

No. 234274

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

STATE OF WASHINGTON,

Respondent,

v.

KYLE KEITH KRONICH,

Petitioner.

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

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Deputy Prosecuting Attorney
Attorney for Respondent

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I. PETITIONER'S ASSIGNMENT OF ERROR

1. The Superior Court erred in finding Mr. Kronich had failed to show prejudice in light of the State's violation of CrRLJ 3.1, which requires the State to provide reasonable access to an attorney upon a defendant's request.

2. The Superior Court erred in holding the State could introduce ex parte declarations by the Department of Licensing to convict Mr. Kronich of driving with a suspended license.

II. ISSUES PRESENTED

1. Did the trial court err in refusing to suppress evidence of defendant's refusal to take a breath test where the defendant first requested an attorney, then later decided he did not want to talk with one?

2. Are Department of Licensing records admissible in the wake of the recent Supreme Court decision of *Crawford v. Washington*?

III. STATEMENT OF THE CASE

Facts regarding the right to counsel argument.

On November 15, 2000, the defendant was arrested for driving while under the influence of alcohol and driving While License Suspended. CP 42; CP 35. The defendant was advised of his implied

consent warnings for breath testing and refused to take the breath test. CP 55-56.

Defendant filed a pretrial Motion to Suppress his refusal to submit a breath test, alleging he was denied access to counsel, that he had not waived counsel. CP 19, lines 9-19. He provided no testimony or affidavit supporting this allegation, but brought the motion solely based upon page two of the seven-page police report. (Exhibit 1 Petitioner's Brief.) Defense counsel conceded that the defendant had been properly Mirandized.¹ CP 15, lines 20-23.

Defense counsel argued that because "Box 10" of the arrest report indicated that defendant had originally requested an attorney, his later decision - that he did not want to call one - could not be construed as a valid waiver of his rights under CrRLJ 3.1. CP 19, lines 9-19 through CP 20, line 1-2.

The trial court denied the defendant's motion to suppress the defendant's refusal of the breath test, holding that after being properly advised of his Miranda warnings and after requesting counsel, the defendant subsequently decided that he didn't want to talk with an attorney:

The only conclusion that I can come up here with reasonably under these facts is that after requesting counsel that for some reason Mr. Kronich decided that he didn't want to call anybody and can he do that? Certainly. Can he waive his right to access to counsel? Yes. Can he make the decision on his own to take the test or not take the test? The answer is correct. All the State has to do or the law enforcement agency has to do is help provide access and we don't even get down to the name or the telephone number because the defendant for some reason changed his decision which he can do. . . .

CP 30, lines 10-17.

Facts regarding Driving While License Suspended Count.

Petitioner states that "Exhibit 2", a certification from Trina Truong, the Custodian of Records for the Department of Licensing, "was the *only* evidence of Mr. Kronich's driving status introduced by the State." Brief of Petitioner, page 5. (Emphasis added, BP 5 hereinafter). That is incorrect.

Prior to the admission at trial of the documentary evidence, Deputy Jenkins testified he had ran the plate of the vehicle prior to the stop and was informed by sheriff's radio that the registered owner was Kyle Kronich and that his Washington's driver's license was suspended. CP 42-44. This evidence was introduced without objection from the defendant. *Id.*

Additionally, Exhibit 1, a file copy of the Department of Licensing Order of Revocation sent to the defendant informing him of his driver's

¹ No Fifth Amendment issue was involved because no questions were

license revocation for one year “and thereafter until it is reinstated and a new driver license is issued” was introduced without objection. CP 60. (Copy attached).

IV. ARGUMENT

A. The trial court did not err in its evidentiary ruling admitting the defendant’s refusal to take a breath test.

Standard of review.

Under RALJ 9.1, this court reviews the district court's decision for errors of law and the district court's factual findings for support by substantial evidence. *State v. Ford*, 110 Wash. 2d 827, 829, 755 P.2d 806 (1988); *State v. Frank*, 112 Wn. App. 515; 49 P.3d 954 (2002).

