

77719-5

SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO. 54767-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

\_\_\_\_\_  
\_\_\_\_\_

STATE OF WASHINGTON,

Respondent,

v.

N.K.,

Petitioner.

2005  
SEP 29 10:07

**FILED**  
SEP 29 2005  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

\_\_\_\_\_  
\_\_\_\_\_

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

The Honorable Leroy McCullough, Judge

\_\_\_\_\_  
\_\_\_\_\_

PETITION FOR REVIEW

\_\_\_\_\_  
\_\_\_\_\_

DANA M. LIND  
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page	
A. <u>IDENTITY OF PETITIONER</u> . . . . .	1	
B. <u>COURT OF APPEALS DECISION</u> . . . . .	1	
C. <u>ISSUES PRESENTED FOR REVIEW</u> . . . . .	1	
D. <u>STATEMENT OF THE CASE</u> . . . . .	2	
E. <u>REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT</u> . . . . .	6	
THIS COURT SHOULD ACCEPT REVIEW BECAUSE N.K.'S CASE INVOLVES SIGNIFICANT QUESTIONS UNDER THE STATE AND FEDERAL CONSTITUTIONS AND AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE RESOLVED BY THIS COURT. . . . .		6
1. <u>N.K.'s Constitutional Rights were Violated under this Court's Opinion in Rankin.</u> . . . . .		7
2. <u>Admission of Travis Boling's Letter Violated N.K.'s Constitutional Right to Confront and Cross- Examine.</u> . . . . .		9
F. <u>CONCLUSION</u> . . . . .	14	

**TABLE OF AUTHORITIES**

	Page
 <b><u>WASHINGTON CASES</u></b>	
<b><u>State v. Cook</u>,</b> 104 Wn. App. 186, 15 P.3d 677 (2001) . . . . .	8
<b><u>State v. Ladson</u>,</b> 138 Wn.2d 343, 979 P.2d 833 (1999) . . . . .	7
<b><u>State v. Larson</u>,</b> 93 Wn.2d 638, 611 P.2d 771 (1980) . . . . .	7
<b><u>State v. N.M.K.</u>,</b> __ Wn. App. __, __ P.3d __ (2005 WL 2001187, 8/22/05) . . . . .	1
<b><u>State v. Nieto</u>,</b> 119 Wn. App. 157, 79 P.3d 473 (2003) . . . . .	12
<b><u>State v. Rankin</u>,</b> 151 Wn.2d 689, 92 P.3d 202 (2004) . . . . .	1, 2, 7
 <b><u>FEDERAL CASES</u></b>	
<b><u>Crawford v. Washington</u>,</b> 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) . . . . .	2, 6, 9-12
<b><u>Miranda v. Arizona</u>,</b> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) . . . . .	4

