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No. 65622-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CORDARREL ROBERT-LOUIS HAYES,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The State charged Cordarrel Hayes with second degree assault but the complaining witness did not testify at trial. Instead, the State was permitted to rely upon her hearsay statements, including those made to a firefighter, a physician, and a social worker, in which the witness claimed she was assaulted by Mr. Hayes. But no exception to the hearsay rule existed at the time of the founding of the Washington Constitution which would have permitted admission of those statements. Thus, their admission violated Mr. Hayes's state constitutional right to confrontation.

Also, the State was permitted to introduce evidence of Mr. Hayes's prior violent acts against the complaining witness to show that she was absent from trial because she was afraid to testify. But the trial court refused to admit two letters she wrote to Mr. Hayes in jail, which were relevant to show she was *not* afraid of him, and which supported the defense theory that she fabricated the allegations in retaliation for his relationships with other women. Exclusion of the letters violated Mr. Hayes's constitutional right to attack the credibility of the complaining witness and to present a defense. Because the above errors cumulatively deprived Mr. Hayes of a fair trial, reversal is required.

B. ASSIGNMENTS OF ERROR

1. Admission of Ms. Shaw's hearsay statements to a firefighter violated Mr. Hayes's state and federal constitutional right to confront the complaining witness.

2. Admission of Ms. Shaw's hearsay statements to a physician violated Mr. Hayes's state and federal constitutional right to confront the complaining witness.

3. Admission of Ms. Shaw's hearsay statements to a social worker violated Mr. Hayes's state and federal constitutional right to confront the complaining witness.

4. Precluding admission of Ms. Shaw's letters to Mr. Hayes violated his constitutional right to attack the credibility of the complaining witness and to present a defense.

5. The above errors cumulatively deprived Mr. Hayes of a fair trial.

6. The trial court erred in including a 2005 prior Ohio conviction for "trafficking in marijuana" in Mr. Hayes's offender score, where the State did not prove the conviction was comparable to a Washington felony.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In determining whether admission of hearsay statements without an opportunity for cross-examination violates an accused's article 1, section 22 right to confrontation, the question is whether the statements would have been admissible under a hearsay exception in existence at the time of the adoption of the Washington Constitution. Did admission of the complaining witness's hearsay statements to a firefighter, physician and social worker without an opportunity for cross-examination violate Mr. Hayes's state constitutional right to confrontation, where such statements would not have been admissible at the time of the founding of the Washington Constitution?

2. Were the statements "testimonial" for purposes of the Sixth Amendment, where the statements described past events, were not made during the course of an ongoing emergency, and were made after police had begun investigating the crime?

3. A criminal defendant has a constitutional right to attack the credibility of the State's witnesses and to present a defense. Was that right violated where Mr. Hayes was not permitted to introduce two letters the complaining witness sent to him in jail, which showed she was not afraid of him but deliberately chose not

to come to trial, and supported the defense theory that she fabricated the allegations in retaliation for his relationships with other women?

4. Did the above errors cumulatively deprive Mr. Hayes of a fair trial?

5. Did the State fail to prove Mr. Hayes's prior Ohio conviction for "trafficking in marijuana" was comparable to a Washington felony, where the Ohio statute criminalizes more conduct than the corresponding Washington statute, and the State did not prove Mr. Hayes committed the narrower offense?

D. STATEMENT OF THE CASE

On the night of February 21, 2010, Cordarrel Hayes went to the Diamond Club in Seattle with some friends. 5/12/10RP 37-38. His girlfriend, Shanay Shaw, met him there later; she drove separately with other friends. 5/12/10RP 41. Mr. Hayes and Ms. Shaw had been dating for about two and one-half years and lived together. 5/12/10RP 36. They had a 16-month-old son, Kaylin. 5/12/10RP 36.

After a few hours, Mr. Hayes and Ms. Shaw decided to go somewhere else. 5/12/10RP 41. She walked him to his car so he could drive his friends and drop them off first. 5/12/10RP 41. As

they stood behind the car talking, a tall man Mr. Hayes did not know pushed him from behind. 5/12/10RP 41. The man accused Mr. Hayes of sleeping with his girlfriend. 5/12/10RP 42. Ms. Shaw heard the comment and became angry. 5/12/10RP 42. The man swung at Mr. Hayes with his fist and the two began fighting. 5/12/10RP 43. Ms. Shaw got between the two men and tried to break them apart. 5/12/10RP 43. In the struggle, both Mr. Hayes and the other man accidentally hit Ms. Shaw. 5/12/10RP 43. Ms. Shaw hit her head against a wall. 5/12/10RP 59-60. She ran back toward the club. 5/12/10RP 45.

Ms. Shaw approached a Seattle police officer, John Schweiger, who was sitting in his patrol car in the parking lot, having been called to the scene on an unrelated matter. Sub #33A at 5-6, 9.¹ Ms. Shaw came up to the car and asked for help; she seemed "shook up" and "scared." Sub #33A at 11. She had a bloody lip. Sub #33A at 11. He asked her what was going on and she said "she'd been beat up, and that her boyfriend had done it." Sub #33A at 11. She said her boyfriend was Cordarrel Hayes. Sub #33A at 12. She said she had been "punched, knocked down, and

¹ Officer Schweiger testified by deposition on April 28, 2010, and a transcript of his testimony was prepared. The transcript, sub #33A, was converted to a file exhibit after trial. The exhibit has been designated. It will be cited in this brief as Sub #33A.

then kicked in the head." Sub #33A at 12. As she was talking to the officer, she saw Mr. Hayes walking through an adjoining parking lot and said, "there he is." Sub #33A at 16. Officer Schweiger asked if that was the guy who beat her up and she said, "yes." Sub #33A at 17. He got out of the car and stared at Mr. Hayes, who turned around and left. Sub #33A at 18. The officer called an aid car for Ms. Shaw. Sub #33A at 11.

