

No. 41966-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN GROVER,

Appellant.

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

The Honorable Paula Casey, Judge
Cause No. 10-1-01707-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the defendant's right to an open and public trial is violated when the defense attorney alerts the judge in chambers that he will be bringing a motion in open court.

2. Whether a claimed error which occurred in a trial which ended in a mistrial is grounds for reversal of a conviction in a subsequent trial.

3. Whether the admission of a certified copy of the victim's Washington driver's license, offered to prove her address, violated Grover's confrontation rights.

4. Whether defense counsel was ineffective for failure to object to the admission of a certified copy of the victim's Washington driver's license.

B. STATEMENT OF THE CASE.

The State accepts Grover's statement of the case. Any additional facts the State finds important will be addressed in the argument portion of this brief.

C. ARGUMENT.

1. There was no violation of Grover's rights to an open and public trial when defense counsel apparently alerted the court, in chambers, of an issue which he then proceeded to raise and argue in open court.

At Grover's first trial, which began on January 18, 2011, and ended in a mistrial on January 19, 2011, the court asked counsel, before the jury came into the courtroom and before any witnesses were called, about motions in limine. [01/18/11 RP 21] After

discussing the State motions, defense counsel said, "Your Honor, the only issue from the defense as a motion in limine was the one that I brought to Your Honor's attention in chambers." [01/18/11 RP 22] Counsel then went on to discuss an issue with the arresting officer testifying that the victim was not at home that evening but was at a shelter. The court asked questions, elicited a response from the State, and eventually ruled on the defense motion. [01/18/11 RP 22-33] Grover maintains that his right to a public trial was violated by this chambers alert.

Grover cites to a number of cases regarding principles of open and public trials, and the State has no disagreement with those cases. While the Supreme Court has never held a public trial violation to be *de minimis*, it has never held that every contact outside of the courtroom is a violation. Where defense counsel apparently told the judge in chambers that he was going to raise an issue, then raised it in open court where it was argued and decided, there can be no serious claim that the rights of either the defendant or the public were violated.

Grover asserts that a hearing was held in chambers to review pre-trial motions, Appellant's Opening Brief at 7, but the record does not support that conclusion. It is equally as likely that

defense counsel stuck his head into the judge's chambers on his way to court to tell him to allow extra time because the defense had an issue to raise. There simply is no evidence here of a public trial violation.

2. Even if there had been an open courtroom violation, the trial during which it occurred ended in a mistrial.

While Grover produces a number of hypothetical horrors that can result from a public trial violation, he does not address the fact that this trial did not result in a conviction. It ended in a mistrial. [01/19/11 RP 153] Grover was convicted following a second trial which occurred on March 24, 2011. There is no authority whatsoever to support a claim that an error from the first trial causes a conviction from a retrial to be reversible.

Assuming *arguendo* that there was a public trial violation in the first trial, and it had resulted in a conviction, the remedy would be reversal and remand for a new trial. See generally State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009); State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005); In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). Grover got a new trial.

3. The admission of the certified copy of the victim's driver's license, offered to prove her address, did not violate Grover's right to confrontation.

Grover maintains that the certified copy of the victim's driver's license constituted testimonial hearsay and thus his right to confrontation was violated when it was admitted into evidence against him. He is incorrect.

Both the Sixth Amendment to the constitution of the United States and article I, section 22 of the Washington constitution guarantee defendants in criminal cases the right to confront and cross-examine witnesses against them. State v. Mares, 160 Wn. App. 558, 561-62, 248 P.3d 140 (2011). Testimonial statements are not admissible unless the person who made them testifies, or if the witness is unavailable, the defendant has had the opportunity to cross-examine the witness in a prior proceeding. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The document which Grover claims was testimonial is a two-page document signed by the custodian of the records for the Washington Department of Licensing (DOL). [Exhibit 4] The first page contains the state seal and the signature of the custodian. He asserts that the attached certified copy of a driver's license issued

to Marcia Rose Grover indicates her status on November 8, 2010.

[Exhibit 4]

RCW 5.44.040 provides:

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.

ER 902 provides that certain documents are self-authenticating, including domestic public documents under seal.

ER 902(a). A certified copy of a driver's license is a public record.

State v. Monson, 113 Wn.2d 833, 836-37, 784 P.2d 485 (1989).