The appellate court shall accept the district court’s factual determinations supported by substantial evidence in the record. These factual determinations include those which were expressly made by the court of limited jurisdiction, or that may reasonably be inferred from the judgment of the court of limited jurisdiction. *Ford*, 110 Wn.2d at 830, quoting RALJ 9.1(b).

asked of the defendant.

Analysis of issue

Respondent requests this Court affirm the decision of the district court² denying suppression of the refusal evidence. Refusal evidence is relevant and fully admissible in driving while under the influence of alcohol cases. *State v. Long*, 113 Wn.2d 266, 270, 778 P.2d 1027 (1989); *State v. Baldwin*, 109 Wn. App. 516, 526, 37 P.3d 1220 (2001), *review denied*, 147 Wn.2d 1020 (2002).

Petitioner claims the admission of the relevant refusal evidence conflicts with CrRLJ 3.1 and the State Supreme Court decision *State v. Templeton*, 148 Wn.2d 193, 59 P.3d 632 (2002). However, because “[e]xclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly”, the *Templeton* Court required that a defendant claiming a violation of CrRLJ 3.1 must establish *both* that the court rule was violated *and that* within reasonable probabilities the error materially affected the outcome of the trial. *Templeton*, 148 Wn.2d 221, 220-221. The Petitioner established neither prong in the instant case.

1) The rule was not violated.

CrRLJ 3.1(c) states:

² Petitioner’s assignment of error claims error in the Superior Court’s affirmance of the District Court, but as noted above, the review is of the District Court decision.

(1) When a person has been arrested he or she shall as soon as practicable be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

(2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place him or her in communication with a lawyer.

The trial court found that the rule had been complied with. The trial court held that after being properly advised of his Miranda warnings, and after requesting counsel, the defendant decided he no longer wanted to talk with an attorney:

The only conclusion that I can come up here with reasonably under these facts is that after requesting counsel that for some reason Mr. Kronich decided that he didn't want to call anybody and can he do that? Certainly. Can he waive his right to access to counsel? Yes. Can he make the decision on his own to take the test or not take the test? The answer is correct. All the State has to do or the law enforcement agency has to do is help provide access and we don't even get down to the name or the telephone number because the defendant for some reason changed his decision which he can do. . . .

RP 17, lines 10-17

The record below supports the above finding. Unlike *Miranda*, CrRLJ 3.1 does not require the court find a knowing and intelligent waiver

before compliance with the rule is found. If that were the case, compliance with the rule could not be found where actual contact with an attorney was attempted, but did not occur. *See Bellevue v. Ohlson*, 60 Wn. App. 485, 490, 803 P.2d 1346 (1991) (police complied with rule by making six attempts to telephone arrestee's attorney). Indeed, the rule is designed to provide a meaningful *opportunity* to contact a lawyer. *State v. Kirkpatrick*, 89 Wash. App. 407, 413, 948 P.2d 882 (1997), *review denied*, 135 Wash. 2d 1012, 960 P.2d 938 (1998). The defendant was provided with that opportunity, but made his own decision not to call.

2) There was no prejudice.

Assuming arguendo the rule was violated, the petitioner fails to establish any prejudice. He did not allege that he would have taken the breath test - and not refused the test - had he known what he is deemed to know after discussing the case with his court appointed counsel in the months preceding the suppression motion. Nor did he allege in the trial court that he would have arranged for alternative testing or that there was exculpatory evidence available or in existence. Counsel for petitioner merely speculates, without any factual basis or support from the record, that there was exculpatory evidence available.

The petitioner has established neither a violation of CrRLJ 3.1, nor probable prejudice as required by *Templeton*.

B. Records from the Department of Licensing are public records and therefore remain admissible in the wake of *Crawford v. Washington*.

Records from the Department of Licensing are public records, and remain admissible in the wake of *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed. 2d 177, 124 S.Ct. 1354 (2004).

It has been a settled issue in the State of Washington that records kept by the Department of Licensing fall under the “official records” hearsay exception. *State v. Monson*, 113 Wn.2d 833, 784 P.2d 485 (1989); *State v. Chapman*, 98 Wn. App. 888, 991 P.2d 126 (2000); *State v. Smith*, 122 Wn. App. 699, 94 P.3d 1014 (2004), *review granted*, ___ Wn.2d ___ (2005); ER 803(a)(8).