Thomas Burke, a Seattle firefighter, was called to the scene to tend to Ms. Shaw. 5/11/10RP 83. Ms. Shaw was crying, physically shaken, and in pain. 5/11/10RP 86. Mr. Burke noted that she was under the influence of alcohol. 5/11/10RP 89. She told him her boyfriend beat her up. 5/11/10RP 87. She said she was hit in the mouth and the neck. 5/11/10RP 86. She had swelling and a cut on her lip and pain in her neck. 5/11/10RP 86. She was sent to the hospital. 5/11/10RP 86.

Ms. Shaw was admitted to Harborview. 5/11/10RP 16. She told medical personnel that her boyfriend choked her and hit her in the face with his fist and she fell to the ground. 5/11/10RP 18, 21-22. She said she had pain in her face, head and neck. 5/11/10RP 18. She had a broken nose but doctors could not tell how old the injury was. 5/11/10RP 19, 32-33. She also had a cut on her lip and

swelling on her face and neck but no other injuries. 5/11/10RP 18-19. She said she had been assaulted by her boyfriend four times in the past. 5/11/10RP 23. Doctors prescribed ibuprofen and a neck collar. 5/11/10RP 25.

Ms. Shaw then talked to a social worker at the hospital, Alice Walters. 5/10/10RP 16. Ms. Walters works with victims of domestic violence, providing emotional support and referrals to domestic violence resources, such as counseling and housing, as needed. 5/10/10RP 16-17. Ms. Shaw seemed fearful and had a bloody, swollen lip. 5/10/10RP 19. Ms. Walters asked what happened and Ms. Shaw said she was outside a bar with her boyfriend, Mr. Hayes, and he grabbed her and threw her down. 5/10/10RP 19-21. She said it had happened four times previously, but never as seriously. 5/10/10RP 19. She said she did not feel safe going home and Ms. Walters found a domestic violence shelter for her. 5/10/10RP 22-23.

Mr. Hayes was arrested later that day. 5/10/10RP 24. He told the officer transporting him to the police station that he had been fighting with another man and his girlfriend got into the middle of the fight. 5/10/10RP 28. She hit her head against a wall, which caused her nose to break. Id.

Mr. Hayes was charged with one count of second degree assault, domestic violence, RCW 9A.36.021(1)(a). CP 14-15.² The State alleged Mr. Hayes intentionally assaulted Ms. Shaw and thereby recklessly inflicted substantial bodily harm. Id.

Prior to trial, the State announced Ms. Shaw was not available for trial, although the State had issued a subpoena for her. 5/05/10RP 9. The State never sought a material witness warrant for Ms. Shaw. 5/12/10RP 22. At trial, Ms. Shaw's mother, Ellecia Johnson, testified that Ms. Shaw was at home and the prosecutor had never asked where she was. 5/11/10RP 57. Ms. Johnson testified Ms. Shaw did not come to court because she was afraid of Mr. Hayes. 5/11/10RP 58.

The State also moved to admit evidence that Mr. Hayes had committed previous acts of domestic violence against Ms. Shaw. 5/05/10RP 67-69. The State intended to elicit testimony from Ms. Johnson that she witnessed Mr. Hayes assault Ms. Shaw two times in the past. 5/05/10RP 69. Defense counsel objected, arguing the evidence was not relevant. 5/05/10RP 72-73. The court overruled

² The State also charged Mr. Hayes with second degree assault by strangulation, RCW 9A.36.021(1)(g), but the jury was unable to agree on a verdict and the court declared a mistrial on that count. CP 14-15, 5/12/10RP 2. The State also charged Mr. Hayes with one count of witness tampering and two counts of misdemeanor violation of a no-contact order, based on his actions after arrest. CP 14-15, 75-77. Those charges are not at issue in this appeal.

the objection, ruling the evidence was admissible to explain the witness's absence from trial. 5/05/10RP 72, 76-80.

The defense moved to admit two letters that Ms. Shaw wrote to Mr. Hayes while he was in jail. 5/06/10RP 3-4; Exhibit 3, 27. In one of the letters, Ms. Shaw expressed frustration that Mr. Hayes "was with a diff[erent] girl" and hanging out with "lil girl-things." Exhibit 27 at 1. But she also stated, "I still have love for you." Id. In another letter, she stated, "I want you out because I need you." Exhibit 3 at 1. She also stated she had received a subpoena "in the mail," but "I'm not" going to testify. Id. at 2.

Defense counsel argued Ms. Shaw's letters were relevant to show that she was not actually afraid of Mr. Hayes. 5/06/10RP 3-4. In other words, the letters rebutted the State's claim that Ms. Shaw did not testify at trial because she was afraid of Mr. Hayes. Id. Instead, the letters supported the defense theory that Ms. Shaw did not testify because she had fabricated the allegations. Counsel argued the letters supported the defense theory that Ms. Shaw fabricated the allegations because she was angry about Mr. Hayes's relationships with other girls. 5/12/10RP 32.

The court ruled the letters were inadmissible because they were not relevant. 5/11/10RP 104-06.

At trial, Ms. Shaw's mother, Ms. Johnson, testified over defense objection that she witnessed Mr. Hayes grab Ms. Shaw by the arm, shove her against a wall, shake her, slap her, and punch her with his fist, on three separate occasions. 5/11/10RP 45.