**TABLE OF AUTHORITIES (CONT'D)**

Page

**FEDERAL CASES (CONT'D)**

**White v. Illinois**,  
502 U.S. 346, 112 S. Ct. 736,  
116 L. Ed. 2d 848 (1992) . . . . . 10

**OTHER JURISDICTIONS**

**People v. Crant**,  
42 Misc.2d 350, 248 N.Y.S.2d 310 (1964) . . . . . 13

**People v. Niene**,  
8 Misc.3d 649, 798 N.Y.S.2d 891  
(N.Y. City Crim. Ct. 2005) . . . . . 12, 13

**RULES, STATUTES AND OTHERS**

Const. art. 1, § 7 . . . . . 7

CrR 3.5 . . . . . 4

ER 803(a)(7) . . . . . 11

RAP 13.4(b)(3) . . . . . 6, 8, 13, 14

RAP 13.4(b)(4) . . . . . 13, 14

RCW 5.45 . . . . . 11

U.S. Const. amend. 6 . . . . . 9, 10, 12

A. IDENTITY OF PETITIONER

Petitioner N.K. asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the published Court of Appeals decision in State v. N.M.K., \_\_ Wn. App. \_\_, \_\_ P.3d \_\_ (2005 WL 2001187, 8/22/05), attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. A police officer investigating a reckless driving incident came upon the suspect Honda. N.K. was seated in the front passenger seat, while another young man was seated directly behind him. Two other young men were standing outside the car. Where it was obvious the two men standing outside were the driver and rear driver's-side passenger, did the officer lack an independent cause to believe petitioner was engaged in criminal activity, thereby rendering the officer's request for identifying information from N.K. illegal under the state constitution and this Court's opinion in State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004)? Did the trial court therefore err in denying the motion to suppress N.K.'s subsequent statements to the officer?

2. Under Crawford v. Washington,<sup>1</sup> the state may not introduce testimonial statements of a non-testifying witness unless (1) the state has established the witness's unavailability and (2) the defendant had a prior opportunity to cross-examine the witness. Although the state failed to introduce evidence fulfilling each of these requirements, it was permitted to use what was essentially an affidavit of a non-testifying witness at the juvenile fact-finding hearing to prove an element of offense. Did this procedure violate N.K.'s Confrontation Clause rights?

D. STATEMENT OF THE CASE

N.K. was convicted of operating a motor vehicle with no valid operator's license and reckless driving. N.K.'s appeal and this petition concern only the no-valid-operator's-license offense. On appeal, N.K. argued the conviction should be reversed on either of two grounds: (1) N.K.'s confession was fruit of an unlawful seizure under this Court's opinion in State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004);<sup>2</sup> and (2) the court's admission of a letter written by a Department of Licensing

---

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

<sup>2</sup> Although this particular suppression argument was not made to the trial court, it is a constitutional issue and the record was sufficiently developed for determination, as is evident by the Court of Appeals published decision addressing its merits. Appendix, at 3-5.

(DOL) employee violated N.K.'s right to confront and cross-examine witnesses.

The evidence at the suppression hearing was as follows. Officer Osterdahl responded to a report of reckless driving in a residential neighborhood in Enumclaw. 1RP 45. While checking the area, he saw the suspect car, a Honda, parked in a McDonald's lot about four blocks away from the reported incident. Id. Osterdahl parked behind the Honda, but claimed he did so in such a way that he did not block the car's egress from the parking lot. At the time, four young men were nearby: two were standing outside the car, N.K. was seated in the front passenger seat, and the fourth young man was seated right behind him in the back passenger-side seat. 1RP 45-46, 49.

Osterdahl asked N.K. and the other young man inside the car to get out, and said it was "possible" that he then patted down each of the four associated with the Honda. 1RP 47, 50. Osterdahl also thought it "very possible" that, for his safety, he had all four stand in front of him while he spoke to them. 1RP 50.

Osterdahl asked each of the four for their names and dates of birth, and they all complied. Osterdahl said that they were not under arrest, and that he had not put any of them in handcuffs. Nor had the officer ordered

them to place their hands on the Honda in an arrest-like pose. 1RP 46-47. Osterdahl did not read N.K. his Miranda<sup>3</sup> rights before questioning him. 1RP 48. It also does not appear that Osterdahl told any of the four that he was free to leave at any time.

The court ruled N.K.'s statements to Osterdahl were admissible and entered the following findings:

1 FACTS

On September 8, 2003, Officer Osterdahl contacted the Respondent, who was sitting in the passenger seat of a Honda in the parking lot of a McDonald's in Enumclaw, Washington. The Officer parked his patrol car behind the Honda, but did not block its exit to the front. The officer asked the Respondent to exit the car, and asked his name and birthdate, and inquired about an incident at Jewell Street. The Respondent provided his name and birthdate, *admitted driving on Jewell Street, and admitted that he did not have a driver's license.*<sup>4</sup>

CP 18 (emphasis added).

