

67536-2

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No. 67536-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent

v.

AARON OLSEN,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 FEB 29 PM 4:50

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

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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..... 1

D. ARGUMENT ..... 4

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT  
ADMITTED HARRIET GRIFFIN'S AFFIDAVIT AS  
SUBSTANTIVE EVIDENCE..... 4

1. The affidavit admitted by the trial court did not  
satisfy the elements of ER 801(d)(1)(i). ..... 4

2. Minimal guaranties of truthfulness are absent..... 5

3. The statement was not used to establish probable  
cause..... 7

4. The trial court erroneously admitted Ms. Griffin's  
affidavit ..... 7

E. CONCLUSION..... 9

TABLE OF AUTHORITIES

**Washington Supreme Court**

City of Kennewick v. Day, 142 Wn.2d 1, 11 P.3d 304 (2000)..... 8

State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982)..... 1, 4, 5, 7, 9

**Washington Court of Appeals**

State v. Nelson, 74 Wn. App. 380, 874 P.2d 170, review denied,  
125 Wn.2d 1002 (1994)..... 5

State v. Nieto, 119 Wn. App. 157, 79 P.3d 473 (2003).....5, 8,  
9

**Rules**

ER 801(d)(1)(i) ..... 1, 4, 5, 7

A. ASSIGNMENT OF ERROR

The trial court erred in admitting the complaining witness's affidavit as substantive evidence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

At trial, the prior statement of a witness may only be admitted as substantive evidence if it satisfies the elements of ER 801(d)(1)(i). State v. Smith, 97 Wn.2d 856, 863, 651 P.2d 207 (1982). Here, the trial court permitted the admission of Harriet Griffin's prior statement over defense objection, despite the fact that the statement did not meet the reliability factors set out in Smith. Where this statement was the only evidence of Mr. Olsen's guilt as to counts one and two, does the court's error in admitting this statement require reversal?

C. STATEMENT OF THE CASE

Aaron Olsen and his girlfriend Harriet Griffin have three children together; they have been a couple since they were both approximately 14 years old. 7/12/11 RP 53-56.<sup>1</sup> At the time of these proceedings they were both 28 years old. Id.

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<sup>1</sup> The verbatim report of proceedings consists of six volumes of transcripts from June 15, 2011, through July 19, 2011. The proceedings will be referred to herein as follows: "6/15/11 RP \_\_\_."

At trial, Ms. Griffin testified that on December 30, 2010, she and the children were playing Monopoly at her apartment with a friend of hers, who goes by the nickname Baby Dub. 7/12/11 RP 64-69. She said that this man was a member of a gang and that she was afraid of him, because he was often armed. Id. at 106-07. Baby Dub became jealous and enraged that night when Ms. Griffin received a phone call, and he began to throw things at her from around the living room and kitchen, including a glass candlestick and pots and pans. Id. at 64-69, 109-12. When Ms. Griffin attempted to call the police, Baby Dub smashed her cell phone. Id. at 76-77. When the police responded to a neighbor's 911 call, Baby Dub jumped off the second-floor balcony and fled. Id. at 99-102.

Fearing retaliation if she reported Baby Dub, Ms. Griffin told the police who responded to the neighbor's 911 call that her assailant had been Aaron Olsen, since she already had a no-contact order against him from a previous case. Id. at 103. Detectives asked Ms. Griffin if she would complete a written statement about the incident, which she did, accusing Mr. Olsen, rather than Baby Dub. Id. at 103, 109-13, 115. She testified that at

the time she signed the affidavit naming Mr. Olsen, she had not understood that she was signing a sworn statement. Id. at 15.

One week later, on January 5, 2011, Ms. Griffin invited Mr. Olsen to her apartment to have dinner and spend time with her and the children. 7/12/11 RP 56-60.<sup>2</sup> As Mr. Olsen was cooking dinner for the family, officers came to the apartment to check on Ms. Griffin and to look for Mr. Olsen, since Ms. Griffin had named him in the first incident. Id. at 60-63; 7/13/11 RP 254-57. After Ms. Griffin answered the door, officers asked for permission to search the apartment; they soon found Mr. Olsen hiding in a closet. 7/13/11 RP 258-62.

