

67536-2

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NO. 67536-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

AARON OLSEN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

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**BRIEF OF RESPONDENT**

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STATE OF WASHINGTON  
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**A. ISSUE PRESENTED**

The admission of evidence at trial is reviewed for an abuse of discretion. Here, the trial court considered each factor of ER 801(d)(1)(i) and found each element to be satisfied. Did the trial court properly admit the victim's written statement to police, per ER 801(d)(1)(i)?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Aaron Olsen was charged by Second Amended Information with (Count I) Domestic Violence Felony Violation of a Court Order with aggravating factors of committing the offense within the sight or sound of the offender's minor child, and as part of an ongoing pattern of abuse of the same victim or multiple victims; (Count II) Interfering with Domestic Violence Reporting; and (Count III) Domestic Violence Felony Violation of a Court Order on January 5, 2011, with an aggravating factor of committing this offense as part of an ongoing pattern of abuse of the same victim or multiple victims. CP 15-17. Olsen proceeded to a jury trial before the Honorable Jay White, and was convicted as charged. CP 96-98, 100. The jury found an aggravating factor as to Count I for a child

being present during the domestic violence offense. CP 99. In a bifurcated portion of the trial, the jury found an aggravating factor for a history of domestic violence as to Count I, but not as to Count III. CP 158-59. The court imposed a standard range sentence. CP 172-83. The defendant appeals his conviction. CP 184.

## **2. SUBSTANTIVE FACTS**

Harriett Griffin lived in an apartment with her three children in Renton, Washington, in late 2010 and early 2011.<sup>1</sup> 2RP 54-55. Olsen is the father of the three children and had dated Griffin for approximately 13 years. 2RP 56. There was a no-contact order protecting Griffin from Olsen. CP 15-17; 2RP 106.

At trial, Griffin testified that on the night of December 30, 2010, she was playing the game of Monopoly at her apartment with her children, and "a man." 2RP 66. On direct examination, Griffin referred to this person as "a man," but did not identify him. 2RP 66.

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<sup>1</sup> Five volumes of verbatim reports of proceedings will be referred to as follows:

1RP: June 15 and 16, 2011  
2RP: July 11 and 12, 2011  
3RP: July 13, 2011  
4RP: July 14, 2011  
5RP: July 18 and 19, 2011

Griffin testified that she received a phone call from a female friend, who the man believed was a male caller. 2RP 66-67. The man got angry and began throwing things at Griffin, and cursing at her. 2RP 66-68. As this was happening, Griffin was running up and down the hallway and yelling for her children to go to their rooms. 2RP 68. Griffin was struck with multiple items including two candleholders, speakers, a folding chair, an ottoman, and pots and pans. 2RP 69, 75, 83-84, 88-89. Griffin explained that the candleholders hit her shoulder and arm, causing excruciating pain, bleeding, and significant bruising. 2RP 90-92. The ottoman hit her finger causing significant pain and swelling. 2RP 94. During the assault, Griffin's children ran and hid. 2RP 96. Griffin tried to call the police with her cell phone, but the man grabbed her phone from her, threw it, stepped on it, and broke it. 2RP 76-77. Griffin grabbed a kitchen knife to defend herself. 2RP 78. When Griffin ran out of her apartment, she dropped the knife by the front door, and was met by police. 2RP 78, 99.

When Griffin saw the police, she yelled that "he was hurting me." 2RP 100. As police came into the apartment, the man jumped off the balcony into the night. 2RP 102, 111. The police and Griffin testified, without objection, that Griffin identified the man

to police as Aaron Olsen. 2RP 103, 110-12, 142. The police looked for the man, but could not locate him. 2RP 100. Griffin then gave a written statement to police regarding the incident consistent with her testimony in court. 2RP 103. In her written statement she also identified Olsen as the man who assaulted her. 2RP 103. On cross examination, Griffin testified that the man was not Olsen, but instead another man who assaulted her, who is a known gang member. 2RP 106-07. She would not name the other man. 2RP 107.