In addition to N.K.'s statements to Osterdahl, the state offered a letter from the DOL to prove that N.K. drove without a license. It was

---

<sup>3</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

<sup>4</sup> The italicized final two clauses of this sentence are not supported by evidence introduced during the CrR 3.5 hearing. The facts were subsequently presented during the fact-finding hearing, however. 1RP 58-59. N.K. does not challenge these findings.

written by Travis Boling, who purportedly was the custodian of records, and asserted the following:

Having been appointed by the Director of Licensing as legal custodian of driving records in the State of Washington, I certify that such records are official, and are maintained in the office of the Department of Licensing, Olympia, Washington. I certify that all information contained in this certificate pertains to the driving record of:

License No: ?

Name: [K., N. M.] Birthdate: August 28, 1988

I further certify under penalty of perjury that after a diligent search of computer files there is no document or other evidence in said official record to indicate that on September 8, 2003[,] the Department of Licensing had issued a valid license to the above named person.

Ex 2; attached as Appendix B. The letter was dated April 5, 2004, approximately three months after N.K. was charged. CP 1-2.

N.K. objected to the admission of the document as inadmissible hearsay. The court admitted the DOL letter and found N.K. The court found N.K. guilty as charged. CP 15; 1RP 75.

Division One of the Court of Appeals affirmed. The court disagreed that N.K.'s confession should have been suppressed because in its opinion, Osterdahl had an independent basis to question N.K.: "Because there was an independent cause to question N.M.K., his state constitutional rights

were not violated when Officer Osterdahl asked him to identify himself." Appendix A, at 5.

The court likewise disagreed that N.K.'s confrontation rights were violated. In the court's opinion, the letter was akin to a business record and therefore not testimonial. Appendix A, at 6-10. According to the court, "we see no reason in law or logic why the absence of a business or public record should be treated differently" than a business record. Appendix A, at 9.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

THIS COURT SHOULD ACCEPT REVIEW BECAUSE N.K.'S CASE INVOLVES SIGNIFICANT QUESTIONS UNDER THE STATE AND FEDERAL CONSTITUTIONS AND AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE RESOLVED BY THIS COURT.

At issue in this case is N.K.'s fundamental right to be free from unreasonable police seizures and his right to confront the witnesses against him. This Court should accept review of these important constitutional issues. RAP 13.4(b)(3). Because the court's opinion carves out a new exception to Crawford's<sup>5</sup> requirement of in-person testimony when the accused has not been provided a prior opportunity for cross-examination,

---

<sup>5</sup> Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

this case also involves an issue of substantial public interest that should be resolved by this Court.

1. N.K.'s Constitutional Rights were Violated under this Court's Opinion in Rankin.

Article 1, § 7 of the Washington State Constitution requires that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." To determine whether a warrantless officer-citizen encounter constitutes a seizure -- that is, an unconstitutional intrusion on the citizen's private affairs -- a court will review whether

considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority.

State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

However, car "passengers are unconstitutionally detained when an officer requests identification 'unless other circumstances give the police independent cause to question [them].'" Id., quoting State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980). This rule persists because "a passenger faced with undesirable questioning by the police does not have the realistic alternative of leaving the scene as does a pedestrian." 151 Wn.2d at 697. If a passenger is seized improperly, "evidence obtained as a result . . . must be suppressed." 151 Wn.2d at 699; see also State v.

Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) ("When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.").

Here, Osterdahl was investigating a reckless driving incident. By the time he encountered the Honda, no one was seated in the driver's seat. Significantly, however, two young men were standing outside the car, N.K. was in the front passenger seat, and another young man was seated directly behind him. As a matter of common sense and simple deduction, the two people standing outside of the car had to be the driver and back driver's-side passenger. 1RP 46. Whether N.K. may have driven the car at some other time is sheer speculation. Contrary to the Court of Appeals opinion, Osterdahl did not have an "independent basis" to question N.K. See, e.g., State v. Cook, 104 Wn. App. 186, 190, 15 P.3d 677 (2001) ("independent basis" for questioning a passenger exists if there is reasonable suspicion the passenger is engaged in criminal activity). In this case, Osterdahl had no more than a hunch that N.K. had engaged in criminal activity. His request for identifying information was an unlawful intrusion into N.K.'s private affairs and required suppression of N.K.'s illegally obtained confession. This Court should accept review. RAP 13.4(b)(3).

