

03661-8

03661-8

No. 63661-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES DEAN WILKS,

Appellant.

2019 JUN 27 PM 1:25
CLERK OF COURT
JULIA M. HARRIS



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

APPELLANT'S REPLY BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

 1. THE TRIAL COURT ABUSED ITS DISCRETION IN
 FINDING WITNESS HOLDEN COMPETENT TO TESTIFY 1

 2. ADMISSION OF HOLDEN'S HEARSAY STATEMENT TO
 OFFICER GALLEGOS VIOLATED MR. WILKS'S SIXTH
 AMENDMENT RIGHT TO CONFRONTATION 6

B. CONCLUSION..... 11

TABLE OF AUTHORITIES

Washington Supreme Court

<u>State v. Allen</u> , 70 Wn.2d 690, 424 P.2d 1021 (1967)	2, 3, 5
<u>State v. Froehlich</u> , 96 Wn.2d 301, 635 P.2d 127 (1981)	5
<u>State v. Koslowski</u> , 166 Wn.2d 409, 209 P.3d 479 (2009)	7, 8, 9
<u>State v. Moorison</u> , 43 Wn.2d 23, 259 P.2d 1005 (1953)	3
<u>State v. Ohlson</u> , 162 Wn.2d 1, 168 P.3d 1273 (2007).....	7
<u>State v. Ryan</u> , 103 Wn.2d 165, 691 P.2d 197 (1984).....	4

Washington Court of Appeals

<u>State v. C.M.B.</u> , 130 Wn. App. 841, 125 P.3d 211 (2005).....	4, 5
---	------

United States Supreme Court

<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)	7, 8, 9
<u>Davis v. Washington</u> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)	7, 8, 10

Statutes

Laws 1986, ch. 195, § 1	5
Laws 1986, ch. 195, § 2	5
RCW 5.60.020.....	4, 5
RCW 5.60.050.....	4, 5, 6
RCW 5.60.060.....	1

Rules

ER 803(a)(1) 7
ER 803(a)(5) 2

Other Authorities

Wilder v. Commonwealth, 55 Va. App. 579, 687 S.E.2d 542
(2010) 10

A. ARGUMENT IN REPLY

1. THE TRIAL COURT ABUSED ITS
DISCRETION IN FINDING WITNESS
HOLDEN COMPETENT TO TESTIFY

The State contends Mr. Wilks waived his right to challenge Witness Holden's competency, because defense counsel did not renew his objection after the trial court reserved ruling on his initial objection. SRB at 19. This Court should reject that argument. The trial court ultimately ruled on Holden's competency to testify and the issue was fully litigated. The issue is preserved for review.

During Holden's testimony, defense counsel objected and argued Holden was not competent to testify, citing RCW 5.60.060. 1/10/08RP 77-78. The court reserved ruling until after Holden's testimony. 1/10/08RP 78. Later, during Officer Gallegos' testimony, the State moved to admit Holden's hearsay statement to Gallegos, in which he said "Look at him. He is threatening me now." 1/10/08RP 182. Defense counsel argued admission of the statement would violate Mr. Wilks's Sixth Amendment right to confront the witness, because the State had not asked Mr. Holden about the statement during direct examination, and also because Holden was not available as a witness because he was incompetent due to his brain damage. 1/10/08RP 185-86. The

parties and the court discussed Holden's competency again the following day, in the context of a discussion about whether Holden's written police statement was admissible as a recorded recollection under ER 803(a)(5). Defense counsel argued admission of the statement would violate Wilks's right to confrontation, as Holden "ha[d] difficulty being able to relay information" and was therefore incompetent. 1/11/08RP 6-7. The court directly ruled on Holden's competency to testify, stating, "I don't on this record find and can't find incompetency as that term is used in the rules. I think those issues go to his recollection and go more to the weight." 1/11/08RP 12. But the court ruled the written statement was nonetheless inadmissible, because Wilks did not have a full and fair opportunity to cross-examine Holden due to his memory lapses. 1/11/08RP 12-13.

