. Ross, 141 Wn.2d 304, 314, 4 P.3d 130 (2000). The Fourth Amendment protects people from unlawful government intrusion where there is a “personal and legitimate expectation of privacy in the area searched.” State v. Jones, 68 Wn. App. 843, 847, 845 P.2d 1358 (1993), review denied 122 Wn.2d 1018 (1994). A motel guest has the same expectation of privacy during his tenancy as the owner of a private residence. State v. Davis, 86 Wn. App. 414, 937 P.2d 1110, review denied, 133 Wn.2d 1028 (1997). And a guest has a legitimate expectation of privacy in his host’s home, subject to the host’s ultimate right to control the property. Minnesota v. Olson, 495 U.S. 91, 98, 109 L. Ed. 2d 85, 94, 110 S. Ct. 1684 (1990).

Although Chang was not the registered occupant of the motel room, he was Cromwell’s guest. He therefore had a legitimate expectation of privacy in the room and consequently a constitutional right to exclude police absent a warrant. Officer Hobbs’s testimony, in response to the

prosecutor's question, invited the jury to infer guilt from Chang's exercise of this right.

Hobbs testified that he approached the motel room with two other officers, pounded on the door, and announced that they were police. He heard some shuffling, and then Chang came out of the room. 3RP 96. At that point, the prosecutor asked, "Was the door open when he came out?" 3RP 96.

Hobbs responded, "What I thought was odd – I do remember this specifically – was when he came out – he came out in kind of a sliding manner. Not opening the door too much. He just barely cracked it open to slide out." 3RP 96-97.

Hobbs's testimony clearly implied that Chang was doing something illegal in the room, because he did not want to let the police enter or look inside. His characterization of Chang's behavior as odd and specifically memorable permitted the jury to infer that Chang's refusal to let the police in the room was devious, wrong, and indicative of guilt. The state's reliance on such adverse inferences from the defendant's constitutionally protected behavior violates due process. See Rupe, 101 Wn.2d at 705-06.

In Rupe, the trial court allowed the state to introduce evidence of the defendant's gun collection in the penalty phase of a capital case, to

show he was a dangerous individual. Rupe, 101 Wn.2d at 703-04. The Washington Supreme Court found that this evidence clearly implicated the defendant's constitutional right to bear arms. The defendant was entitled to possess weapons without the risk that the state would use the mere fact of possession against him in a criminal trial unrelated to their use. Id. at 706. Thus, the state's attempt to draw an adverse inference, that the defendant deserved the death penalty, from his exercise of this constitutional right violated due process, and the court reversed the defendant's sentence of death. Id.

Here, the state presented evidence that Chang exercised his constitutional right to prevent a warrantless search of the motel room to suggest he was guilty of committing the charged crimes. The attempt to draw an adverse inference from this constitutionally protected behavior denied Chang due process.

In Gregory, the Supreme Court noted that not all arguments touching on constitutional rights amount to impermissible comments on the exercise of those rights. Gregory, 158 Wn.2d at 806. The relevant issue is whether the prosecutor "manifestly intended" the statement in question to be a comment on the constitutional right. Id. at 807. So long as the focus of the question is not on the exercise of the constitutional right, it does not infringe on that right. Id.

In that case, the prosecutor asked the rape victim how she felt about having to testify and be cross examined. The witness then described how upset she was. *Id.* at 805-06. In closing, the prosecutor relied on this testimony to argue that the witness would not have subjected herself to trial just to “avenge a broken condom.” *Id.* at 806. The defendant argued on appeal that the prosecutor’s question was an improper comment on his constitutional right to confront the witnesses against him, but the Supreme Court disagreed. It noted that the prosecutor did not criticize the defense’s cross examination or imply that the defendant should have spared the victim the ordeal of a trial. Rather than focusing on the defendant’s right of confrontation, the question and argument focused on the credibility of the victim, as opposed to the credibility of the accused. *Id.* at 807.

Here, on the other hand, it is clear the prosecutor manifestly intended to comment on Chang’s exercise of his constitutional right. The prosecutor specifically asked whether Chang left the door open when he came out of the room, implying that excluding the police by closing the door demonstrated his guilt. Unlike in *Gregory*, the prosecutor had no other legitimate purpose for this evidence. It was focused solely on creating an adverse inference from Chang’s constitutionally protected conduct.

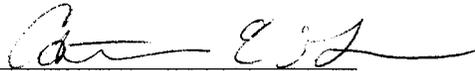
Because this error is of constitutional magnitude, it cannot be deemed harmless unless the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993) (finding impermissible comment on right of confrontation harmless beyond a reasonable doubt), review denied, 124 Wn.2d 1018 (1994). That is not the case here. Without the impermissible comment on Chang's constitutional right, and without the improper closing argument, the state is left with Chang's mere brief proximity to the stolen items. This evidence is not so overwhelming that it necessarily leads to a finding of guilt. The constitutional error was not harmless, and Chang's convictions must be reversed.

D. CONCLUSION

Violation of Chang's constitutional right of confrontation, prosecutorial misconduct, and impermissible comment on Chang's exercise of a constitutional right denied Chang a fair trial. In addition, the state failed to prove Chang was in possession of the stolen items. This Court should reverse Chang's convictions and dismiss the charges.

DATED this 1st day of May, 2007.

Respectfully submitted,



CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

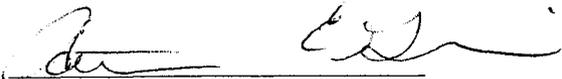
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Supplemental Designation of Clerk's Papers and Brief of Appellant in *State v. Steven Kie Chang*, Cause No. 35789-5-II, directed to:

Kathleen Proctor
Pierce County Prosecutor's Office
Room 946
930 Tacoma Avenue South
Tacoma, WA 98402-2102

Steven Kie Chang, DOC# 800422
C/O King County Jail
500 5th Ave.
Seattle, WA 98104

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
May 1, 2007

07 MAY -2 PM 9:28
STATE OF WASHINGTON
BY 