2. Admission of Travis Boling's Letter Violated N.K.'s Constitutional Right to Confront and Cross-Examine.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Since a "witness" is defined as a person giving testimony, an accused person's constitutional right to confront witnesses against him requires actual confrontation and cross-examination for the prosecution to introduce any out-of-court statements that are "testimonial" in nature. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1359, 1364, 158 L. Ed. 2d 177 (2004). Crawford rejected decisional law that equates confrontation clause analysis with admissibility under hearsay rules. 124 S. Ct. at 1370-71. The Crawford Court reasoned that "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.

Because it was unnecessary to resolve the case, the Crawford Court left for "another day any effort to spell out a comprehensive definition of 'testimonial.'" Crawford, 541 U.S. at 68. However, the Crawford Court did provide some guidance on the issue. The Court determined from the historical record that "the principal evil at which the Confrontation Clause

was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused" and that "[t]he Sixth Amendment must be interpreted with this focus in mind." Crawford, 541 U.S. at 51. With this in mind the Court then listed various formulations of what it determined to be a "core class" of testimonial statements: "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; "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." Crawford, 541 U.S. at 52 (citations omitted, emphasis added) (quoting White v. Illinois, 502 U.S. 346, 365, 112 S. Ct. 736, 747, 116 L. Ed. 2d 848 (1992)).

Crawford also refers to types of hearsay that are not testimonial. These include: (1) "[a]n off-hand, overheard remark;" (2) "a casual remark to an acquaintance;" (3) "business records or statements in furtherance of

a conspiracy;" and (4) "statements made unwittingly to an FBI informant" by a co-conspirator. Crawford, 541 U.S. at 51, 56 and 58.

The Court of Appeals found that Boling's letter fell within the "absence-of-a-public-record" exception to the hearsay rule (ER 803(a)(7))<sup>6</sup> and that such an exception parallels the business record exception. Because Crawford states that business records are non-testimonial, Division One concludes the document at issue here was non-testimonial as well.

But there are significant distinctions between Boling's letter and a business record. For one thing, it is not a record that DOL keeps in the normal course of business. Rather, it was prepared in anticipation of trial to prove that Nathan was not licensed at the time he was allegedly driving. And because the statement was certified under penalty of perjury, it is

---

<sup>6</sup> ER 803(a)(7) provides:

**(a) Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

*(7) Absence of Entry in Records Kept in Accordance with RCW 5.45.* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

tantamount to an affidavit under Washington law. See, e.g., State v. Nieto, 119 Wn. App. 157, 161, 79 P.3d 473 (2003). Affidavits are within that core class of statements Crawford expressly held were testimonial. And clearly, Boling reasonably expected the letter to be used prosecutorially, as he prepared the letter at the prosecutor's behest.

Persuasive authority from New York supports the conclusion that Boling's letter is testimonial. People v. Niene, 8 Misc.3d 649, 798 N.Y.S.2d 891 (N.Y. City Crim. Ct. 2005). Niene was charged with being an unlicensed vendor of goods in violation of a particular administrative code. As proof that he was unlicensed, the state offered an affidavit of an official of the Department of Consumer Affairs reporting that she had made a search of the DCA records and the defendant was not the holder of a general vendor's license. Niene, 798 N.Y.S.2d at 892-93.