Ms. Shaw's hearsay statements to Officer Schweiger, the firefighter, medical personnel at Harborview, and the social worker, were also admitted at trial. Sub #33A; 5/10/10RP 16-23; 5/11/10RP 18-33, 83-86.

Nichole O'Donnell, a friend of Mr. Hayes who was present at the Diamond Club that night, also testified. 5/11/10RP 60. She saw Mr. Hayes and the other man fighting by the car in the parking lot, but she did not see Ms. Shaw get hit. 5/11/10RP 71. She also testified that two days after the incident, Ms. Shaw told her that she had lied to police about the assault because she was angry at Mr. Hayes for cheating on her and wanted him to go to jail. 5/11/10RP 80.

The parties also stipulated that at Mr. Hayes's arraignment on March 9, 2010, Ms. Shaw told a State victim advocate that the incident was all a misunderstanding and that she had got in the way when Mr. Hayes was fighting with someone else. 5/12/10RP 30.

Mr. Hayes testified consistently with his statement to police and with Ms. Shaw's recantation—that she was accidentally injured when she tried to intervene in the fight between him and the other man who assaulted him in the parking lot at the club. 5/12/10RP 37-44.

In closing argument, the deputy prosecutor said "this [is] a case about fear and manipulation." 5/12/10RP 62. The prosecutor argued Ms. Shaw was not present in court, and had recanted her story to police, because she had been manipulated by Mr. Hayes and was afraid. 5/12/10RP 62-63.

The jury found Mr. Hayes guilty as charged of assault in the second degree (reckless infliction of bodily harm). CP 38-39, 41.

At sentencing, the trial court calculated Mr. Hayes's offender score as a "5," which included a 2005 Ohio conviction for "trafficking in marijuana." CP 63, 68.

E. ARGUMENT

1. ADMISSION OF MS. SHAW'S HEARSAY STATEMENTS UNDER THE MEDICAL DIAGNOSIS AND TREATMENT EXCEPTION TO THE HEARSAY RULE VIOLATED MR. HAYES'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSER

a. Admission of the statements violated article 1, section 22 of the Washington Constitution. The Washington Constitution provides criminal defendants the right to confront and cross-examine the witnesses against him. Const. art. 1, § 22. Article 1, section 22 states, "in criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face." This constitutional provision provides greater protection for the right to confrontation than does the Sixth Amendment. State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009); State v. Foster, 135 Wn.2d 441, 473-74, 481, 957 P.2d 712 (1998) (Alexander, J., concurring in part, dissenting in part); 135 Wn.2d at 481-94 (Johnson, J., dissenting).³ An analysis under the factors announced in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), is not required. Pugh, 167 Wn.2d at 835.

³ In Foster, five justices agreed that the state confrontation clause is more protective than the federal confrontation clause: the one-justice concurrence/dissent and the four-justice dissent. The concurrence/dissent created a plurality that the conviction should be affirmed.

Construction of the state constitution is a question of law that is reviewed de novo. Pugh, 167 Wn.2d at 835.

In interpreting Washington's Confrontation Clause, the appellate court looks at the history of the constitutional provision and Washington law at the time of the adoption of the constitution. The Pugh Court, for example, determined that statements to a 911 operator did not violate the Washington Constitution because similar statements would have been admitted in court at the time of the constitution's adoption. Pugh, 167 Wn.2d at 837-40. The law at the time of the passage of our constitution similarly demonstrates that Washington's Confrontation Clause does not permit a prosecution based primarily upon statements made by a nontestifying witness for purposes of medical treatment.

The State's case was based in large part upon statements Ms. Shaw made to a firefighter who was providing her medical treatment, and to medical personnel and a social worker at Harborview. The statements were presumably admitted under the hearsay exception for statements for medical diagnosis and treatment, ER 803(a)(4). This modern hearsay exception became part of Washington's evidence law in 1978, when the Rules of Evidence were adopted by the Washington Supreme Court.

Judicial Council Task Force on Evidence Comment, ER 803(a)(4) (found in Robert H. Aronson, The Law of Evidence in Washington § 803.02, at 803-6.1 (4th ed. 2008)).

Prior to 1978, a patient's description of past symptoms and medical history to a medical provider was not admissible in Washington courts as substantive evidence, although a physician could testify as to his medical conclusion based in part upon the patient's description. Petersen v. Dept. of Labor & Industries, 36 Wn.2d 266, 269, 217 P.2d 607 (1950); Kraettli v. North Coast Transp. Co., 166 Wash. 186, 189-94, 6 P.2d 609 (1932); Task Force Comment (Aronson, The Law of Evidence, *supra*, at §803.02) (citing Smith v. Ernst Hardware Co., 61 Wn.2d 75, 377 P.2d 258 (1962) and Kennedy v. Monroe, 15 Wn. App. 39, 547 P.2d 899 (1976)). A patient's statements to her physician were "admissible for the purpose of affording the jury some means of determining the weight to give to the opinion of the physician, but not as evidence tending to prove the actual condition of the patient at the time." Kraettli, 166 Wash. at 191 (quoting Estes v. Babcock, 119 Wash. 270, 274, 205 P. 12 (1922)).

Thus, prior to the adoption of ER 803(a)(4), a treating physician could relate a patient's description of symptoms only to

show the basis for his expert opinion. The patient's statements were not admissible as substantive evidence, nor would a medical treatment provider relate a patient's description of a crime or identification of the perpetrator of a crime. FRE Advisory Committee Note to Fed.R.Evid. 803(a)(4) (found in Aronson, The Law of Evidence in Washington, supra, § 803.09, at 803-13).⁴ As the Advisory Committee to the Federal Rules of Evidence explained, "[t]hus, a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light." Id.