Mr. Olsen was charged with two counts of felonious violation of a no-contact order (one for each incident) and one count of interfering with domestic violence reporting. CP 15-17. Ms. Griffin's written statement to police was admitted as substantive evidence of the first violation, over defense objection. CP 36-41; 7/12/11 RP 118; 7/13/11 RP 303.

Following a jury trial, Mr. Olsen was convicted of all counts. The State asked for only a standard range sentence. 8/12/11 RP 5.

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<sup>2</sup> Ms. Griffin testified that she had invited Mr. Olsen to her home, that she is not afraid of him, and that she had never wanted the no-contact order (NCO). 7/12/11 RP 104, 108.

The trial court agreed, giving a sentence at the low end of the standard range. Id. at 16.

Mr. Olsen timely appeals. CP 184.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION  
WHEN IT ADMITTED HARRIET GRIFFIN'S  
AFFIDAVIT AS SUBSTANTIVE EVIDENCE.

1. The affidavit admitted by the trial court did not satisfy the elements of ER 801(d)(1)(i). Although in general, the State must prove its case by presenting live testimony at trial, and it cannot rely upon prior statements as substantive evidence, an exception is made for the prior statement of a witness if it satisfies the elements of ER 801(d)(1)(i). State v. Smith, 97 Wn.2d 856, 863, 651 P.2d 207 (1982). Under ER 801(d)(1)(i), a witness's prior statement may be admitted when the declarant testifies at the trial and is subject to cross examination concerning the statement, and the prior statement is inconsistent with the declarant's testimony; the prior statement also must have been given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. ER 801(d)(1)(i); Smith, 97 Wn.2d 856 at 863.

To determine whether a prior statement is reliable, and therefore admissible, the trial court must consider the Smith factors.

State v. Nelson, 74 Wn. App. 380, 387, 874 P.2d 170, review denied, 125 Wn.2d 1002 (1994). The court must consider: 1) whether the witness voluntarily made the statement; 2) whether there were minimal guaranties of truthfulness; 3) whether the statement was taken as part of a standard procedure in one of the four methods for determining probable cause; and 4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement. Smith, 97 Wn.2d at 861-63. Here, the second and third factors were not satisfied.

2. Minimal guaranties of truthfulness are absent. The required guaranty of truthfulness element is satisfied if the prior statement was made under oath, subject to the penalty of perjury and in a formalized proceeding. Smith, 97 Wn.2d at 862; ER 801(d)(1)(i).

In State v. Nieto, this Court held that a prior statement that was not made under oath subject to the penalty of perjury was not sufficiently reliable to uphold a conviction. 119 Wn. App. 157, 163, 79 P.3d 473 (2003). The Nieto Court found that the boilerplate language of the affidavit signed by the complaining witness, who later recanted, was confusing, and it was unclear from the witness's

testimony that she had understood the “penalty of perjury” language when she signed her statement. Id.

In the instant case, as in Nieto, no notary was present and no formal procedures were followed when Ms. Griffin signed her statement following the December 30<sup>th</sup> assault at her apartment. 7/12/11 RP 115, 144-45. Ms. Griffin testified to a lack of memory as to whether the penalty of perjury language was explained to her, and there is no evidence that the assisting officer informed Ms. Griffith of the consequences of her statement. 7/12/11 RP 115, 144-45. The affidavit is ambiguous as to who actually signed the form, as well as the time and place it was signed. Ex. 7. Only Officer Lane seems to have filled out the date and location, and this may not be contemporaneous with Ms. Griffin’s writing; it is irrelevant to the truthfulness of the affidavit. Ex. 7.

Here, Ms. Griffin’s testimony was clear that she did not understand she was signing a statement subject to the penalty of perjury. 7/12/11 RP 115. Although an unsworn written statement may satisfy the oath requirement if it is signed and contains penalty of perjury language, Nieto, 119 Wn. App. at 161, the boilerplate language here, combined with Ms. Griffith’s testimony indicating her

confusion about what she signed, does not satisfy the requirements of proof.

