

No. 64203-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN CHRISTOPHER MARES,

Appellant.

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

The Honorable Mary E. Roberts

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 4

THE ADMISSION OF A CERTIFIED COPY OF MS.
KNOPFF’S DRIVER’S LICENSE TO ESTABLISH
HER IDENTITY VIOLATED MR. MARES’ SIXTH
AMENDMENT RIGHT TO CONFRONTATION 4

1. The Confrontation Clause bars admission of testimonial
hearsay absent an opportunity to confront the declarant..... 4

2. The DOL records were testimonial and their admission
was barred by the Confrontation Clause. 5

3. The error in admitting Ms. Knopff’s DOL records was not
harmless..... 10

E. CONCLUSION 12

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIpassim

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, § 22 1, 4

FEDERAL CASES

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) 5, 7

Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) 5, 7

Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)passim

United States v. Arnold, 486 F.3d 177 (6th Cir.2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 871, 169 L.Ed.2d 736 (2008) 5

United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010).... 9, 10

WASHINGTON CASES

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)..... 10

State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007) 9

State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007) 9

State v. Liu, 153 Wn.App. 304, 221 P.3d 948 (2009), *review granted*, ___ Wn.2d ___ (March 30, 2010) 9

State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008) 5

State v. Shafer, 156 Wn.2d 381, 128 P.3d 87, *cert. denied*, 549 U.S. 1019 (2006) 10

State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980) 10

OTHER STATE CASES

Tabaka v. District of Columbia, 976 A.2d 173
(D.C.Ct.App. 2009) 8

Washington v. State, 18 So.3d 1221 (Fla.App.Ct. 2009)..... 4, 7, 9

A. ASSIGNMENT OF ERROR

The admission of a Department of Licensing (DOL) certified copy of Brittany Knopff's driver's license to establish her identity at trial violated Mr. Mares' Sixth Amendment right to confront witnesses.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution guarantee a defendant the right to confront and cross-examine witnesses against them. Testimonial hearsay statements made by a non-testifying declarant violate the right to confrontation. A clerk's certification of a copy of a driver's license created for the sole purpose of providing evidence against the defendant is inadmissible testimonial hearsay. Here, the State introduced a certified copy of non-testifying witness, Brittany Knopff's driver's license, which was created by the prosecution for the sole purpose of identifying her as the woman Mr. Mares was alleged to have assaulted. Did the admission of the certified copy violate Mr. Mares' right to confrontation requiring reversal of his conviction and remand for a new trial?

C. STATEMENT OF THE CASE

On April 29, 2009, Sarah Winnick, the bartender at the Central Pub in Kent, was standing outside the establishment when she saw a man and a woman fighting. 7/27/09amRP 24-29. Ms. Winnick identified Brian Mares as the man involved and later identified Mr. Mares' girlfriend, Brittany Knopff, as the woman. *Id.* at 30.¹ Afraid to get involved, Ms. Winnick called the police. 7/27/09am 37.

Kent Police Detective Tim Burnside was later assigned to investigate the matter and went to Ms. Knopff's apartment. 7/23/09RP 112-15. Prior to entering the apartment, Burnside observed Mr. Mares entering the apartment. 7/23/09RP 121. Burnside later saw Mr. Mares coming out the rear of the apartment, pursued Mr. Mares, and subsequently arrested him. 7/23/09RP 122-25, 134.

Mr. Mares was charged with felony violation of a no contact order, elevated to a felony because of his alleged assault of Ms.

¹ A no contact order was admitted, which barred Mr. Mares from being within 500 feet of Ms. Knopff or her residence. CP Supp, ___ Sub No. 35G, Exhibit 10; 9/23/09RP 134.

Knopff. CP 28-29.² Ms. Knopff did not testify nor did she appear at trial. Over vehement defense objection on confrontation clause grounds, a certified copy of Ms. Knopff's driver's license was admitted and the accompanying photograph was shown to Ms. Winnick, who identified Ms. Knopff as the person who was fighting with Mr. Mares. CP Supp ____, Sub No. 4; 7/23/09RP 134, 7/27/09amRP 40-41. In addition, the photograph was shown to the initial responding police officer, Kent Police Officer Jeffrey Shirey, who also identified Ms. Knopff as the person he contacted outside the pub in response to Ms. Winnick's call. 7/23/09RP 89.

Following a jury trial, Mr. Mares was found guilty as charged. CP 64.

² Mr. Mares was also charged with reckless endangerment. CP 28-29. Ms. Knopff was carrying her and Mr. Mares' infant son when the assault allegedly occurred. *Id.* The jury was unable to reach a verdict on this count. CP 62, 66.

