

NO. 43249-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

**RICHARD JANNSSEN aka
ALI AKBAR MUHAMMAD,**

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's refusal to allow the defense to elicit evidence calling into question the ability of the complaining witness to accurately recall prior events denied the defendant his right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

2. The trial court's decision to admit a written statement into evidence after the author had testified and been released denied the defendant his right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court's refusal to allow the defense to elicit evidence calling into question the ability of a complaining witness to accurately recall prior events deny that defendant the right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the excluded evidence would have shown that the complaining witness's use of drugs impeded his or her ability to accurately remember and recall the events relevant to the issues before the court?

2. Does a trial court's decision to admit a written statement into evidence after the author has testified and been released deny a defendant the right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

Factual History

In late May of 2011, the defendant Richard Janssen¹ and a person by the name of Brandon Johnson were both incarcerated in different pods in the Cowlitz County Jail. RP 51-54, 106-109. On May 26, 2011, jail personnel caught Mr. Johnson masturbating in the public dayroom of his pod, so they transferred him into a new pod and into Cell F-10, where the defendant was housed. RP 116. About two hours after this transfer, the defendant left the cell during his free time and walked down a number of units where he spoke with an inmate by the name of Roger Berry. RP 39-42. According to Mr. Berry, the defendant mentioned that he had a new cell mate, that he was weird and that this person was “not going to last five minutes.” *Id.* A short time later, the defendant returned to his cell. *Id.*

At around 9:45 that evening, Officer Steven Caldwell was working in the jail control room when he received a call from cell F-10. RP 49-51. When the call was made, he heard a scuffling and someone say “Why are you hurting me?” *Id.* In response, Officer Caldwell requested that floor officers respond to F-10 to see what was happening. *Id.* Based upon this call,

¹As indicated from the first page of the Opening Brief of Appellant, the defendant had changed his name to Ali Akbar Muhammad and wishes to be referred to as such. For the purpose of clarity, Counsel for Appellant is using his prior name of Richard Janssen in this brief because that is the name used in the verbatim reports. No disrespect is intended.

Officers Munger, Manni and Bottemiller went to F-10. RP 52-54, 78-81, 86-93. Upon opening the outer door, they could all see into cell F-10, where the defendant and Mr Johnson were grappling with each other. *Id.* One of the officers saw something in one of the defendant's hands, which he discarded as the officers entered and grabbed the two inmates. RP 86-93. This officer later retrieved this item, which was a small piece of rolled up cardboard with a small razor blade taped to the end of it. RP 98-99.

As the officers entered, the lead officer ordered the defendant and Mr. Johnson to get on the floor. RP 56-60. When they failed to do so, the second officer hit them both with OC spray. RP 78-81. At this point, the officers were able to get the defendant and Mr. Johnson apart. RP 59-61, 78-84, 86-93. They immediately noted that Mr. Johnson was bleeding from a number of lacerations around his neck and head. *Id.* After taking Mr. Johnson out of the cell and letting him clean the OC spray off him in a shower, one of the officers took him to the emergency room of the local hospital. RP 92. Once at the hospital, the ER physician examined Mr. Johnson, noted a number of "superficial" lacerations to the head and neck, which he closed with skin adhesive. RP 126-130.

After Mr. Johnson was taken out of the cell, the remaining officers put the defendant in restraints and took him to an area where he could wash off the OC spray. RP 85. While in transit, the defendant exchanged words

with a female inmate with whom he was acquainted. RP 72, 148. When she asked what had happened, he responded that “I just slashed up a dude in the F-Unit,” or “I just slashed some dude’s throat over in F-pod.” *Id.* In a later recorded telephone conversation with a friend outside the jail, the defendant stated the following about the incident: “Yeah, I tried to saw his fucking head off with a razor.” RP 172.