On review, the court held that the admission of the document violated Niene's Sixth Amendment right to confront. At the outset, the court noted that the document was neither a public document nor a business record. Rather, as captioned, it was an affidavit prepared by an official who searched the records of the DCA for the express purpose of determining whether Niene was validly licensed. The document was prepared at the request of law enforcement for use in the criminal

prosecution of Niene. Accordingly, it was testimonial and the defendant was entitled to confront and cross-examine its maker. Niene, 798 N.Y.S.2d at 893-94. The same conclusion is mandated here.

The "shopbook rule" or business records exception was designed to permit incidental use of records which are made and kept primarily for nontestimonial purposes. People v. Crant, 42 Misc.2d 350, 352, 248 N.Y.S.2d 310, 312 (1964) (police report should not be admissible under the business records exception if prepared for use in a court proceeding). The Crant decision makes sense and explains why business records are usually non-testimonial. But records prepared specifically for trial -- like the one at issue here -- are different than those kept in the ordinary course of business.

The Court of Appeals decision carves out a new exception to a defendant's right of confrontation, one that is not supported in law or reason. This Court should accept review to resolve this important constitutional issue that is of substantial public interest. RAP 13.4(b)(3), (4).

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP  
13.4(b)(3), (4).

DATED this 9<sup>th</sup> day of September, 2005.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



\_\_\_\_\_  
DANA M. LIND, WSBA No. 28239  
Office ID No. 91051

Attorneys for Petitioner

## **APPENDIX A**

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

STATE OF WASHINGTON,	)	No. 54767-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
N.M.K. [DOB: 08/28/88],	)	PUBLISHED
	)	
Appellant.	)	FILED: <u>August 22, 2005</u>
	)	

COX, C.J. – Where the admissibility of testimonial evidence is at issue, the Sixth Amendment of the United States Constitution demands that the witness be unavailable at trial and that the accused had a prior opportunity to cross-examine the witness.<sup>1</sup> While the full scope of what is included within “testimonial” evidence is not fully defined by the United States Supreme Court, that court made clear that business records are generally not testimonial evidence.<sup>2</sup> In this case, the trial court admitted into evidence a certified letter from the Department of Licensing (DOL) stating that no driver’s license had been issued to N.M.K.

---

<sup>1</sup> Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

<sup>2</sup> Crawford, 541 U.S. at 56.

under the absence of a public record exception to hearsay.<sup>3</sup> Because admission of the document under this exception is consistent with the rationale cited in Crawford and there was no other error, we affirm.

In September 2003, Rodger Miller, a resident of Jewell Street in Enumclaw, Washington observed N.M.K. driving a black Honda over a sidewalk and the front lawn of a home on Jewell Street. Minutes later, another Jewell Street resident, Rocky Johnson, also saw N.M.K. driving at a high rate of speed around Jewell Street.

Miller and Johnson reported the incident to police, and an officer arrived at the scene to interview them. After the interviews, Officer Osterdahl located a black Honda that matched the description given to the interviewing officer by Miller and Johnson parked at a nearby McDonald's. Officer Osterdahl parked behind the Honda, leaving a way for the car to exit. Two young men were standing next to the vehicle, N.M.K. was in the passenger seat, and another young man was in the backseat.

Officer Osterdahl asked the two people in the vehicle if they would step out of the vehicle. They did. The officer advised them of the complaints by Miller and Johnson. Officer Osterdahl asked each for his legal name and date of birth.

---

<sup>3</sup> ER 803(a)(10) states: The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

No. 54767-4-1/3

N.M.K. stated his full name and date of birth. He also admitted that he did not have a driver's license and had been driving the Honda on Jewell Street. Officer Osterdahl arrested him.

The State charged N.M.K. with reckless driving and driving without a valid operator's license. During the fact-finding hearing, the juvenile court held a CrR 3.5 hearing to determine the admissibility of N.M.K.'s statements to Officer Osterdahl prior to arrest. The court determined N.M.K.'s statements were admissible.