D. ARGUMENT

THE ADMISSION OF A CERTIFIED COPY OF MS. KNOPFF'S DRIVER'S LICENSE TO ESTABLISH HER IDENTITY VIOLATED MR. MARES' SIXTH AMENDMENT RIGHT TO CONFRONTATION

1. The Confrontation Clause bars admission of testimonial hearsay absent an opportunity to confront the declarant. The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross examine witnesses. The Confrontation Clause “applies to ‘witnesses’ against the accused - in other words, those who ‘bear testimony.’” *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citation omitted). It also “bars ‘admission of testimonial statements of a witness who did not appear at trial unless [the declarant] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), quoting *Crawford*, 541 U.S. at 53-54. The State has the burden of establishing the witness's statements were not testimonial. *United States v. Arnold*, 486 F.3d 177, 192 (6th Cir.2007), cert. denied, ___ U.S. ___, 128 S.Ct. 871, 169 L.Ed.2d 736 (2008).

A challenge to the admission of out-of-court testimony under the Confrontation Clause is reviewed *de novo*. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008).

2. The DOL records were testimonial and their admission was barred by the Confrontation Clause. The admission of the certified copy of Ms. Knopff's driver's license used to identify Ms. Knopff at trial violated Mr. Mares' right to confrontation.

The United States Supreme Court has ruled that admission of lab reports without the lab technician testifying violated the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). In *Melendez-Diaz*, the defendant was charged with distributing and trafficking in cocaine. To prove that the substance officers seized from him was in fact cocaine, the prosecutor submitted three "certificates of analysis" sworn to by laboratory analysts before a notary public. The certificates stated simply, " 'The substance was found to contain: Cocaine.' " *Melendez-Diaz*, 129 S.Ct. at 2531. The Supreme Court concluded under a "rather straightforward" application of *Crawford* that the certificates were inadmissible. *Melendez-Diaz*, 129 S.Ct. at 2531. After determining the certificates

were “quite plainly affidavits,” the Court held that they constituted “testimonial” statements because they were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’ ” *Melendez-Diaz*, 129 S.Ct. at 2532, quoting *Davis*, 547 U.S. at 830. Moreover, the statements were “ ‘made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.’ ” *Melendez-Diaz*, 129 S.Ct. at 2532, quoting *Crawford*, 541 U.S. at 52. Consequently, the analysts were “witnesses” for Confrontation Clause purposes and *Melendez-Diaz* had the right to confront them. *Melendez-Diaz*, 129 S.Ct. at 2532. Because he was not given this opportunity, the evidence should not have been admitted. *Melendez-Diaz*, 129 S.Ct. at 2542. The Court concluded, “The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against *Melendez-Diaz* was error.” *Melendez-Diaz*, 129 S.Ct. at 2542.

Regarding certifications or affidavits by clerks, the Court held that in some cases these can be testimonial: “A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts here did here: *create* a

record for the sole purpose of providing evidence against a defendant.” *Id.* at 2539 (italics in original).

No cases from Washington have addressed the scope of *Melendez-Diaz* as it applies to DOL certifications. Two decisions from other jurisdictions have addressed this issue and concluded a DOL certification, similar to that admitted here, violates the Confrontation Clause in light of *Melendez-Diaz*. In *Washington v. State*, and relying on *Melendez-Diaz*, the Florida Court of Appeal ruled that a “certification of non-licensure” prepared by the State of Florida Licensing Division, Construction Industry Licensing Board, in a unlicensed contractor criminal matter violated the Confrontation Clause, because it

is accusatory, was introduced to establish an element of the crime, was prepared at the request of law enforcement as part of its investigation in this case, and is evaluative in the sense that it represents not simply production of an existing record, but an assertion regarding the individual’s search of a database or databases. As such, the admission of the document, over the defendant’s *Crawford* objection, was error and a violation of the defendant’s Sixth Amendment rights.

18 So.3d 1221, 1224 (Fla.App.Ct. 2009).

Similarly, in *Tabaka v. District of Columbia*, the District of Columbia Court of Appeals, again relying on *Melendez-Diaz*, ruled

that the admission of a Department of Motor Vehicles (DMV) certification that a search of its records revealed no license for the defendant (CNR) in a prosecution for driving without a driver's license violated the Sixth Amendment. 976 A.2d 173, 175-76 (D.C.Ct.App. 2009). The Court ruled:

The Supreme Court's analysis [in *Melendez-Diaz*] conclusively shows that the CNR in this case, "a clerk's certificate attesting to the fact that the clerk searched for a particular relevant record and failed to find it," was inadmissible over objection without corroborating testimony by the DMV official who had performed the search. The contrary conclusion reached by a division of this court in an analogous setting, (attesting to no record of license to carry a pistol or registration of firearm not "testimonial", cannot survive the holding and analysis of *Melendez-Diaz*. And, because the CNR was the sole and sufficient proof of appellant's non-licensure to operate a motor vehicle, her conviction for that offense cannot stand.

Id at 176 (citations omitted).

In a slightly different scenario but still relevant to the issue here, in *United States v. Martinez-Rios*, the Fifth Circuit ruled the admission of a certificate of nonexistence of record (CNR) in a undocumented alien prosecution violated the Sixth Amendment. 595 F.3d 581, 585-86 (5th Cir. 2010).