On January 5, 2011, the defendant Aaron Olsen was again in Griffin's home and hid in the closet when the police arrived. 2RP 59-60. The defendant was arrested. 2RP 62. After arresting Olsen, Officer Lane noticed Olsen had a fairly significant limp. 2RP 152. Olsen later told the jail booking staff that he had injured his ankle in a "big fall" a week prior. 2RP 153.

**C. ARGUMENT**

**1. THE COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING GRIFFIN'S WRITTEN STATEMENT TO THE POLICE.**

Olsen asserts that the trial court erred in admitting Griffin's written statement to police as substantive evidence, pursuant to

ER 801(d)(1)(i). Ex. 7. Olsen argues that two of the four Smith factors were not satisfied. State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982). However, before admitting the statement, the trial court factually found each Smith factor had been satisfied. Thus, Olsen's claim should be rejected.

Decisions involving evidentiary issues are largely within the discretion of the trial court and will not be reversed on appeal without a showing of an abuse of discretion. Maehren v. City of Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979). Olsen assigns error to the trial court's admission of Griffin's written statement, but assigns no error to the court's written findings of fact and conclusions of law.<sup>2</sup> CP 189-91. Indeed, Olsen fails to even reference these findings in his appeal. These trial court findings are verities on appeal.<sup>3</sup> State v. Broadaway, 133 Wn.2d 118, 130, 942 P.2d 363, 370 (1997).

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<sup>2</sup> See State v. Alexander, 125 Wn.2d 717, 723, 888 P.2d 1169, 1172 (1995) (citing State v. Estrella, 115 Wn.2d 350, 355, 798 P.2d 289 (1990); State v. Pennington, 112 Wn.2d 606, 608, 772 P.2d 1009 (1989)).

<sup>3</sup> The reviewing court held that it could review only those facts where error was assigned, and if there were substantial evidence in the record supporting the finding, "those facts will be binding on appeal." Broadaway, 133 Wn.2d at 130.

For a prior inconsistent statement to be admissible at trial, the declarant testifying at trial must be subject to cross examination concerning the statement, and it must have been given under oath subject to the penalty of perjury. ER 801(d)(1)(i). Admissibility under ER 801(d)(1)(i) is also based on the Smith factors which address the reliability of the statement and 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 given the subsequent inconsistent statement. Smith, 97 Wn.2d at 861-63.

Olsen argues that the statement should not have been admitted because the second and third Smith factors were not satisfied. However, the trial court fully addressed these factors at trial and in its findings. Thus, Olsen's claim fails.

a. The Trial Court Properly Found Minimal Guaranties Of Truthfulness.

First, Olsen argues that minimal guaranties of truthfulness are absent. If a witness knows that he or she is signing the

statement under penalty of perjury, this establishes guaranties of truthfulness. State v. Neito, 119 Wn. App. 157, 79 P.3d 473 (2003). Olsen argues that Griffin did not understand that she was signing the statement under penalty of perjury. Id.

This claim ignores the court's explicit written findings that Griffin did in fact know that she was signing the statement under penalty of perjury. CP 190. The court noted in its oral rulings that Griffin in her testimony responded in the affirmative to signing the statement under penalty of perjury. 3RP 301; 2RP 112. When asked during her testimony if she was told by police that Griffin was signing the statement under penalty of perjury, she responded "[t]hey probably did." 2RP 115, 144-45. Upon review of this testimony and the context of the testimony, the court concluded that Griffin "understood that she was signing under penalty of perjury." 3RP 301; CP 190. Thus, this Smith factor is factually satisfied.

The court further found that "[t]his statement was given voluntarily on Griffin's own initiative with the intent of helping police identify and locate the person who had victimized her." CP 189. "The victim's statement was obtained right after the crime...." CP 190. "She wrote the statement in her own hand...signed the statement...reviewed and was aware of the contents of the

statement when she completed the written statement and gave it to police.” CP 189; 3RP 298. Officer Lane assisted Griffin, but in no way directed the content or improperly influenced the creation of the written statement. CP 189. The court properly found that minimal guaranties of trustworthiness were satisfied. CP 190.

- b. The Trial Court Properly Found That Griffin's Written Statement Was Taken As Part Of A Standard Procedure For Determining Probable Cause.

