

64328-2

64328-2

NO. 64328-2-I

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

REC'D
JUL 13 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

TRAMAINE ISABELL,

Appellant.

2010 JUL 13 PM 3:53


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

The Honorable Jeffrey Ramsdell, Judge

REPLY BRIEF OF APPELLANT

JARED B. STEED
ERIC BROMAN
Attorneys for Appellant

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

TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ARGUMENT IN REPLY</u> | 1 |
| 1. THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS FROM POREE’S 911 CALL..... | 1 |
| B. <u>CONCLUSION</u> | 5 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Ohlson
162 Wn.2d 1, 168 P.3d 1273 (2007)..... 2, 3, 4

State v. Pugh
167 Wn.2d 825, 255 P.2d 892 (2009)..... 2

State v. Rivera
51 Wn. App. 556, 754 P.2d 701 (1988)..... 1

State v. Smith
148 Wn.2d 122, 59 P.3d 74 (2002)..... 1

FEDERAL CASES

Barber v. Page
390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)..... 1

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

A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS FROM POREE'S 911 CALL

Testimonial statements may not be presented through a hearsay witness when the declarant does not testify, unless there was a prior opportunity to cross-examine the declarant about the testimonial statement. Crawford v. Washington, 541 U.S. 36, 59, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Before a witness can be declared unavailable, the State must make a good-faith effort to obtain the witness' presence and the witness must rebuff that effort. Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); State v. Smith, 148 Wn.2d 122, 132, 59 P.3d 74 (2002). Good faith requires untiring efforts in good earnest. State v. Rivera, 51 Wn. App. 556, 559, 754 P.2d 701 (1988).

Isabell argues the trial court violated his constitutional right to confront witnesses by admitting Poree's testimonial statements identifying Isabell as the person who entered her apartment, because Poree did not testify at trial and Isabell did not have a prior opportunity to cross-examine her. Brief of Appellant (BOA) at 1, 9-20. Though failing to address why Poree was not unavailable as a witness at trial, the State nonetheless claims Poree's statements were properly admitted as nontestimonial. Brief of Respondent (BOR) at 1, 6-15 (citing State v. Pugh, 167 Wn.2d 825, 255

P.2d 892 (2009); State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007)).

Each case relied upon by the State is distinguishable.

In Pugh, Bridgette Pugh called 911 and alleged her husband, Timothy Pugh, assaulted her. Bridgette referred to the alleged assault in both past tense and the present tense, stating, “He’s [Pugh] beating me up (unintelligible).” Bridgette was concerned Pugh would assault her again if she went outside. Bridgette also said she needed an ambulance. Police officers “found Mrs. Pugh obviously upset and crying.” Bridgette had bruises and a chipped tooth. Pugh, 167 Wn.2d at 829-31. The court concluded Bridgette’s statements were nontestimonial because Bridgette’s conflicting statements about Pugh’s presence and request for an ambulance suggested a medical emergency requiring assistance. Pugh, 167 Wn.2d at 833-34.

Unlike Pugh, when Poree called 911, the incident was over and there was no present emergency or threat of harm. Poree referred to the alleged incident in the past tense throughout the 911 call and was across the street at a neighbor’s apartment when she made the call. Poree’s tone with the 911 operator was calm, and she gave no indication she needed medical attention or was being threatened or forcibly restrained. 2RP 81, 83. Choi said Poree had no visible injuries and declined medical assistance. 3RP 85.

This case is also distinguishable from Ohlson, 162 Wn.2d 1. Police responded to a report that a speeding car was trying to hit juveniles standing on a sidewalk. The juveniles told police the car drove toward them on at least four separate occasions, driving out of sight before returning. Ohlson admitted to yelling racial slurs and making gestures at the juveniles while driving past them multiple times, as well as to driving “kind of recklessly to scare [L.F. and D.L.],” at one point coming within “about five feet from [D.L.]” Ohlson said he was in a “fit of rage” because he lied to his wife about using drugs. Ohlson, 162 Wn.2d at 5-7.

The court found the juveniles’ statements nontestimonial, concluding they addressed a present emergency because Ohlson’s behavior was unpredictable since he had previously left the scene before returning and escalating his behavior. Ohlson, 162 Wn.2d at 18-19. The court also concluded the statements were admissible as excited utterances because both juveniles were “pretty upset” and “pretty shaken up” and described the incident in a “spontaneous recitation of the facts.” Ohlson, 162 Wn.2d at 9. Finally, the trial court noted any error in admitting the juveniles’ statements to police was harmless because eyewitness testimony, and Ohlson’s own statements, both at arrest and trial, overwhelmingly lead to a finding of guilt. Ohlson, 162 Wn.2d at 19, n. 4.

Unlike Ohlson, Isabell never returned, or threatened to return, to escalate the alleged situation. Although Isabell's whereabouts were unknown during the 911 call, unlike the juveniles who remained at the alleged incident scene, Poree was safely at her neighbors' house during the call. Furthermore, Poree's 911 call was not a "spontaneous recitation of the facts" as in Ohlson. Most of the 911 call involves Poree answering questions. 2RP 87-89. Indeed, Poree identified Isabell as the alleged intruder only after being asked for his name by the 911 operator. Poree was not in a state of excitement when she made the call. She was not crying, frantic or hysterical. Poree sounds calm as she tells the operator about the alleged contact with Isabell. Ex 2. Poree was being asked what happened as part of an investigation into past events and not to resolve a present emergency. Therefore, her statements were testimonial.

Finally, as discussed in Isabell's opening brief, because this case came down to identity, Poree's hearsay statements cannot be considered harmless. BOA at 17-20, 25-26. Unlike Ohlson, without admission of Poree's statements there is not overwhelming untainted evidence-connecting Isabell to the alleged incident. Because there is a reasonable probability the hearsay error materially affected the outcome of the trial, Isabell's conviction should be reversed and the case remanded for a new trial.

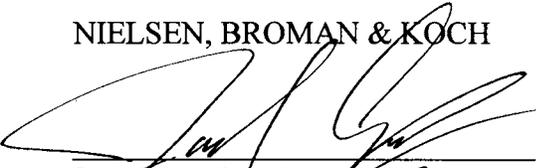
B. CONCLUSION

For the reasons discussed above and in the opening brief, Isabell's conviction should be reversed and the case remanded for a new trial.

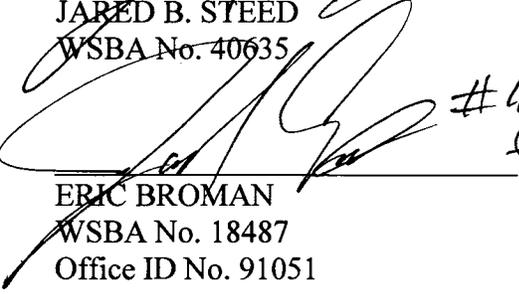
DATED this 13th day of July, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635



ERIC BROMAN
WSBA No. 18487
Office ID No. 91051

40635
for

Attorneys for Appellant

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

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 64328-2-1 |
| |) | |
| TRANAINE ISABELL, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TRANAINE ISABELL
DOC NO. 733930
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JULY, 2010.

x *Patrick Mayovsky*