This rule was consistent with the common law at the time of the adoption of Washington's Constitution. A hearsay exception existed for a person's exclamation of pain and terror at the time of an injury, similar to the current exception for excited utterances. Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues § 271, at 202-03 (9th ed. 1884). This exception did not extend to the patient's hearsay statements as to the cause of her injury. Id. at 202 n.4. As one respected commentator of the day noted, a doctor could not testify as to his patient's description of the cause of an injury because the physician "would merely repeat

⁴ Washington's evidence rules were patterned after the Federal Rules of Evidence, and the comments of the drafters of the federal rules are therefore

what the patient said." John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law, § 688, at 784 (1909). While an exception existed for the "fact of complaint" of a sexual assault to demonstrate the prosecutrix made a timely report, this exception could not be used to identify the perpetrator, and it did not extend to a non-sexual assault. Wharton, Treatise, supra, at § 273, at 204-05.

The Washington Supreme Court has long held that article 1, section 22's guarantee of due process includes the right to meet the witnesses in open court and cross-examine them. State v. Stentz, 30 Wash. 135, 142, 70 P. 241 (1902) ("This means that the examination of such a witness shall be in open court, in the presence of the accused, with the right of the accused to cross-examine such witness as to facts testified to by him."); State v. Eddon, 8 Wash. 292, 301, 305, 36 P. 139 (1894) (error for trial court to instruct jury that dying declaration may be given same weight as live testimony). As demonstrated above, Washington courts in 1889 would not have permitted a medical provider to repeat to the jury Ms. Shaw's statements describing the alleged assault and identifying Mr. Hayes as her assailant. Instead, her

enlightening. State v. Sua, 115 Wn. App. 29, 40, 60 P.3d 1234 (2003).

description of her symptoms would be admissible only to explain the doctor's expert opinion as to the nature of her injuries.

Moreover, modern science and social science demonstrate the theory behind the modern hearsay exception for medical diagnosis is flawed and undermine its continued use in the absence of cross-examination. The justification for a hearsay exception for statements for medical treatment is that a patient is motivated to be truthful in seeking medical treatment. Petersen, 36 Wn.2d at 269; Judicial Task Force Comment on ER 803(a)(4) (Aronson, Law of Evidence, supra, § 803.03, at 803-12). But this is often not true. Many patients do not accurately report their conditions to treating physicians. John J. Capowski, An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception, 33 Ga. L. Rev. 353, 385-86 (1999) (and studies cited therein, comparing misrepresentation among somatic and mental health patients).⁵

Ms. Shaw did not testify at Mr. Hayes's trial in part because the State chose not to compel her attendance. Although the State issued a subpoena, the State never sought to obtain a material

⁵ Other studies show physicians are poor at discerning patient dishonesty. Id. at 386, (citing Douglas Woolley, M.S. & Thad Clements, M.D., Family Medical Residents' and Community Physicians' Concerns about Patient Truthfulness, 72 Acad. Med. 155, 156 (1997)).

witness warrant for Ms. Shaw. 5/05/10RP 9; 5/12/10RP 22. Ms. Shaw's mother testified that Ms. Shaw was at home, and presumably available, at the time of trial. 5/11/10RP 57. A witness may not be considered unavailable unless the State has made a "good faith" effort to obtain the witness's presence at trial. State v. Smith, 148 Wn.2d 122, 132, 59 P.3d 74 (2002). The issuance of a subpoena, alone, does not satisfy the requirement. Additional efforts must be made to secure the witness's presence. State v. Rivera, 51 Wn. App. 556, 560, 754 P.2d 701 (1988).

The jury was never able to evaluate Ms. Shaw's demeanor and credibility, and Mr. Hayes never had the opportunity to cross-examine her. This Court should find hearsay statements to a medical provider were not admissible at the time of the writing of Washington's Constitution, and article 1, section 22 forbids their admission absent an opportunity for cross-examination. The admission of Ms. Shaw's statements to three medical providers violated Mr. Hayes's state constitutional right to confront his accuser.

b. Admission of Ms. Shaw's hearsay statements to medical providers violated Mr. Hayes's Sixth Amendment right to confrontation. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."⁶ The essence of the Sixth Amendment's right to confrontation is the right to meaningful cross-examination of anyone who bears testimony against him. Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); United States v. Owens, 484 U.S. 554, 557, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

"A witness's testimony against a defendant is thus inadmissible against a defendant unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 2531, 174 L.Ed.2d

⁶ This guarantee applies to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

314, (2009); accord Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); Crawford, 541 U.S. 53-54.

A Confrontation Clause challenge is reviewed de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). The State has the burden on appeal of establishing that statements are nontestimonial. Id. at 417 n.3. This Court should find Ms. Shaw's statements describing the alleged assault and identifying the perpetrator were testimonial.

i. The United States Supreme Court has declined to provide a definitive definition of what statements are "testimonial" for purposes of the Confrontation Clause. "[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused" Bruton v. United States, 391 U.S. 123, 138, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (Stewart, J., concurring). In Crawford, the United States Supreme Court announced the Confrontation Clause forbids the introduction of "testimonial" hearsay against the accused unless the declarant is unavailable and the defendant had the prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 54.