Procedural History

By information filed May 27, 2011, and later amended, the state charged the defendant Richard Janssen with one count of First Degree Assault with a deadly weapon enhancement, or in the alternative, one count of Second Degree Assault with a deadly weapon enhancement. CP 6-8, 45-47. The case eventually came on for trial before a jury with the state calling nine witnesses, including the officer who was working the control center, the three responding officers, a treating physician and Brandon Johnson, as well as two other officers who overheard the defendant’s statements following the incident. RP 38-172. These witnesses testified to the facts from the preceding Factual History. *See* Factual History.

As its first witness, the state called Roger Berry to testify concerning his conversation with the defendant in the jail prior to the incident. RP 38-47. During his testimony, Mr. Berry stated that the defendant had commented to him that he had a new cell mate, that he was a young kid who

was weird, and that he “wasn’t going to last long.” RP 39-40. During direct examination, Mr. Berry denied that the defendant had told him why his new cell mate “wasn’t going to last long.” RP 42-44. The state then asked Mr. Berry to review a written statement he had given under oath concerning the incident to see if it refreshed his memory on this issue. *Id.* Mr. Berry reviewed that statement, but still maintained that he did not remember if the defendant said anything about why the “kid” “wasn’t going to last long.” RP 42-44.

In fact, a few hours after the incident, Mr. Berry had written a statement under oath for the jail staff stating that the defendant had told him that his cell mate wasn’t going to last long because “he was going to hert [sic] him bad.” Trial Exhibit 19. Although Mr. Berry admitted writing the statement and admitted its truthfulness, the state specifically declined to move it into evidence. RP 44.² Following the state’s direct, the defense then cross-examined Mr. Berry about the fact that he had been in custody for two days on a material witness warrant in this case, and that he had been told that he would be held in contempt and kept in jail if he did not testify. RP 45-46. After Mr. Berry’s testimony, the court asked if the state had any objection to releasing him from his subpoena and releasing him from custody. RP 47.

²MS. SHAFFER: (To the Clerk.) “I’m not offering this at this time.”

The state responded that it had no objection. *Id.* As a result, the court released the defendant from further attendance in court and from custody. RP 47-48.

During cross-examination on Mr. Johnson, the defense elicited the fact that on January 7th, four days before the trial started, police officers had arrested him on a material witness warrant. RP 118. The defense then had the probable cause statement from that arrest marked as Exhibit 19. *See* Trial Exhibit 19. That probable cause statement reveals that Mr. Johnson was in possession of two methamphetamine pipes with methamphetamine residue when arrested, and that he had admitted to recent methamphetamine use. *Id.* The defense then proposed to examine Mr. Johnson concerning his methamphetamine addiction, and how his recent methamphetamine use interfered with his ability to accurately remember and relate events from the past. RP 122-126. The state objected to this line of questioning and the court sustained the objection. *Id.* As a result, the jury did not hear this evidence and the defense was not able to incorporate it into its closing argument. RP 226-238.

Following the close of the state's case, the defense rested without calling any witnesses. RP 174. The state then proposed to admit Exhibit 3 into evidence. RP 175-180. This exhibit was the written statement of Roger Berry, the state's first witness who had been released from his subpoena and

custody earlier in the day. *Id.* The state argued that it was admissible as a prior written statement since it had been given under oath, the maker had been examined at trial, and it was inconsistent with the evidence that witness had given in trial. *Id.* The trial court granted this motion over the defendant's objection. *Id.*