Also in the CrR 3.5 hearing, the State offered a certification from the DOL, indicating that there was no record of a driver's license for N.M.K. The defense objected, claiming the certification was hearsay. The court overruled the objection and the certification was admitted under ER 803(a)(10), the absence of a public record exception.

Thereafter, the court found N.M.K. guilty of driving without a valid operator's license and reckless driving. The juvenile court entered a disposition order that imposed a sentence of six months of community supervision and 21 hours of community service.

N.M.K. appeals the adjudication of guilt for driving without a valid operator's license.

### **PRE-ARREST STATEMENTS**

#### *Seizure*

N.M.K. first argues that he was illegally seized by Officer Osterdahl because the officer did not have reasonable suspicion to stop and ask him, as a

passenger in the car, to identify himself. According to N.M.K., because the seizure was not valid, the admissions that followed must be suppressed. We hold there was no seizure at that point in the encounter between the two. Thus, suppression of the statements was not required on this ground.

N.M.K. relies on State v. Rankin,<sup>4</sup> contending that the officer's request for identification violated article I, section 7 of the Washington Constitution that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."<sup>5</sup> In Rankin, passengers were stopped, searched, and found with drugs. There, the officer requested and retained identification or driver's licenses from the passengers. The court pointed out that the police officers had no independent basis for requesting identification from the passengers in each case and that requesting and holding the passengers' identification constituted a seizure.<sup>6</sup> The evidence obtained post-seizure was ruled inadmissible.<sup>7</sup>

However, "not every encounter between a police officer and a citizen is an intrusion requiring an objective justification."<sup>8</sup> Under article I, section 7, passengers are unconstitutionally detained when an officer requests identification "unless other circumstances give the police independent cause to question [the] passengers."<sup>9</sup>

---

<sup>4</sup> 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

<sup>5</sup> U.S. CONST. art. I, § 7.

<sup>6</sup> Rankin, 151 Wn.2d at 699.

<sup>7</sup> Rankin, 151 Wn.2d at 699.

<sup>8</sup> Rankin, 151 Wn.2d at 695 (citing United States v. Mendenhall, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

<sup>9</sup> Rankin, 151 Wn.2d at 695 (citing State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980)).

Here, other circumstances gave Officer Osterdahl independent cause to ask N.M.K. to identify himself. Officer Osterdahl knew that a black Honda had been seen speeding on Jewell Street. N.M.K. was seated in a car that matched the description of the car involved in the reckless driving incident. The car was parked in a parking lot near Jewell Street. No one was in the driver's seat of the parked car. Officer Osterdahl stopped, but did not place N.M.K. and the other three men in custody while he investigated the incident. Officer Osterdahl had a reasonable, articulable suspicion to ask N.M.K. to identify himself.

Because there was an independent cause to question N.M.K., his state constitutional rights were not violated when Officer Osterdahl asked him to identify himself.

#### *Custodial Interrogation*

N.M.K. also appears to argue that his statements to Officer Osterdahl should have been suppressed because he was not read his Miranda rights before being questioned. We disagree.

In order to trigger Miranda protections, “[a] suspect must be in custody or ‘otherwise deprived of his freedom of action in a significant way[.]’”<sup>10</sup> The question is not whether a reasonable person would believe that he was free to leave but rather whether he would believe that “he was in police custody of the degree associated with formal arrest.”<sup>11</sup> This determination is made by

---

<sup>10</sup> State v. Mahoney, 80 Wn. App. 495, 496, 909 P.2d 949 (1996).

<sup>11</sup> State v. Ferguson, 76 Wn. App. 560, 566, 886 P.2d 1164 (1995) (quoting 1 Wayne R. LaFare & Jerold H. Israel, Criminal Procedure § 6.6, at 105 (Supp. 1991)).

objectively looking at the actions of the law enforcement officer.<sup>12</sup> Incriminating statements and admissions that are not in response to an officer's questions are "freely admissible."<sup>13</sup>

Here, it is clear that N.M.K. was not seized. Nothing in the words or actions of Officer Osterdahl indicated that N.M.K. was in custody. He did not handcuff N.M.K., nor did he tell him he could not leave the scene. There was no arrest until after the confession. In short, Miranda warnings were not required as N.M.K.'s freedom of action was not curtailed to a degree associated with formal arrest.