The Crawford Court, however, declined to provide a definitive definition of what qualifies as a "testimonial" statement,

instead offering examples of the "core class of testimonial statements," such as "pretrial statements that declarants would reasonably expect to be used prosecutorially." Id. at 51-52. The Supreme Court again failed to provide a complete definition of testimonial statements in Davis, but offered further insight into its meaning. Davis, 547 U.S. at 822. The Davis Court explained that statements made in response to police interrogation are not testimonial if the primary purpose of the interrogation is to address an on-going emergency rather than to establish past events. Id.

The United States Supreme Court has not addressed under what circumstances statements to medical personnel are testimonial for purposes of Confrontation Clause analysis. Lower courts have reached divergent results when deciding whether statements to medical personnel describing criminal activity are testimonial. Jeffrey L. Fisher, What Happened—And What is Happening—to the Confrontation Clause, 15 J.L. Pol'y 587, 619 (2007).

ii. The historical treatment of statements to medical personnel demonstrate Ms. Shaw's description of the assault were testimonial. This Court has previously found a domestic assault victim's statements to a physician were not

testimonial because (1) they were made for diagnosis and treatment, (2) the speaker did not expect the statements would be used at trial, and (3) the doctor was not working with the State. State v. Sandoval, 137 Wn. App. 532, 537, 154 P.3d 271 (2007) (citing State v. Moses, 129 Wn. App. 718, 729-30, 119 P.3d 906 (2005)). This analysis, however, did not take into account Crawford's return to the original principles of Sixth Amendment jurisprudence in addressing the Confrontation Clause, which was designed as a break from prior English practices. Crawford, 541 U.S. at 50, 60-61. Looking at the history of the medical exception to the hearsay rule demonstrates Ms. Shaw's statements to medical providers would not have been considered admissible against Mr. Hayes by the Framers of the Constitution.

At the time of the drafting of the United States Constitution, doctors were permitted to give their opinions as to medical conditions, but hearsay statements to physicians were not generally admissible. Only spontaneous expressions of pain and suffering were admissible because they were viewed as more reliable than the patient's later testimony in court. Similarly, a woman's statements while undergoing the pain of childbirth were admissible to show parentage. David J. Carey, Reliability Discarded: The

Irrelevance of the Medical Exception to Hearsay in Post-Crawford Confrontation Jurisprudence, 64 N.Y.U. Ann. Surv. Am. L. 653, 679-80 (2009).

The Confrontation Clause was intended to strengthen the right of confrontation as it existed at the time of the writing of the Constitution, not replicate common law. *Id.* at 682-83 (citing *inter alia* Crawford, 541 U.S. at 47-50). Ms. Shaw's statements describing the assault and naming her boyfriend as the person who inflicted her injuries would not have been admitted in a criminal trial in colonial America, and they are the kind of testimonial statements forbidden by the Sixth Amendment.

iii. The *Davis* factors demonstrate Ms. Shaw's description of the assault was testimonial. Use of the factors utilized to review hearsay statements made to police in Davis also demonstrates Ms. Shaw's description of an assault by Mr. Hayes is testimonial. In Davis, the Court provided a generalized test for statements made to government agents such as the police or 911 operators who are responding to a call for help:

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 indicated 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 prosecutions.

Davis, 547 U.S. at 822.

By utilizing the Davis analysis to review a woman's statements to her doctor that she was "tied and raped," the Illinois appellate court found they were testimonial. People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675 (2008). There the victim was unavailable to testify and her statements to her doctor fit within the medical diagnosis exception to the hearsay rule. Spicer, 884 N.E.2d at 685. The appellate court turned to the four Davis factors and found they all supported the conclusion the statement was made to prove past events since the victim was relating past events, was safe in the hospital and not trying to address a current emergency, and was upset but not frantic. Id. at 687. Since the victim had been transported to the hospital by the police, the court could find no reason to distinguish between "a note-taking policeman" and "a note-taking doctor." Id. at 688.

Similarly, here, while Ms. Shaw was not transported to the hospital by the police, the same analysis applies. Ms. Shaw spoke to a medic at the scene after speaking to police and after police called the aid car for her. Sub #33A at 11; 5/11/10RP 86. She then

went to the hospital after speaking to police and medics.

5/11/10RP 16. Thus, the statements to medical providers were made when Ms. Shaw was not under an immediate threat but was safely in the care of medical personnel after police had intervened. In addition, the medical providers questioned Ms. Shaw about past events in part to determine how the alleged crime occurred, and who was responsible. 5/11/10RP 86-87; 5/11/10RP 18, 21-23; 5/10/10RP 19-21.

Additionally, the information relayed to the medical providers was like that of criminal testimony, as it described what happened in the past and identified Ms. Shaw's boyfriend as her assailant. If Ms. Shaw's statements to the medical providers had been made to a police officer, they clearly would be considered testimonial. See Spicer, 884 N.E.2d at 688; Carey, Reliability Discarded, *supra*, at 690 (declarant's identification of her assailant should not be treated differently merely because given to doctor and not police officer).

Commentators on the Confrontation Clause also view statements to medical personnel describing past crimes as testimonial. Professor Friedman, for example, posits a crime victim's description of the crime, whether made to authorities or to a private party, is normally testimonial. Richard Freidman,

Confrontation: The Search for Basic Principles, 86 Geo. L. J. 1101, 1042-43 (1998). Professor Fisher agrees that description of past events as part of a interview with medical personnel is testimonial:

When a person submits to a detailed and structured interview with someone who is trying, at least in part, to discern whether they have been criminally harmed, that should be all we need to know. The declarant is not under any immediate threat and is narrating purely past events. Furthermore, the evidentiary product that results is functionally equivalent to testimony on direct examination. Even if certain snippets of medical interviews—such as descriptions of physical symptoms—are nontestimonial, descriptions, as Davis puts it, of "how potentially criminal past events began and progressed" and especially who perpetrated them, must be considered testimonial.