In *Monson*, the Washington Supreme Court held that records from the Department of Licensing are admissible under the public records hearsay exception to prove that a defendant was driving while their license was revoked. 113 Wn.2d at 849-50. In *Chapman*, this Court held that DOL records – identical in nature and content to Exhibits 1 and 2 in the instant case - were self-authenticating. 98 Wn. App. at 891.

Petitioner contends that *Monson* and *Chapman* are overruled in the wake of *Crawford v. Washington*, to the extent that *Crawford* prohibits the use of ex parte declarations. Petitioner concedes, “the business and public records exception will survive [*Crawford*], but only to the extent that such records contain nontestimonial evidence.” BP page 16. However, because this belated concession is not binding on the Court,³ and because review of this case was accepted, counsel for respondent deems it imperative to discuss the effect of *Crawford* on the business and public records exception. As is explained below, the *Crawford* Court did not do away with the public records hearsay exception. Therefore, *Monson*, *Smith*, and *Chapman* remain untouched.

Crawford and Public Records

Since the Supreme Court of the United States issued its opinion in *Crawford v. Washington*, courts across the country have been dealing with a decision purporting to exclude all testimonial, ex parte evidence (i.e. hearsay evidence) where there has been no opportunity for cross-examination of the witness.

There is substantial confusion over how courts should interpret this decision. Much of it centers on the need to define what is and what is not

³ *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988).

“testimonial”. The admissibility of ex parte evidence depends on whether or not it is “testimonial”. The Supreme Court offers no comprehensive definition for the term as the Court uses it. As it stands, the *Crawford* decision is worded in such broad strokes that all of the hearsay exceptions provided for under the state and federal rules of evidence are likely to be challenged.⁴ The case now before the court challenges the public records hearsay exception.

Fortunately, the *Crawford* decision offers more guidance regarding public records than it does other areas of hearsay law. In the course of its historical review of the Confrontation Clause and hearsay law, the Supreme Court remarks:

⁴ For example, the excited utterance hearsay exception was challenged last year in *State v. Orndorff*, 122 Wn. App. 781, 95 P.3d 406 (2004). The Court there held that the excited utterance exception survives *Crawford*.

In *United States v. Rueda-Rivera*, 396 F.3d 678 (5th Cir. 2005), defendant was found in the United States following deportation and removal, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. The court made it clear that the Certificate of Nonexistence of Record ("CNR") reflecting the absence of a record that defendant had received consent to re-enter the United States, did not fall into the specific categories of testimonial statements referred to in *Crawford*, and declined to extend *Crawford* to reach such a document. The District Court properly admitted the CNR, without the testimony of its author, to establish that the Government had not consented to the defendant's presence in the country.

Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records[.]

Id., 541 U.S. at 56, 158 L.Ed. 2d at 195.

The distinction between a business record and a public record is slight. It is a reasonable inference to make that because business records remain admissible, then so do public records. Justice Rehnquist bolsters this inference in his concurring opinion:

To its credit, the Court’s analysis of “testimony” excludes at least some hearsay exceptions, such as business records and official records. To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process.

Id., 541 U.S. at 76, 158 L.Ed. 2d at 208 (internal citations omitted).

The most reasonable conclusion to be drawn from these statements is that the court does not consider public records to be testimonial, and did not intend to do away with the public records hearsay exception. This conclusion is supported by contrasting the types of hearsay the Supreme Court found to be testimonial with the public records exception. The Court illustrates its intentions by listing certain types of statements that are “testimonial” under any definition of the word, such as “testimony at a preliminary hearing” and “[s]tatements taken by police officers in the course of interrogation.” *Id.*, 541 U.S. at 52, 158 L.Ed. 2d at 193. The

factual scenario in *Crawford* involved the admission at trial of hearsay statements elicited under police interrogation.

The distinction between the admissibility of hearsay statements elicited under the pressures of police interrogation and the admissibility of a public record, kept for the public good, and containing purely factual information, is easy to draw. The *Crawford* Court did not draw the distinction as clearly as it may have, but what guidance it gives leads to the conclusion that public records are non-testimonial, and therefore admissible.