The court then instructed the jury on the crimes charged, as well as the lesser included offense of Fourth Degree Assault. RP 200-217, CP 86-109. Both sides then presented closing argument. RP 217-244. Following deliberation, the jury returned a verdict of guilty to the greater charge of first degree assault. CP 110. The jury also returned a special verdict that the defendant had been armed with a deadly weapon during the commission of the crime. CP 113. The court later sentenced the defendant to life in prison without the possibility of parol based upon the state's presentation of certified copies of judgements and sentences indicating that the defendant had two prior convictions for strike offenses. RP 256-262; CP 119-127. The defendant thereafter filed timely notice of appeal. CP 129.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENSE TO ELICIT EVIDENCE CALLING INTO QUESTION THE ABILITY OF THE COMPLAINING WITNESS TO ACCURATELY RECALL PRIOR EVENTS DENIED THE DEFENDANT HIS RIGHT TO CONFRONTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, a defendant is entitled to confront the witnesses testifying against him or her. *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968); *State v. St. Pierre*, 111 Wn.2d 105, 111-12, 759 P.2d 383 (1988). An integral part of this constitutional protection is the right to fully cross examine a witness concerning bias or prejudice such as confronting a witness concerning the extent of any plea bargain the witness has made with the state and how that affects the bias or prejudice of the witness. *State v. Redden*, 71 Wn.2d 147, 149-50, 426 P.2d 854 (1967). For example, under this constitutional protection, a defendant is entitled to cross-examine an accomplice concerning both the fact of the plea bargain as well as the details of the agreement and the facts underlying the agreement in order to fully show the possibility of bias. *State v. Portnoy*, 43 Wn.App. 455, 718 P.2d 805 (1986). The court in *Portnoy* states the principle as follows:

Such cross examination is the price the State must pay for admission

of a co-defendant's testimony to that plea. The jury needs to have full information about the witness's guilty plea in order to intelligently evaluate his testimony about the crimes allegedly committed with the defendant. Unfair prejudice is avoided by this opportunity for full cross-examination.

State v. Portnoy, 43 Wn. App. at 461 (citations omitted).

In addition, since the refusal to allow a defendant to fully cross-examine a witness concerning his or her bias directly impinges upon the constitutional right to confrontation, this error is presumed prejudicial. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Thus, the appellate court must reverse unless the state proves beyond a reasonable doubt that error was harmless. *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974). In *Van Arsdall*, the United States Supreme Court states the following concerning the review for prejudice.

Whether such an error [in preventing cross-examination that might reveal bias of a prosecution witness and impeach his credibility] is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, supra.

For example, in *State v. Brooks*, 25 Wn.App. 550, 611 P.2d 1274

(1980), the defendant was charged with first degree robbery and unlawful possession of a firearm conviction out of a single event. At trial, his accomplice testified for the state, under an agreement in which he had pled to the robbery charge, and the state had agreed to drop a five year deadly weapon enhancement. Although the court did allow the defense to elicit evidence of the agreement on cross-examination, it did not allow him to cross examine the accomplice on the specific legal effect of the state's having dropped the deadly weapon enhancement (the elimination of minimum mandatory five years in prison). Upon conviction, the defendant appealed, arguing that the trial court's refusal to allow him to examine the accomplice concerning the specific effect of dropping the deadly weapon enhancement denied him the constitutional right to confrontation.

The court of appeals agreed and reversed, stating as follows.

Great latitude must be allowed in cross-examining a key prosecution witness, particularly an accomplice who has turned State's witness, to show motive for his testimony. The right of cross-examination allows more than the asking of general questions concerning bias; it guarantees an opportunity to show specific reasons why a witness might be biased in a particular case.

Here, the dropping of the deadly weapon allegation pursuant to the plea bargain agreement obviated a mandatory 5-year minimum term for Macklin if he were sentenced to prison. The jury was entitled to consider that evidence in weighing Macklin's credibility.

State v. Brooks, 25 Wn.App. 551-552 (citations omitted); *See also State v.*

Brown, 48 Wn.App. 654, 739 P.2d 1199 (1987) (witness's use of drugs

admissible on the issue of his ability to accurately remember past events).

In the case at bar, the trial court erred when it denied the defense request to cross-examine the complaining witness concerning his recent drug abuse and how that abuse affected his ability to recall and accurately relate past events. As the probable cause statement the defense produced showed, the witness has just recently been found with methamphetamine in his possession, along with methamphetamine pipes. In addition, he had admitted using methamphetamine. Since this evidence was relevant and admissible on the issue of his ability to accurately recall and relate prior events, the trial court's refusal to allow the defense to cross-examine the witness concerning his drug use denied the defendant his right to confrontation.