Fisher, What Happened, supra, at 622 (quoting Davis, 547 U.S. at 829-30).

Ms. Shaw's description of the alleged assault and who assaulted her were testimonial statements. When the firefighter, hospital personnel and social worker asked her "what happened?" they were already aware that police were investigating whether Ms. Shaw's injuries were the result of criminal conduct. Ms. Shaw's statements that her boyfriend assaulted her by hitting her in the face and her comments that he had assaulted her in the past are testimonial.

c. Admission of Ms. Shaw's hearsay statements to medical providers without an opportunity for cross-examination was not harmless beyond a reasonable doubt. Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error analysis. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). However, a constitutional error may be "so unimportant and insignificant" in the setting of a particular case that the error is harmless beyond a reasonable doubt. State v. Wells, 72 Wn.2d 492, 500, 433 P.2d 869 (1967) (emphasis omitted) (quoting Chapman, 386 U.S. at 21-22). "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). Where the untainted evidence alone is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. Id. at 426. But a conviction should be reversed "where there is any

reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict." Id.

Here, there is a reasonable possibility that admission of Ms. Shaw's repeated hearsay statements to three medical providers influenced the jury's verdict. The untainted evidence was far from overwhelming. The only evidence describing the assault and identifying the perpetrator were Ms. Shaw's hearsay statements. The State was permitted to rely on four separate statements to four separate individuals, each of which added additional details. Without Ms. Shaw's statements to the three medical providers, the jury would likely have concluded Ms. Shaw's statement to Officer Schweiger alone did not rise to the level of proof beyond a reasonable doubt. Therefore, the conviction for assault must be reversed.

2. THE TRIAL COURT'S DECISION TO EXCLUDE MS. SHAW'S LETTERS TO MR. HAYES VIOLATED MR. HAYES'S CONSTITUTIONAL RIGHT TO CHALLENGE THE CREDIBILITY OF THE COMPLAINING WITNESS AND TO PRESENT RELEVANT EVIDENCE IN HIS DEFENSE

Mr. Hayes sought to admit two letters that Ms. Shaw had written to him while he was in jail. 5/06/10RP 3-4; Exhibit 3, 27. The letters supported the defense theory that Ms. Shaw fabricated

the allegations in retaliation for Mr. Hayes's relationships with other women. The letters also rebutted the State's theory that Ms. Shaw did not appear at trial, and recanted her allegations,⁷ because she was afraid of Mr. Hayes. The trial court's decision to exclude the evidence therefore violated Mr. Hayes's constitutional rights to attack the credibility of the complaining witness and to present a defense.

a. Mr. Hayes had a constitutional right to introduce Ms. Shaw's letters in order to attack her credibility and to present a defense. ""The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."" State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. Jones, 168 Wn.2d at 720. ""The right to confront and cross-examine adverse witnesses is [also]

⁷ Nichole O'Donnell testified Ms. Shaw told her two days after the incident that she had lied to police about the incident because she was angry at Mr. Hayes for cheating on her and wanted him to go to jail. 5/11/10RP 80. The parties also stipulated that, at Mr. Hayes's arraignment on March 9, 2010, Ms. Shaw told a victim advocate that the incident was all a misunderstanding, that

guaranteed by both the federal and state constitutions." Id.
(quoting State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189
(2002) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920,
18 L.Ed.2d 1019 (1967)); U.S. Const. amends. 6, 14; Const. art. 1,
§§ 3, 22.

Denial of a defendant's right to adequately cross-examine an essential prosecution witness as to relevant matters tending to establish motive or bias violates his Sixth Amendment right to confront the witnesses against him. State v. Brooks, 25 Wn. App. 550, 551-52, 611 P.2d 1274 (1980). "Great latitude must be allowed in cross-examining a key prosecution witness . . . to show motive for his testimony." Id. "Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

Here, although Ms. Shaw did not testify at trial and was therefore not subject to cross-examination, Mr. Hayes nonetheless had a right to attack her credibility because the court admitted her hearsay statements. Mr. Hayes moved to admit Ms. Shaw's letters under ER 806. 5/06/10RP 3-4. ER 806 provides:

she was not assaulted but instead was injured when she tried to break up a fight between Mr. Hayes and someone else. 5/12/10RP 30.

When a hearsay statement, or a statement defined in rule 801(d)(2)(iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross examination.

The rationale underlying ER 806 is that "[t]he declarant of a hearsay statement which is admitted in evidence is in effect a witness" whose credibility is subject to challenge just like any testifying witness. Advisory Committee's Note to FRE 806, 56 F.R.D. 183, 329 ("The declarant of a hearsay statement which is admitted in evidence is in effect a witness."). "The hearsay declarant is a witness because his or her out-of-court statement is offered for the same purpose as an in court witness' in-court statement: to prove the truth of the matter asserted. It is because the declarant is a witness that ER 806 exists." State v. Karpenski, 94 Wn. App. 80, 115 n.145, 971 P.2d 553 (1999), abrogated on other grounds by State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003).

Therefore, to the extent Mr. Hayes would have had a right to cross-examine Ms. Shaw as to her motives for making the initial

allegations and for later recanting them if she had testified at trial, he had an equal right to challenge her credibility on those bases even though she did not testify at trial.