The Petitioner's allegations

The Petitioner alleges the introduction of Exhibit 2 containing the factual statement that he “[h]ad not reinstated his/her driving privilege. Was suspended/revoked” violated his Sixth Amendment right to confrontation.⁵ Petitioner claims this statement constitutes “‘testimonial’ evidence”⁶ because it is a “conclusory opinion of Mr. Kronich’s driving record, created after the declarant exercised judgment and discretion.”⁷ Additionally, Petitioner claims that Exhibit 2 is different than the exhibit(s) introduced in *Monson, supra*. Because *Crawford* excludes such

⁵ Brief of Petitioner (BP Hereinafter), pp. 11-12.

⁶ BP p. 12.

⁷ BP p. 16.

non-testimonial records from its reach, because Exhibit 2 is identical to, rather than being different from the exhibit(s) introduced in *Monson* and *Chapman*, and because the exhibit contains neutral facts – not conclusions involving judgment and discretion, the Petitioner’s argument must fail.

As explained above, the *Crawford* Court gave two examples of “statements that by their nature were not testimonial” – business records and statements in furtherance of a conspiracy. 541 U.S. at 55; 158 L.Ed.2d at 195-96; 124 S.Ct. at 1367; *see also id.* at 1378 (Rehnquist, C.J. concurring in judgment) (noting that “the Court’s analysis of ‘testimony’ excludes some hearsay exceptions, such as business records and official records.”). Therefore, as is conceded by Petitioner, it is reasonable to conclude the *Crawford* Court intended to exclude business and public records from its reach.

Our State Supreme Court and this Court have held that exhibits identical to Exhibit 2 are public records. In *State v. Monson*, 113 Wn.2d 833, 784 P.2d 485 (1989), the defendant objected at trial to the admission of a three-part document that was introduced “in order to establish that defendant’s driving privilege was revoked *at the time he was cited.*” *Id.* at 835 (emphasis added). Part One of the document/driving record in *Monson* was *identical* to Exhibit 2 in the instant case, and Part 2 of the

document/driving record in *Monson* was identical to Exhibit 1 in the instant case.⁸ Both were declared to be public records. *Monson* held that RCW 5.44.040 “codifies the common law public records exception,” and noted that testimony from the custodian “could add nothing to the substantive evidence in the certified copy of the driving record. The better evidence is thus not live testimony.” 133 Wn.2d at 844.⁹

⁸ The *Monson* Court described these records as follows:

The record consists of: (1) a cover letter which includes a certification by the legal custodian of driving records of this state that such records are official and maintained in the office of the Department of Licensing in Olympia, that the information in the record pertains to defendant, that two attached documents (an order of revocation and an abstract of driving record) are true and accurate copies of defendant's official record, and that after diligent search there is no document or other evidence in defendant's official record to indicate that as of October 25, 1985, the Department had reinstated defendant's driving privilege; (2) a copy of the order of license revocation dated September 30, 1985, which was mailed to defendant's last known address and informed him that on October 10, 1985, he must stop driving and must send his driver's license to the Department, and that his driving privilege had been revoked for 1 year for driving while his license was revoked; and (3) an abstract of defendant's 5-year driving record.

Monson, 113 Wn.2d at 835-36.

⁹ An identical view was expressed by Justice Rehnquist in his concurring opinion in *Crawford*:

In *Chapman*, this Court rejected the same arguments made by Petitioner Kronich. Addressing Chapman’s argument that Exhibit 2A¹⁰ was specifically prepared for litigation and was not public in nature, the Court stated, “[a] driving record is ‘a classic example of a public record kept pursuant to statute, for the benefit of the public and available for public inspection,’ ” and that the exhibit “contains neither expressions of opinion nor conclusions requiring the exercise of discretion.” *Chapman*, 98 Wn. App. at 891, quoting and citing *Monson*, 53 Wn. App. at 858 (internal citations omitted).

As a last point, it is notable that the Supreme Court of Washington, in *State v. Gaddy*, 152 Wn.2d 64; 93 P.3d 872 (Decided July 8, 2004), recently upheld the admissibility of DOL records, post *Crawford*.¹¹ Though the issue was not raised, the *Gaddy* Court upheld the presumptive

To its credit, the Court’s analysis of “testimony” excludes at least some hearsay exceptions, such as business records and official records. *To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process.*

Crawford, 541 U.S. at 76, 158 L.Ed.2d at 208 (citation omitted, emphasis added).