Next, the State contends the factors set forth in State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967) for determining a witness's competency apply only to child witnesses. SRB at 14 n.14. But the State cites no case that holds the Allen factors apply only to child witnesses. To the contrary, the test the Washington Supreme Court adopted for determining the competency of *all* witnesses is similar to the Allen test. Moreover, the Legislature's

decision in 1986 to eliminate the distinction between adult and child witnesses in the competency statute suggests that a uniform test for all witnesses should apply.

Under Allen, a witness is competent to testify if the witness has: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it. Allen, 70 Wn.2d at 692.

In State v. Moorison, 43 Wn.2d 23, 28-29, 259 P.2d 1005 (1953), the Supreme Court adopted a test for determining the competency of an adult witness which is indistinguishable from the Allen test: "A mentally defective person is competent to testify as a witness if he has sufficient mental capacity to understand the nature and obligation of an oath and possessed of sufficient mind and memory to observe, recollect, and narrate the things he has seen or heard."

In State v. Ryan, the court reaffirmed that the test set forth in Moorison applies when determining the competency of a witness.

State v. Ryan, 103 Wn.2d 165, 171, 691 P.2d 197 (1984) (citing Moorison, 43 Wn.2d at 28-29).

Moreover, now that the competency statute no longer distinguishes between adult and child witnesses, there is little reason to apply a different test for children and adults.

"Washington statutes do not set a presumptive age of competency of a child, but instead treat all 'persons' the same for the purposes of competency." State v. C.M.B., 130 Wn. App. 841, 844, 125 P.3d 211 (2005).

RCW 5.60.020 provides, "*Every* person of sound mind and discretion, except as hereinafter provided, may be a witness in any action, or proceeding." (emphasis added). Persons who are not competent to testify are

(1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and

(2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050. The former version of RCW 5.60.050 provided for the incompetency of "[c]hildren under ten years of age, who appear incapable of receiving just impressions of the facts." But the 1986 Legislature removed the reference to "[c]hildren under ten years of

age," changing it to "[t]hose." C.M.B., 130 Wn. App. at 845 (citing Laws 1986, ch. 195, § 2). The same statute removed "suitable age" from the qualifications of competency set out in RCW 5.60.020. C.M.B., 130 Wn. App. at 845 (citing Laws 1986, ch. 195, § 1).

Thus, "the changes in the statutes removed the distinction between the competency of children and adults and eliminated any presumptive age of competency of a child." C.M.B., 130 Wn. App. at 845. As a result, both children *and* adults "who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly," RCW 5.60.050, are incompetent to testify. The Allen factors provide a means for determining whether this standard is met for *any* witness.

As argued in the opening brief, Holden was not competent to testify, because he did not have a memory sufficient to retain an independent recollection of the occurrence. Instead, he was apparently unable to distinguish his memory of the occurrence from his memories of other, unrelated, occurrences from his past.

The State relies on State v. Froehlich, 96 Wn.2d 301, 635 P.2d 127 (1981) in arguing that Holden was sufficiently competent to testify. SRB at 16-17. But Froehlich predates the 1986

amendments to the competency statute. Froehlich held that because there was "nothing in the record to establish that [the witness] was of unsound mind," the trial court did not abuse its discretion in ruling he was competent to testify. 96 Wn.2d at 304. But again, the test for determining the competency of an adult witness is no longer simply whether the witness is "of unsound mind." The witness must also be capable "of receiving just impressions of the facts, respecting which [he or she] is examined, [and] of relating them truly." RCW 5.60.050(2). Because Holden was not able to do so, the trial court abused its discretion in finding he was competent to testify.

2. **ADMISSION OF HOLDEN'S HEARSAY STATEMENT TO OFFICER GALLEGOS VIOLATED MR. WILKS'S SIXTH AMENDMENT RIGHT TO CONFRONTATION**

The State concedes that, if Holden's hearsay statement to Officer Gallegos was testimonial, Mr. Wilks's constitutional right to confront the witnesses was violated, because the deputy prosecutor did not question Holden about the statement on direct examination. SRB at 23, n.24. But the State argues there was no Confrontation Clause violation, because the statement was not testimonial.