Although defendants generally have a constitutional right to present evidence and cross-examine adverse witnesses, they have no right to present irrelevant evidence. Jones, 168 Wn.2d at 720. But if the evidence is relevant, the State has the burden to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Id. The State's interest in excluding prejudicial evidence must "'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" Id. (quoting Darden, 145 Wn.2d at 622). The integrity of the truth-finding process and a defendant's right to a fair trial are important considerations. Jones, 168 Wn.2d at 720. Therefore, for evidence of high probative value, no state interest is compelling enough to preclude its introduction consistent with the Sixth Amendment and article 1, section 22 of the Washington Constitution. Id.

Here, the trial court excluded Ms. Shaw's letters because the judge believed the reason why Ms. Shaw was absent from trial was

irrelevant. 5/11/10RP 104-06. The court did not find admission of the letters would prejudice the State.

Contrary to the court's ruling, the letters were relevant not only to rebut the State's argument about why Ms. Shaw was absent from trial, but also to support the defense theory that she fabricated the allegations in retaliation for Mr. Hayes's relationships with other women. In the letters, Ms. Shaw expressed frustration that Mr. Hayes "was with a diff[erent] girl" and hanging out with "lil girl-things." Exhibit 27 at 1. She also expressed a desire to be with Mr. Hayes, stating, for example, "I want you out because I need you." Exhibit 3 at 1. She also stated she had received a subpoena but would deliberately not testify at trial. Exhibit 3 at 2.

The State bolstered its case by arguing to the jury that Ms. Shaw was afraid of Mr. Hayes and that is why she recanted her allegations and did not appear at trial. 5/12/10RP 62-63. The prosecutor was permitted to ask Ms. Johnson why Ms. Shaw did not come to court; Ms. Johnson testified she did not come to court because she was afraid of Mr. Hayes. 5/11/10RP 58. Finally, the State was permitted to introduce evidence, over defense objection, that Mr. Hayes had assaulted Ms. Shaw previously, in order to explain why she did not come to trial. 5/05/10RP 67-69, 72-73, 76-

80. The Washington Supreme Court has held that evidence of prior acts of domestic violence, involving the defendant and the complaining witness, are admissible to assist the jury to judge the credibility of a recanting victim. State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008) (plurality opinion); id. at 194 (Madsen, J., concurring).

But if the State may introduce evidence of a complaining witness's fear of testifying and prior incidents of violence to explain inconsistencies in her statements, or her failure to testify, the defendant must be able to present evidence that rebuts the State's theory. The defense must be able to present evidence that is relevant to show that the witness's subsequent recantation is more believable than her initial allegations to police.

Here, Ms. Shaw's letters indicating that she was angry at Mr. Hayes for his relationships with other women; that she was not afraid of him but indeed wanted him back; and that she deliberately chose not to testify, were relevant to her credibility. Because the State's case depended on "the jury's belief or disbelief of essentially one witness," Ms. Shaw's credibility was subject to close scrutiny. Roberts, 25 Wn. App. at 834. By precluding Mr. Hayes from presenting evidence that was relevant to Ms. Shaw's credibility, the

trial court violated his constitutional rights to attack the credibility of the complaining witness and to present a defense.

b. The trial court's decision to exclude Ms. Shaw's letters was not harmless beyond a reasonable doubt. The State must prove the court's decision not to admit the letters was harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724. The error is not harmless if a reasonable jury could have found differently if it heard the proffered evidence. Id. at 725.

Here, a reasonable jury could have found differently if it heard, in Ms. Shaw's own words, that she was not afraid of Mr. Hayes. The jury could have found differently if it heard that she was frustrated with him for his relationships with other women. The conviction must therefore be reversed.

3. THE CUMULATIVE EFFECT OF THE ABOVE ERRORS DENIED MR. HAYES A FAIR TRIAL

The due process clauses of the federal and state constitutions provide a criminal defendant the right to a fair trial. U.S. Const. amend. 14; Const. art. 1, §§ 3, 22. The cumulative effect of trial court errors may result in an unfair trial and require reversal, even if each error on its own is harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

The cumulative effect of the above trial court errors requires reversal of Mr. Hayes's conviction, in the event this Court concludes that each error examined on its own would otherwise be harmless, or that some error was improperly preserved. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). This Court has discretion under RAP 2.5(a)(3) to review any inadequately preserved errors and determine if the cumulative effect of incompetent evidence denied the defendant his constitutional right to a fair trial. Id.

In Alexander, this Court ordered a new trial because (1) a counselor impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony at trial and in closing. 64 Wn. App. 147, 158, 822 P.2d 1250 (1992). In Coe, the court reversed four rape convictions due to numerous evidentiary errors and a violation of discovery rules by the prosecutor. 101 Wn.2d at 774-86, 788-89.

Here, similarly, the trial court's decision to admit Ms. Shaw's hearsay statements even though Mr. Hayes never had an opportunity to cross-examine her, together with its decision to

preclude Mr. Hayes from presenting evidence attacking her credibility and supporting the defense theory, cumulatively denied him a fair trial.