¹⁰ Exhibit 2A in *Chapman* is a replica of Exhibit 2 in the instant case.

reliability of driving records. In doing so, the Court noted that DOL is not a police agency, is the agency required to regulate driver's licenses, is responsible for administering and recommending the improvement of the motor vehicle laws of this state relating to driver records, is responsible for performing the function of suspending and revoking driver's licenses, is mandated to maintain current and accurate information regarding suspension or revocation of driver's licenses, and that there are "strict standards in place regarding DOL's authorization to suspend a person's driver's license and how it reinstates driving privileges when it is appropriate to do so." 152 Wn.2d at 71-73.

Exhibit 2 in this case simply is a public record of this Department carrying out its legislatively mandated functions.

Crawford does not overrule or directly implicate *Monson*, *Chapman*, or *Smith*. Records from the Department of Licensing remain admissible under the public records hearsay exception.

V. CONCLUSION

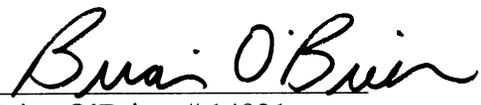
For the reasons stated herein, the respondent respectfully requests that this Court affirm Defendant's convictions for Driving While Under

¹¹ As did *State v. Smith*, 122 Wn. App. 699, 704-705. (Certified copy of driving record admissible as possessing special trustworthiness and a classic example of a public record, citing *Monson* and *Chapman supra*.)

the Influence of Alcohol and Third Degree Driving While License
Suspended.

Respectfully submitted this 4th day of April 2005 at Spokane,
Washington.

STEVEN J. TUCKER
Prosecuting Attorney


Brian O'Brien # 14921
Deputy Prosecuting Attorney
Attorney for Respondent

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
DRIVER RESPONSIBILITY DIVISION
PO BOX 9030
OLYMPIA, WASHINGTON 98507-9030

FILE COPY

October 29, 1997
ORDER OF REVOCATION

12-15-97 3CRA 12-15-01 12-15-98
CITATION #:10169700

KRONICH, KYLE KEITH
110 11 E 4TH
SPOKANE WA 99206

LICENSE #: KRONIKK376PW
BIRTHDATE: 10-16-1963 M

On December 15, 1997 AT 12:01 AM you must stop driving a motor vehicle in this state. If you have a Washington State driver's license it must be surrendered to this department.

Your driving privilege will be revoked for one year and thereafter until it is reinstated and a new driver license is issued.

DO NOT RESUME DRIVING UNTIL YOU HAVE BEEN NOTIFIED OF REINSTATEMENT AND HAVE OBTAINED A VALID DRIVER'S LICENSE.

P218673004

Driver Responsibility Division
Suspension Section
Phone: (360) 902-3900

DA Bradley

I certify under penalty of perjury under the laws of the State of Washington that I caused to be placed in a U. S. Postal Service mail box, a true and accurate copy of this document to the person named herein at the address shown, which is the last address of record. Postage prepaid, on October 29, 1997 in Olympia, Wa.
Agent for the Department of Licensing



DR-552-002 (N/1/96)

Exhibit 1 at trial.
(Admitted at CP 61,
RP 48)



STATE OF WASHINGTON
DEPARTMENT OF LICENSING

P. O. Box 9030, Olympia, WA 98507-9030

December 19, 2000

tnt

Having been appointed by the Director of Licensing as legal custodian of driving records of 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:

Lic. #: KRONIKK376PW
Name: KRONICH, KYLE KEITH
1708 N PARK BASEMENT
SPOKANE, WA 99212

Birthdate: October 16, 1963
Eyes: HAZ Sex: M
Hgt: 5 ft 10 in Wgt: 175 lbs
License Issued: September 29, 1987
License Expires: October 16, 1989

I certify under penalty of perjury that the attached document(s) herein is/are a true and accurate copy of the document(s) in the official record of the above named driver. I further certify that after a diligent search of the computer files the said official record indicates on November 15, 2000, the following statements apply to the status of the above named person:

Had not reinstated his/her driving privilege. Was suspended/revoked.