Second, Olsen argues that the statement was not used to establish probable cause. But again, Olsen ignores the court's factual findings to the contrary. There are four methods of finding probable cause: 1) filing of an information by the prosecutor in superior court; 2) grand jury indictment; 3) inquest proceedings; and 4) filing a criminal complaint before a magistrate. Smith, 97 Wn.2d at 862 (citing State v. Jefferson, 79 Wn.2d 345, 347, 485 P.2d 77 (1971)).

Renton Police Detective Andie Metzger, assigned to the Domestic Violence Unit, was the detective directed to investigate the case involving Griffin and Olsen. 3RP 235. During her investigation she testified that after she was assigned to the case,

Detective Metzger read the report, victim statements, if any, the officer's narrative, looked at photographs, and checked in with the DV advocate. 3RP 235-36. After completing her investigation, which included a follow-up interview of Griffin, Detective Metzger submitted the police reports, photographs, and the written statement of Griffin to the prosecutor's office for determination of potential charges. 3RP 240-44, 247-48.

The court found that "[t]he taking of the statement and the form used were consistent with the standard victim statement procedure."<sup>4</sup> CP 190. The court continued, that "A victim statement is then submitted by police to a prosecutor to help establish probable cause for a crime." CP 190. The court expressly found that Griffin's statement was used to help establish probable cause. CP 190. Thus, this Smith factor is factually satisfied. Because all of the Smith factors were satisfied, the court properly admitted Griffin's written statement pursuant to ER 801(d)(1)(i).

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<sup>4</sup> Officer Lane interviewed Ms. Griffin, gave her the statement form on which she wrote her statement shortly after the incident, with instructions regarding any mistake she might make on the page, and had her sign under the perjury statement. 2RP 144-45.

**2. ANY ERROR RESULTING FROM THE ADMISSION OF GRIFFIN'S WRITTEN STATEMENT WAS HARMLESS.**

The improper admission of evidence to support a criminal conviction may be harmless error. State v. Bashaw, 169 Wn.2d 113, 143, 234 P.3d 195, 200 (2010) (citing State v. Flores, 164 Wn.2d 1, 18, 186 P.3d 1038 (2008)). An evidentiary error is not harmless "if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" Bashaw, 169 Wn.2d at 143 (citing State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986))). Here, the victim testified to essentially all the facts contained in the statement. 2RP 53-104. The trial court stated orally "other than the identification of Mr. Olsen, her statement is entirely consistent with the evidence that she presented at trial...she just wanted to testify here at trial that... she maintains that it was another man." 3RP 299. Thus, the victim's identification of Olsen in her written statement would be a statement of identification under ER 801(d)(1)(iii).

This identification was made through substantive evidence apart from Griffin's written statement, as Griffin testified that she told the police that Olsen was the one that assaulted her on December 30, 2010, right after the incident. 2RP 103, 110-12, 142. This was also a statement of identification under ER 801(d)(1)(iii), and Olsen raised no objection to it. Because the victim testified to all the facts contained in her statement, with the exception of the identity of the person who assaulted her, and the identity was established through her oral statement, the admission of the actual written document would not have materially changed the outcome of the trial. Therefore, any error resulting from the admission of the written statement of the victim was harmless, as it would not have materially affected the outcome of the trial.

**D. CONCLUSION**

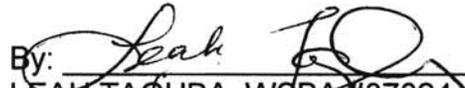
Each Smith factor necessary to admit the written statement of Griffin pursuant to ER 801(d)(1)(i) was found at the trial by the court. Thus, the trial court did not abuse its discretion by admitting

the written statement of Griffin to the police. Had there been any error, it was harmless. His convictions should be affirmed.

DATED this 8<sup>th</sup> day of May, 2012.

Respectfully submitted,

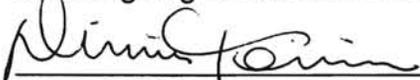
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Transen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, <sup>and copy of cert of mailing</sup> in STATE V. AARON OLSEN, Cause No. 67536-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name Divina Tomasini  
Done in Kent, Washington

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