4. THE TRIAL COURT ERRED IN INCLUDING THE 2005 OHIO CONVICTION FOR TRAFFICKING IN MARIJUANA IN MR. HAYES'S OFFENDER SCORE, WHERE THE STATE DID NOT PROVE IT WAS COMPARABLE TO A WASHINGTON FELONY

At sentencing, the trial court included a 2005 Ohio conviction for "trafficking in marijuana" in Mr. Hayes's offender score. CP 68. In doing so the trial court erred, because the State did not prove the offense was comparable to a felony in Washington.

a. A sentencing court may not include a prior out-of-state conviction in a person's offender score unless the State proves the offense is comparable to a Washington felony. A defendant's offender score establishes the range a sentencing court may use in determining the sentence. RCW 9.94A.530. The court calculates the offender score based upon its findings of the defendant's criminal history, which is a list of the defendant's prior convictions. RCW 9.94A.030(11); RCW 9.94A.525. With limited

exceptions,⁸ the offender score includes only prior convictions for felony offenses. RCW 9.94A.525; State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994).

Where the prior convictions are from another state, the SRA requires the court to translate the convictions "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The Washington Supreme Court has adopted a two-part test to determine whether an out-of-state conviction may be included in the offender score. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the court compares the legal elements of the out-of-state crime with the comparable Washington felony offense. If the elements are comparable, the out-of-state conviction is equivalent to a Washington felony and may be included in the offender score. Lavery, 154 Wn.2d at 254. But where the elements of the out-of-state crime are different or broader, the sentencing court must examine the defendant's conduct as evidenced by the undisputed facts in the record to determine whether the conduct violates the comparable Washington statute. Morley, 134 Wn.2d at 606;

⁸ Where the current conviction is for a felony traffic or watercraft offense, the SRA authorizes the court to include serious misdemeanor traffic or watercraft

Lavery, 154 Wn.2d at 255. The State bears the burden of proving the existence and comparability of the out-of-state offense. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999).

b. The Ohio crime of trafficking in marijuana is not legally comparable to a felony in Washington. The relevant inquiry is whether the elements of the 2005 Ohio offense are comparable to the elements of a Washington felony in effect at the time of the offense. Morley, 134 Wn.2d at 605. "If the elements of the foreign offense are broader than the Washington counterpart," that is, if the out-of-state statute criminalizes more conduct than the comparable Washington statute, the elements are not legally comparable. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007); Morley, 134 Wn.2d at 606. Put another way, if the court can conceive of a situation in which a defendant could commit the foreign crime without committing the Washington crime, the crimes are not legally comparable. State v. Jackson, 129 Wn. App. 95, 107-09, 117 P.3d 1182 (2005).

A comparison of the 2005 statutes from Washington and Ohio shows that the Ohio statute criminalized more conduct than

offenses in the offender score. See RCW 9.94A.525(11), (12).

the comparable Washington statute. In 2005, the Ohio statute for trafficking in a controlled substance, Ohio Rev. Code Ann. § 2925.03 (2005), provided:

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

"If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of trafficking in marihuana." Ohio Rev. Code Ann. § 2925.03(C)(3) (2005).

The comparable Washington statute provided: "Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." RCW 69.50.401(1) (2005). If the person committed the offense involving a "controlled substance classified in Schedule I, II, or III," was guilty of a class C felony.

RCW 69.50.401(2)(c) (2005). Marijuana is a Schedule I substance. RCW 69.50.204(c)(14) (2005).

The Ohio statute is broader than the comparable Washington statute to the extent it requires only that the person act with knowledge rather than intent. In Washington, knowledge is a less culpable mental state than intent. "A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). By contrast,

A person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(1)(b). This statute, which replaces concepts of specific and general intent with four levels of culpability: intent, knowledge, recklessness, and criminal negligence, creates a hierarchy of mental states for crimes of increasing culpability. State v. Allen, 101 Wn.2d 355, 359, 678 P.2d 798 (1984).

Because the Ohio statute criminalizes conduct performed only with knowledge rather than requiring proof of intent, it criminalizes more conduct than the comparable Washington statute. The offense is therefore not legally comparable to a Washington felony.

c. The State did not prove the Ohio conviction was factually comparable to a felony in Washington. Where a foreign conviction is not legally comparable to a Washington felony, the sentencing court may look at the record to assess whether the underlying conduct would have violated the comparable Washington statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. The court may examine only those documents that show conclusively that the facts necessary to establish comparability were proved to a jury or admitted by the defendant in the course of a guilty plea. Lavery, 154 Wn.2d at 258. The mere fact of the prior conviction is not sufficient to make this showing. Id.

Here, the State presented no evidence to show Mr. Hayes's 2005 Ohio conviction for trafficking in marijuana was comparable to a Washington felony. The State therefore did not prove the offense

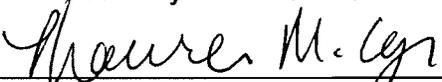
was comparable to a Washington felony and the trial court erred in including the offense in Mr. Hayes's offender score.

d. Mr. Hayes must be resentenced. Where a sentence is erroneous due to the miscalculation of the offender score, the defendant must be resentenced. State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). That is the remedy here.

E. CONCLUSION

Mr. Hayes's state and federal constitutional right to confront his accusers was violated when the trial court admitted the complaining witness's accusatory hearsay statements but Mr. Hayes never had an opportunity to cross-examine her. Further, his constitutional right to attack the credibility of the complaining witness and to present a defense were violated when the court precluded him from presenting relevant evidence in his defense. The cumulative effect of the above errors denied him a fair trial and the conviction must be reversed. Finally, the trial court erred in including an out-of-state conviction in Mr. Hayes's offender score. Mr. Hayes must therefore be resentenced.

Respectfully submitted this 30th day of November 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. 65622-8-I
)
 CORDARREL HAYES,)
)
 Appellant.)

2010 NOV 30 PM 4:40
COURT OF APPEALS
CLERK OF COURT

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF NOVEMBER, 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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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF NOVEMBER, 2010.

X _____ 

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