To the contrary, under the test set forth by the United States Supreme Court in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and the Washington Supreme Court in State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009), Holden's statement was testimonial because he was not facing an ongoing emergency at the time he made the statement.

The State emphasizes that Holden's statement was admitted under the "present sense impression" exception to the hearsay rule. See ER 803(a)(1). But it is well established that the question of whether a hearsay statement is "testimonial" is separate from the question of whether the statement is admissible under an exception to the hearsay rule. See Crawford v. Washington, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ("[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence"); State v. Ohlson, 162 Wn.2d 1, 16-17, 168 P.3d 1273 (2007) (rejecting, in light of Davis, any *per se* rule that statements admissible as excited utterances cannot be testimonial).

The State cites Crawford in arguing that Holden's statement was nontestimonial because it was not made in response to

"structured police questioning"¹ and did not entail the "involvement of government officers in the *production of testimony with an eye toward trial*."² But the Court's use of the term "interrogation" was meant in a colloquial rather than a technical legal, sense.

Crawford, 541 U.S. at 53 n.4. Further, "a certain level of formality occurs whenever police engage in a question-answer sequence with a witness." Koslowski, 166 Wn.2d at 429.

The test for determining whether a witness's statements made to a responding police officer are testimonial is set forth in

Davis:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. The question is whether a "reasonable listener" would conclude the speaker was facing an ongoing emergency that required police assistance, and whether the statements were necessary to resolve that emergency. Koslowski, 166 Wn.2d at 418-19. "A plain call for help against a bona fide

¹ SRB at 24 (quoting Crawford, 541 U.S. at 53 n.4) (emphasis in SRB).

physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency."

Id.

Here, a reasonable listener would conclude Holden was facing no ongoing emergency at the time he made the statement. Mr. Wilks was secured inside the patrol car and the police officer was present to protect Mr. Holden from any possible danger. The State emphasizes that Mr. Holden "*perceived* an ongoing emergency." SRB at 27-28 (emphasis added). But "the fact that the victim or other complainant is distressed is not dispositive of whether an emergency exists." Koslowski, 166 Wn.2d at 424. Instead, the question is whether a "reasonable listener" would conclude the speaker was facing an ongoing emergency that required help, such as a bona fide physical threat. Id. at 425. No reasonable listener would draw that conclusion here.

The State further emphasizes that Holden's statement was spontaneous and not in response to any question. SRB at 27-28. But it is apparent from the record that the statement was made in the course of police interrogation that had the primary purpose of establishing past facts in order to aid a criminal investigation. That

² SRB at 24 (quoting Crawford, 541 U.S. at 56 n.7) (emphasis in SRB).

the statement was not made in response to a specific question is not material. Davis explained: "The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation." Davis, 547 U.S. at 822 n.1.

In Wilder v. Commonwealth, 55 Va. App. 579, 687 S.E.2d 542 (2010), the Virginia Court of Appeals held that a witness's hearsay statements to a 911 operator describing a larceny in progress, which were admissible as a present sense impression, were testimonial for purposes of the Confrontation Clause. Although the witness was describing events as they were actually happening, he was not facing an ongoing emergency that called for help. Id. at 591. The witness was not facing a bona fide threat, as the suspects were not aware of his presence, and their actions did not present a threat to others. Id.

Similarly, here, Holden's statement was testimonial because he was not facing a bona fide threat. Therefore, admission of the statement violated Mr. Wilks's constitutional right to confrontation. As argued in the opening brief, in the absence of overwhelming untainted evidence, the error was not harmless beyond a reasonable doubt and the conviction must be reversed.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Wilks's conviction for the attempted robbery of Mr. Holden must be reversed. Also, because defense counsel provided constitutionally deficient representation in failing to raise the issue of Mr. Wilks's competency to the trial court, all of the convictions must be reversed and remanded for a new trial.

Respectfully submitted this 27th day of August 2010.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 63661-8-I
)	
JAMES WILKS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] JAMES WILKS 331247 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF AUGUST, 2010.

X _____ 

2010 AUG 27 PM 4:50
COURT OF APPEALS - DIVISION ONE
CLERK OF COURT

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710