Trina Truong
Custodian of Records
Place: Olympia, Washington
Date: December 19, 2000



Exhibit 2 at trial.
(Admitted at CP 61,
RP 48)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

RECEIVED

DIVISION III

Washington Court of Appeals, Division III

STATE OF WASHINGTON,

No.: 234274

Plaintiff/Respondent,

vs.

STATEMENT OF ADDITIONAL
AUTHORITY

KYLE KEITH KRONICH,

Defendant/Appellant.

COMES now Respondent, State of Washington, and submits to the
Court additional authority.

State v. N. M. K., 547674 slip op., (Division One, August 2005)

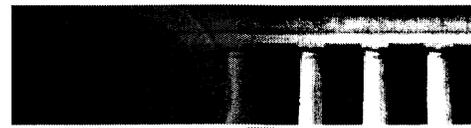
DATED this 23rd day of August, 2005.

STEVEN J. TUCKER
Spokane County Prosecuting Attorney


Brian O'Brien, WSBA # 14921
Deputy Prosecuting Attorney



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Court of Appeals Division I

State of Washington

Opinion Information Sheet

Docket Number: 54767-4-I
Title of Case: State of Washington, Respondent v. N. M. K., dob: 8/28/88, Appellant
File Date: 08/22/2005

SOURCE OF APPEAL

Appeal from Superior Court of King County
Docket No: 03-8-05373-4
Judgment or order under review
Date filed: 07/16/2004
Judge signing: Hon. Leroy McCullough

JUDGES

Authored by Ronald Cox
Concurring: Anne Ellington
Faye Kennedy

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Seattle, WA 98104-2362

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: August 22, 2005
)

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.¹ 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.² 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. under the absence of a public record exception to hearsay.³ 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. 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*,⁴ 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.'⁵ 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.⁶ The evidence obtained post-seizure was ruled inadmissible.⁷ However, 'not every encounter between a police officer and a citizen is an intrusion requiring an objective justification.'⁸ 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.'⁹

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{.}'¹⁰ 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.'¹¹ This determination is made by objectively looking at the actions of the law enforcement officer.¹² Incriminating statements and admissions that are not in response to an officer's questions are 'freely admissible.'¹³

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.¹⁴ Such documents are considered self-authenticating.¹⁵ 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.¹⁶

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)}.'¹⁷ This latter rule 'allows the admission of evidence that an event or matter was not recorded to show that it did not occur or did not exist. The rule is a logical extension of the business records statute.'¹⁸ 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.¹⁹ 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.²⁰ 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.²¹

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 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*,²² 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.²³ 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{.}'²⁴ 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.'²⁵ The court declined to extend Crawford, and concluded that the contents of the defendant's immigration file were business records, and thus, not testimonial.²⁶

In a statement of additional authority, N.M.K. cites a New York State Criminal Court case, *People v. Niene*,²⁷ 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.²⁸ 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.²⁹ Thus, we do not view that case as helpful.

We affirm the disposition order.

WE CONCUR:

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

2 *Crawford*, 541 U.S. at 56.

3 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.

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

5 U.S. Const. art. I, sec. 7.

6 *Rankin*, 151 Wn.2d at 699.

7 *Rankin*, 151 Wn.2d at 699.

8 *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)).

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

10 *State v. Mahoney*, 80 Wn. App. 495, 496, 909 P.2d 949 (1996).

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

12 *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998).

13 *State v. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787 (1992).

14 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).

15 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}.

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

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

18 Tegland, Washington Practice: Courtroom Handbook on Washington Evidence, at 406.

19 541 U.S. 36.

20 Crawford, 541 U.S. at 68.

21 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.)

22 396 F.3d 678 (5th Cir. 2005).

23 Rueda-Rivera, 396 F.3d at 680.

24 Rueda-Rivera, 396 F.3d at 679.

25 Rueda-Rivera, 396 F.3d at 680.

26 Rueda-Rivera, 396 F.3d at 680.

27 2005 WL 1183188 (N.Y. Crim. Ct. 2005).

28 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).

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

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