## CONFRONTATION CLAUSE

### *Authenticity*

N.M.K. first argues that the certified copy of the absence of a driver's license is inadmissible under Crawford because the State failed to establish witness unavailability and there was no evidence that the records custodian had been cross-examined about the record before the hearing. We hold that the document was not testimonial and thus unavailability of the witness was irrelevant.

Extrinsic evidence of the authenticity of a certified copy of a public record is not required as a condition precedent to admissibility.<sup>14</sup> Such documents are

---

<sup>12</sup> State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998).

<sup>13</sup> State v. McWatters, 63 Wn. App. 911, 915, 822 P.2d 787 (1992).

<sup>14</sup> ER 902(d); see State v. Chapman, 98 Wn. App. 888, 891, 991 P.2d 126 (2000) (certified copy of driving record held self-authenticating; live foundation testimony unnecessary).

considered self-authenticating.<sup>15</sup> Because the document offered into evidence here bears the official seal of the DOL and is attested to by the custodian of records, the document is self-authenticating and did not require unavailability or cross examination of the custodian.<sup>16</sup>

### *Hearsay Exception*

N.M.K. next argues that the certified copy of the statement from the DOL that no operator's license existed for N.M.K. was improperly admitted under the rules of evidence. We disagree.

The absence of a public record has traditionally been admitted under an exception to the rule against hearsay as stated in ER 803(a)(10). The comments to ER 803(a)(10) state, "Rule 803(a)(10) defines a hearsay exception [] for evidence of a lack of public record or entry, offered to prove the absence of data or the nonoccurrence or nonexistence of a matter of which a public record is regularly made and preserved. The rule parallels the hearsay exception for a lack of a business record [Rule 803(a)(7)]."<sup>17</sup> This latter rule "allows the admission of evidence that an event or matter was *not* recorded to

---

<sup>15</sup> ER 902. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

...

(d) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with section (a), (b), or (c) of this rule or complying with any applicable law, treaty or convention of the United States, or [of this state].

<sup>16</sup> See State v. Ross, 30 Wn. App. 324, 327, 634 P.2d 887 (1981).

<sup>17</sup> Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence, 409-10 (2005).

show that it did not occur or did not exist. The rule is a logical extension of the business records statute.”<sup>18</sup>

Here, the copy of the certified statement from the DOL was properly admitted under ER 803(a)(10) and ER 803(a)(7).

*Testimonial Evidence*

N.M.K. principally argues that the admission of a certified copy from the DOL stating that no license had been issued to him was testimonial and violated his Sixth Amendment right to confrontation as established by Crawford.<sup>19</sup> We disagree.

Where the admissibility of testimonial evidence is at issue, the Sixth Amendment requires that the witness be unavailable at trial and that the accused had a prior opportunity to cross-examine the witness.<sup>20</sup> The United States Supreme Court did not define the full scope of what it considers to be “testimonial” evidence. But the court made clear that business records are not testimonial evidence.<sup>21</sup>

Here, the certified copy declared “that after a diligent search of computer files there is no document or other evidence ... to indicate that ... the [DOL] had issued a valid license to” N.M.K. We have heard no persuasive argument that

---

<sup>18</sup> Tegland, Washington Practice: Courtroom Handbook on Washington Evidence, at 406.

<sup>19</sup> 541 U.S. 36.

<sup>20</sup> Crawford, 541 U.S. at 68.