3. The statement was not used to establish probable cause. A mandatory factor in the admissibility of a purported affidavit as substantive evidence is that it was used to determine probable cause. Smith, 97 Wn.2d at 862. There are four legally permissible methods for determining the existence of probable cause, allowing charges to be filed against a defendant: 1) the filing of an information by a prosecutor in superior court; 2) grand jury indictment; 3) inquest proceedings; and 4) filing of a criminal complaint before a magistrate. Id. In this case, Ms. Griffin's prior statement did not factor into the establishment of probable cause.

Detective Metzger did file a probable cause statement. CP 1-9. However, nothing in this probable cause statement states that it relies upon Ms. Griffin's so-called Smith affidavit.

Accordingly, this required Smith factor, like the required minimal guaranty of truthfulness factor, was not met.

4. The trial court erroneously admitted Ms. Griffin's affidavit. This prior statement was the primary evidence against Mr. Olsen of counts one and two. The admissibility of a prior inconsistent statement under ER 801(d)(1)(i) is reviewed for abuse

of discretion. Where the trial court based its evidentiary ruling on an incomplete legal analysis or a misapprehension of the legal issues, the ruling was an abuse of discretion. City of Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000).

The trial court here misapplied the law when it admitted Ms. Griffin's prior statement as substantive evidence. Two of the four Smith factors, as discussed above, were absent from Ms. Griffin's affidavit. The proponent of the statement's admissibility bears the burden of proving each of these elements. Nieto, 119 Wn. App. at 161. Here, the State failed to establish the affidavit's reliability prior to its admission. Accordingly, the trial court abused its discretion when it allowed the statement to be used as substantive evidence against Mr. Olsen.

Since Ms. Griffin subsequently recanted her statement concerning Mr. Olsen's involvement in the December 30<sup>th</sup> incident, testifying instead that the man who assaulted her and then jumped off the balcony was Baby Dub, the trial court's misapplication of the law cannot be viewed as harmless. Counts one and two cannot be sustained in the absence of the improperly admitted Smith affidavit.

Accordingly, because the trial court's decision to admit the prior statement was an abuse of discretion, which cannot be

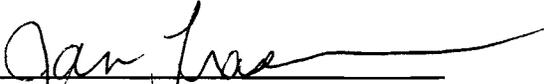
considered harmless, reversal is required. Smith, 97 Wn.2d at 862;

Nieto, 119 Wn. App. at 161.

E. CONCLUSION

For the above reasons, Aaron Olsen's convictions must be reversed and dismissed without prejudice. In the alternative, the domestic violence aggravator must be vacated.

Respectfully submitted this 29<sup>th</sup> day of February, 2012.

  
\_\_\_\_\_  
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	)	
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	)	
Appellant.	)	

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STATE OF WASHINGTON  
2012 FEB 29 PM 4:58

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF FEBRUARY, 2012, 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:

- |  |                                     |               |
|--|-------------------------------------|---------------|
| <input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY | <input checked="" type="checkbox"/> | U.S. MAIL     |
| APPELLATE UNIT   | <input type="checkbox"/>            | HAND DELIVERY |
| KING COUNTY COURTHOUSE   | <input type="checkbox"/>            | _____         |
| 516 THIRD AVENUE, W-554  |                                     |               |
| SEATTLE, WA 98104  |                                     |               |
| <br>   |                                     |               |
| <input checked="" type="checkbox"/> AARON OLSEN                      | <input checked="" type="checkbox"/> | U.S. MAIL     |
| 853071   | <input type="checkbox"/>            | HAND DELIVERY |
| STAFFORD CREEK CORRECTIONS CENTER                                    | <input type="checkbox"/>            | _____         |
| 191 CONSTANTINE WAY  |                                     |               |
| ABERDEEN, WA 98520   |                                     |               |

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2012.

X \_\_\_\_\_ 

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