The Washington Supreme Court has held that admission of a clerk's certification to the absence of DOL record for a defendant

does not violate the Confrontation Clause. *State v. Kirkpatrick*, 160 Wn.2d 873, 888-89, 161 P.3d 990 (2007). See also *State v. Kronich*, 160 Wn.2d 893, 903, 161 P.3d 982 (2007) (admission of certificated DOL statement regarding revocation status of defendant's license also not violative of Sixth Amendment). These cases were decided before the decision in *Melendez-Diaz*, and, as the *Washington*, *Martinez-Rios*, and *Tabaka* decisions indicate, must be reexamined in light of *Melendez-Diaz*.³

Here, Mr. Mares objected to the admission of the DOL certified copy on confrontation clause grounds. 7/23/09RP 100-03. Further, counsel noted that instead of merely certifying to the authenticity of the copy, the clerk "had to search a database for Brittany Knopff. She had to decide whether or not this was the Brittany Knopff that the prosecutor was interested in." 7/23/09RP 102.

As a consequence, the clerk's action here is identical to the clerk's actions in *Takada* and *Washington*. The clerk's certification was not merely to the copy's authenticity, but was the result of a

³ The Supreme Court has granted review of this Court's decision in *State v. Liu*, 153 Wn.App. 304, 221 P.3d 948 (2009), review granted, ___ Wn.2d ___ (March 30, 2010), which applied *Melendez-Diaz* and ruled reports by a non-testifying pathologist and laboratory technician did not violate the Sixth Amendment,

search by the clerk of the DOL database for “Brittany Knopff,” and an analysis to determine whether the “Brittany Knopff” she found was indeed the “Brittany Knopff” in this case. As a result, the admission of this certified copy violated Mr. Mares’ right to confrontation. *Melendez-Diaz*, 129 S.Ct. at 2539.

3. The error in admitting Ms. Knopff’s DOL records was not harmless. Confrontational clause errors are subject to a harmless error analysis. *State v. Shafer*, 156 Wn.2d 381, 395, 128 P.3d 87, *cert. denied*, 549 U.S. 1019 (2006). “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is presumed to be prejudicial and the State bears the burden of proving beyond a reasonable doubt that the error was harmless. *Guloy*, 104 Wn.2d at 425; *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

The certified copy of Ms. Knopff’s driver’s license containing her photograph was the *only* proof the State offered of her identity. The copy of the driver’s license was generated by the prosecution for the sole purpose of identifying Ms. Knopff at trial and was the

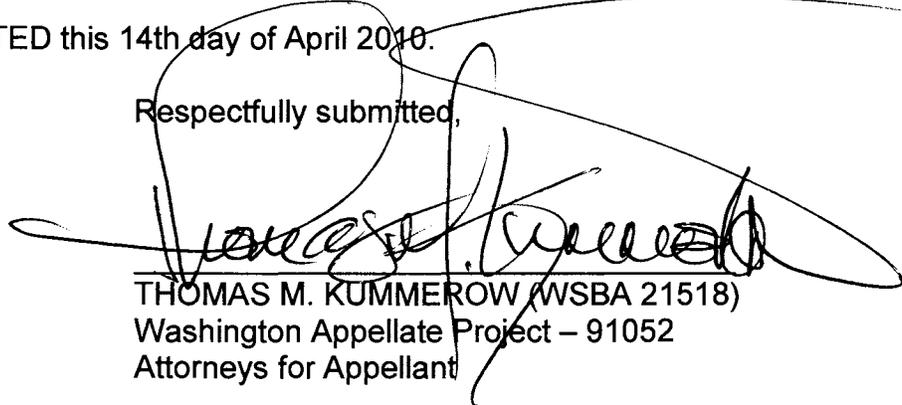
result of the clerk searching the DOL database for the name of “Brittany Knopff.” The photograph was shown at trial to the initial responding officer and he identified Ms. Knopff as the woman he spoke with at the scene. 7/23/09RP 89. The photograph was also shown to Sarah Winnick, the witness who claimed she saw Mr. Mares assaulting Ms. Knopff, who also identified Ms. Knopff as the person she saw. 7/27/09amRP 40. Since Ms. Knopff did not testify or appear at the trial, these two witnesses were the only ones who identified Ms. Knopff as the woman they observed that night who had claimed Mr. Mares assaulted her. As a consequence, the error in admitting the DOL copy of Ms. Knopff’s driver’s license and its accompanying photograph of Ms. Knopff was not harmless. Mr. Mares is entitled to reversal of his conviction and remand for a new trial.

E. CONCLUSION

For the reasons stated, Mr. Mares submits this Court must reverse his conviction and remand for a new trial.

DATED this 14th day of April 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and extends upwards into the 'DATED' line.

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Attorneys for Appellant

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DIVISION ONE**

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)	
Respondent,)	
)	NO. 64203-1-I
v.)	
)	
BRIAN MARES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **OPENING 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:

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