<sup>21</sup> Crawford, 541 U.S. at 56 (“Most of the hearsay exceptions covered statements that by their nature were not testimonial--for example, **business records** or statements in furtherance of a conspiracy.”); Crawford, 541 U.S. at 76 (the court’s analysis of “testimony” excludes at least some hearsay exceptions, such as **business records and official records**) (Rehnquist, C.J., concurring in judgment). (Emphasis added.)

this document is anything other than one that falls squarely within the absence of a public record exception to hearsay that ER 803(a)(10) describes. Such an exception parallels the absence of a business record exception that ER 803(a)(7) describes. The express language of Crawford states that “business records” are not testimonial. But we see no reason in law or logic why the absence of a business or public record should be treated differently. In short, we conclude that such a record is the functional equivalent of a business record for purposes of the Confrontation Clause.

Recently, in United States v. Rueda-Rivera,<sup>22</sup> the 5th Circuit came to a similar conclusion. The court there held that a Certificate of Non-Existence of Record (CNR) was properly admitted into evidence to establish that the government had not consented to the defendant’s presence in the country.<sup>23</sup> In Rueda-Rivera’s case, a records custodian at the Immigration and Naturalization Service created the CNR, stating that “after a diligent search no evidence [was] found to exist in the records of the [INS] of the granting of permission for admission into the United States after deportation[.]”<sup>24</sup> The court in Rueda-Rivera, likened the INS record to a business record, stating the CNR “does not fall into the specific categories of testimonial statements referred to in Crawford.”<sup>25</sup> The court declined to extend Crawford, and concluded that the

---

<sup>22</sup> 396 F.3d 678 (5th Cir. 2005).

<sup>23</sup> Rueda-Rivera, 396 F.3d at 680.

<sup>24</sup> Rueda-Rivera, 396 F.3d at 679.

<sup>25</sup> Rueda-Rivera, 396 F.3d at 680.

contents of the defendant's immigration file were business records, and thus, not testimonial.<sup>26</sup>

In a statement of additional authority, N.M.K. cites a New York State Criminal Court case, People v. Niene,<sup>27</sup> for the proposition that an affidavit submitted by a police officer that is used to prove the absence of a record is testimonial. This argument is not persuasive.

First, a decision from a trial court in another state is of questionable precedential value either in that state or this one. Moreover, we are not bound by the decisions of even the highest court of another state.<sup>28</sup> Second, Niene analyzes an affidavit submitted by a police officer, not a records custodian. More importantly, the case does not consider any of the evidentiary rules that are before us now.<sup>29</sup> Thus, we do not view that case as helpful.

We affirm the disposition order.

Cox, CJ

WE CONCUR:

Guth, ACT

Kennedy, J.

<sup>26</sup> Rueda-Rivera, 396 F.3d at 680.

<sup>27</sup> 2005 WL 1183188 (N.Y. Crim. Ct. 2005).

<sup>28</sup> See State v. Wadsworth, 139 Wn.2d 724, 740, 991 P.2d 80 (2000) (other states' supreme court cases are of no precedential value to Washington courts).

<sup>29</sup> Niene, 2005 WL 1183188 (examined whether a police officer's affidavit of an absence of a license was testimonial).

**APPENDIX B**



STATE OF WASHINGTON  
DEPARTMENT OF LICENSING  
P. O. Box 9030 • Olympia, Washington 98507-9030

April 5, 2004

tb

Having been appointed by the Director of Licensing as legal custodian of driving records in the State of Washington, I certify that such records are official, and are maintained in the office of the Department of Licensing, Olympia, Washington. I certify that all information contained in this certificate pertains to the driving record of:

License No: ?

Name: KIRKPATRICK, NATHAN M

Birthdate: August 28, 1988

I further certify under penalty of perjury that after a diligent search of computer files there is no document or other evidence in said official record to indicate that on September 8, 2003 the Department of Licensing had issued a valid license to the above-named person.

Travis Boling  
Custodian of Records  
Place: Olympia, Washington  
Date: April 05, 2004