In addition, Brandon Johnson's recent drug use was also admissible for another purpose: to show bias or prejudice. Under the facts as the defense presented them in its offer of proof, it was apparent that when Mr. Johnson was arrested on the material witness warrant, he had methamphetamine in his possession. Thus, it behooved him to testify consistent with the state's wishes, whether true or not, in the hopes that the state would either not charge him with this new offense, or that the state would give him a favorable recommendation if it did charge him. Consequently, the trial court's refusal to allow the defense to examine Mr. Johnson concerning his drug use and recent drug possession denied the

defendant his right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

II. THE TRIAL COURT'S DECISION TO ADMIT A WRITTEN STATEMENT INTO EVIDENCE AFTER THE AUTHOR HAD TESTIFIED AND BEEN RELEASED DENIED THE DEFENDANT HIS RIGHT TO CONFRONTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court had occasion to reevaluate the scope of the confrontation clause in relation to the admission of a prior hearsay statement made by a witness who did not testify in the case. In this case, the state charged the defendant with assault after he confronted and stabbed the complaining witness during an argument about the defendant's wife, who was present during the incident. The defendant argued self-defense. In order to rebut this claim, the state attempted to call the defendant's wife. When the defendant successfully exercised his privilege to prevent her testimony, the state moved to admit her statements to the police after the incident under the argument that they undercut the claim of self-defense. The defense objected that such statements were inadmissible hearsay and violated the defendant's right to confrontation.

The state countered that the statements fell under the hearsay exceptions of statements against penal interest because, at the time the wife

made the statements, she was also a suspect in the assault. The state further argued that the statements did not violate the defendant's confrontation rights because under the decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the statements bore "adequate 'indicia of reliability'". The court granted the prosecutor's motion, ruling that the statements did qualify as "statements against penal interest," and that under *Ohio v. Roberts*, there was no confrontation violation because the statements bore sufficient indicia of reliability. The defendant was subsequently convicted, and he appealed. The Court of Appeals reversed, finding insufficient indicia of reliability, but the Ohio Supreme Court disagreed and affirmed the conviction. The defendant thereafter obtained review before the United States Supreme Court.

In its opinion the Supreme Court first made an extensive review of origins of the legal principle of confrontation, noting that the "right to confront one's accusers is a concept that dates back to Roman times." The court then examined the common law origins of the right to confrontation, particularly in relation to the "infamous political trials" such as the treason trial of Sir Walter Raleigh in 1603 in which he was convicted largely upon the admission of an alleged co-conspirator's statement, in spite of Sir Walter Raleigh's call that he be confronted by his accuser. Based largely upon the abuses perceived in these trials, the common law courts recognized that in

criminal trials a defendant should be afforded the right to confront and cross-examine the witnesses called against him.

In *Crawford*, the court noted that the one exception allowed under the common law involved the admission of prior testimony given by a witness under circumstances in which the defendant was afforded the right to confrontation at the prior hearing. In this one exception, the common law found no confrontation denial in admitting the prior testimony if the witness was no longer available.

In *Crawford*, the United States Supreme Court overturned its prior rule that an out-of-court statement could be admitted as evidence solely based on whether it fell within a “firmly rooted hearsay exception,” or was given under circumstances showing it to be trustworthy. 124 S.Ct. at 1364, 1369. *Crawford* rejected decisional law that equated the confrontation clause analysis with admissibility under hearsay rules. *Id.* at 1370-71. The Court reasoned that the Sixth Amendment is not based on the reliability of evidence. “It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: By testing in the crucible of cross-examination.” *Id.* at 1370. Thus in *Crawford*, the court “reject[ed]” the view that the reliability-based framework of *Roberts* or the rules of evidence, govern the admissibility of out-of-court statements. The court held:

Where testimonial statements are at issue, the only indicium of

reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: Confrontation.