The driver's license would still not be admissible if it violated the confrontation clause of the United States constitution. A claimed violation of that right is reviewed *de novo*. State v. Kirkpatrick, 160 Wn.2d 881, 901, 161 P.3d 990 (2007). Grover maintains that the admission of the certified copy of the driver's license violated Crawford because it was created for the purpose of prosecuting him. However, Crawford specifically noted that business records are "by their nature . . . not testimonial." Crawford, 541 U.S. at 56. In his concurring opinion, Chief Justice

Rehnquist specifically mentioned that the majority opinion excluded business and official records from the category of testimonial evidence. Id., at 76.

The Washington Supreme Court, in State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007), held that a certified document from DOL describing the status of a person's driving privilege is not testimonial. Id., at 903 (citing to Monson, 113 Wn.2d 833, which held that a certified copy of a driver's record is admissible as a public record). In Kirkpatrick, *supra*, the court held that both certified DOL records and certifications that there are no such records are not testimonial for purposes of Crawford. Kirkpatrick, 160 Wn.2d at 884.

Although the custodian of the DOL records prepared the certificate of authenticity for trial, it is not testimonial because it "attests only to the existence of a particular public record and does not interpret the record nor certify its substance or effect." Mares, 160 Wn. App. at 563-64. In other words, the underlying document, which is the real evidence in the case, was not prepared for purposes of litigation but was an existing public record. A public record does not run afoul of the confrontation clause because it was created for the administration of the agency's business, and

not for the purpose of proving a particular fact at trial. Id., at 564
The custodian of the records who authenticated the copy did not
make any testimonial statements. Id., at 565.

Even if the copy of the driver's license had been admitted in
error, it would be harmless error. "Confrontation clause errors are
subject to harmless error analysis." Mares, 160 Wn. App. at 562.
A constitutional error is harmless if the reviewing court finds beyond
a reasonable doubt that any reasonable jury would have reached
the same verdict if the error had not occurred. State v. Guloy, 104
Wn.2d 412, 425, 705 P.2d 1182 (1985) If there is overwhelming
evidence untainted by the error it necessarily would lead to a guilty
verdict. Id., at 426; State v. Watt, 160 Wn.2d 626, 640, 160 P.3d
640 (2007).

In Grover's case, both his mother and brother testified that
the victim lived at the address where he was arrested, but she was
away from home at the time. [03/24/11 RP 44-45, 49, 51] There
was no evidence presented that she lived anywhere else. Even
without the driver's license, a reasonable jury would have found
beyond a reasonable doubt that the victim lived at that address.

4. Because it was not error to admit the certified copy of the
victim's driver's license, it was not ineffective assistance of counsel
for defense counsel to fail to object to it.

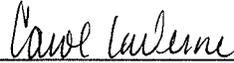
For an appellant to prevail on a claim of ineffective assistance of counsel, it must first be shown that there was error, and that the outcome would have been different had the alleged error not occurred. State v. We, 138 Wn. App. 716, 722, 158 P.3d 1238, 1241 (2007). Once the error has been identified, two prongs are considered to assess the performance of defense counsel. The appellant must demonstrate (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

In Grover's case, it was not error for the court to admit the certified copy of the victim's driver's license and therefore any objection would have been frivolous. Trial counsel's decision not to object was not ineffective assistance.

D. CONCLUSION.

There was no violation of the public trial rights of either Grover or the public, and certainly not during the trial in which he was convicted. The certified copy of the victim's driver's license did not violate Grover's right to confront witnesses, nor was it ineffective assistance of counsel for his attorney to fail to object to it. The State respectfully asks this court to affirm Grover's conviction.

Respectfully submitted this 30 day of November, 2011.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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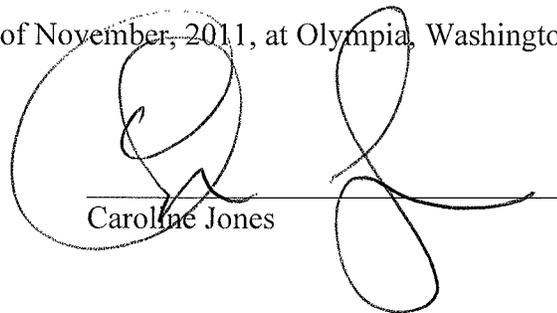
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ATTORNEY FOR APPELLANT
email: stilloutraged@gmail.com

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

Dated this 3 day of November, 2011, at Olympia, Washington.



Caroline Jones

THURSTON COUNTY PROSECUTOR

November 03, 2011 - 2:38 PM

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Statement of Arrangements

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Answer/Reply to Motion: ____

 Brief: Respondents'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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