124 S.Ct. at 1374.

In *Crawford* the Court did not definitively explain the scope of what “testimonial evidence” is. *Id.* at 1374 (“we leave for another day any effort to spell out a comprehensive definition of ‘testimonial’”). However, the Court did set out a “core class of ‘testimonial’ statements,” the admission of which would violate the confrontation clause without the in court testimony of the proponent.” *Id.* at 1364. This “core class” of “testimonial statements” 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 1364. Thus, the “common nucleus” of the confrontation clause includes “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.* This definition includes at its core statements elicited in response to police questioning during an investigation. *State v. Walker*, 129 Wn.App. 258, 268, 118 P.3d 935 (2005); *see also State v. Moses*, 129 Wn.App. 718, 119 P.3d 906 (2005) (Domestic violence victim’s statements in response to police questioning are testimonial for purposes of confrontation under the Sixth Amendment).

In the case at bar, the state proposed the substantive admission of Roger Berry's prior written statement, arguing that there was no confrontation violation because the state had called Roger Berry as a witness and the defense had the opportunity to cross-examine him. *See State v. Price*, 158 Wn.2d 630, 146 P.3d 1183 (2006). The trial court agreed with this argument and admitted Roger Berry's written statement over the defendant's objection. The error in the trial court's ruling was in failing to recognize that while the state had called Roger Berry as a witness, and while the defense had the opportunity to cross-examine Mr. Berry, the state did not examine Mr. Berry about the substance of his written statement and the defense did not have the opportunity to cross-examine him concerning the substance of the written statement because the state strategically refrained from moving that statement into evidence while Mr. Berry was on the witness stand. In fact, the state did not move it into evidence until after Mr. Berry had been released from his subpoena and from custody, and after both sides had closed their cases.

Since the state had failed to seek the timely admission of Mr. Berry's statement, the defense was denied the opportunity to cross-examine him about why he had written a claim that the defendant had threatened to hurt Mr. Johnson but denied on the witness stand that the defendant had made any

such statement. Indeed, Mr. Berry may well have included such a claim in his written statement because he wanted to ingratiate himself in the eyes of the jail staff and believed he could do so by writing this statement even though it was false. There are a number of other possibilities and the point is that the defense was denied the opportunity to explore any of them because of the state's strategic decision to wait until after Mr. Berry was gone and after both sides had closed their cases before moving the written statement into evidence. Thus, when the trial court's admission of this statement into evidence violated the defendant's right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Since the right to confrontation is fundamental under our state and federal constitutions, this court should reverse the defendant's conviction and remand for a new trial unless the state can prove beyond a reasonable doubt that this error was harmless. In this case the state cannot meet this high burden, particularly given two facts. The first is that the wounds that the defendant inflicted on Mr. Johnson were only "superficial" to use the definition of the treating physician. Second, while the defendant had made two subsequent statements that he had inflicted wounds upon Mr. Johnson that were far more serious than he had actually done, the only statement of the defendant's intent came from Mr. Berry's written statement. Thus,

absent this statement, there is a significant possibility that the jury would have returned a verdict of “not guilty” on the more serious offenses of first and second degree assault and convicted on the lesser included offense of fourth degree assault. As a result, this court should reverse the defendant’s conviction and remand for a new trial.

CONCLUSION

The defendant is entitled to a new trial based upon the trial court's failure to grant the defendant his full right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

DATED this 5th day of October, 2012.

Respectfully submitted,

A handwritten signature in black ink that reads "John A. Hays". The signature is written in a cursive, flowing style.

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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

STATE OF WASHINGTON,
Respondent,

vs.

RICHARD D. JANSSEN,
Appellant.

NO. 43249-8-II

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Donna Baker states the following under penalty of perjury under the laws of Washington State. On October 5th, 2012, I personally placed the United States Mail and/or e-filed the following documents with postage paid to the indicated parties:

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/s/

Donna Baker, Legal Assistant

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