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Supreme Court No. _____
Court of Appeals No. 57915-4-II

Case #: 1033494

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER MARTIN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Jennifer Martin, the petitioner, requests this Court to grant review of the Court of Appeals' decision terminating review. The Court of Appeals issued an unpublished opinion holding that Ms. Martin failed to preserve her confrontation clause violation claim. This was despite the trial court granting her pre-trial motion in limine on the issue and her objection to the testifying officer "reporting hearsay from the store clerk *that we can't examine*." RP 304 (emphasis added). This holding is contrary to precedent and this Court should grant review.

To the extent Ms. Martin did not technically preserve the issue, Ms. Martin was entitled to review of the claimed error because it qualified as manifest error affecting a constitutional right. This Court should also grant review to overrule its decision in *State v. Burns*, 193 Wn.2d 190, 438 P.3d 1183 (2019), where five justices held, over strong disagreement by four other justices, that confrontation right violations

categorically cannot be raised for the first time on appeal as manifest constitutional error under RAP 2.5(a)(3).

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Absent unavailability and a prior opportunity for cross-examination, testimonial statements from a non-testifying witness may not be admitted. Statements are testimonial when the primary purpose of the statement is to assist law enforcement officers in investigating a crime. Believing Ms. Martin had committed a crime, several deputies looked for her in a grocery store shortly after she went inside. A store worker told a deputy Ms. Martin was in the bathroom and had been in there since she walked into the store. Was this statement testimonial when the primary purpose of the statement was to assist a criminal investigation by law enforcement?

2. A party's objection preserves an issue for review if the ground for the objection is readily apparent from the circumstances. The Court of Appeals refused to review the

preceding issue on the grounds that Ms. Martin's objection did not preserve the constitutional right to confrontation issue. Ms. Martin objected to Deputy Cappetto "reporting hearsay from the store clerk *that we can't examine*." RP 304 (emphasis added). Before trial, the court granted Ms. Martin's motion to exclude testimonial hearsay in violation the defendant's constitutional right of confrontation. CP 27, 111. Given this context, was it readily apparent that the ground for the objection was the right to confrontation?

3. In *Burns*, a narrow five-justice majority held that constitutional confrontation right claims cannot be raised as a matter of right as "manifest error affecting a constitutional right." RAP 2.5(a)(3). Four justices "strongly disagree[d]." *Burns* is in conflict with subsequent precedent on RAP 2.5(a)(3) and relegates an express constitutional right meant, to ensure fair trials, to a second-class status. Should Ms. Martin's constitutional claim be reviewed under RAP 2.5(a)(3) and *Burns* be overruled?

4. Hearsay, an out-of-court-statement admitted for the truth of the matter asserted, is generally inadmissible under the Rules of Evidence. Hearsay that is a "present sense" impression is admissible. A present sense impression does not include an answer to an inquiry or situations where there is time to reflect. Law enforcement inquired with store employees that they were looking for a woman, Ms. Martin. Five minutes later, a store worker said Ms. Martin was in the bathroom and had been in there since coming into the store. Was the present sense impression exception inapplicable?

C. STATEMENT OF THE CASE

Sherry Caulder testified that she drove her friend, Jennifer Martin, to Tammie Wright's house so Ms. Martin could help Ms. Wright move. RP 420. A few hours later, Ms. Martin called Ms. Caulder, asking her to pick her up from jail. RP 421. Ms. Martin had been arrested for purportedly possessing a stolen motor vehicle.

According to Justin Mondry, his 2016 Toyota Camry was missing when he woke up one morning in early July 2021. RP 194-95. He thought he might have left his key fob in the car or dropped it in his yard. RP 213, 225-26. Mr. Mondry claimed that several weeks later, his brother called him saying he had seen what appeared to be Mr. Mondry's car outside a house near a job site where he had been. RP 195, 253. Mr. Mondry, who had been drinking, had his girlfriend drive him to the area which was in Tacoma about a mile and a half away. RP 196-97, 225-26.

From a distance, Mr. Mondry believed it was his car and called a non-emergency line. RP 196. He saw the car leave, although he did not see who was driving it. RP 199. He gave inconsistent statements about either one or two women getting in the car. RP 216, 236. Mr. Mondry and his girlfriend followed the car to a U-Haul business in Spanaway. RP 198. During the drive, they spoke to Deputy Carly Cappetto. RP 221; Ex. 26.

Deputy Cappetto, who was in uniform and driving a patrol vehicle, responded to the scene. RP 294, 307. Contrary to her statements in the recorded call, Deputy Cappetto testified she saw the car pull into the U-Haul parking lot. RP 298; Ex. 26. In the call, after Mr. Mondry tells Deputy Cappetto that his car is parked at a U-Haul, Deputy Cappetto asks Mr. Mondry if the car is being put into a U-Haul truck, and later says she is pulling into the U-Haul parking lot. Ex. 26. Deputy Cappetto claimed to have seen Ms. Martin get out of the car and meet with a man and a woman at the U-Haul. RP 297.

Deputy Cappetto noticed the car had no license plates. RP 297. While Ms. Martin was out of the car, Deputy Cappetto took a picture of the vehicle identification number of the car. RP 298. Using that number, she determined the car was stolen. RP 298.

Deputy Cappetto testified she saw Ms. Martin get into a U-Haul truck with two others, a man and a woman, and leave. RP 298, 301. The truck drove to a nearby grocery store less

than a minute away. RP 312. Deputy Cappetto followed. RP 302. Deputy Cappetto was aware that people at the U-Haul had noticed her presence. RP 302. Deputy Cappetto saw Ms. Martin enter the grocery store. RP 302-03. Other law enforcement officers arrived. RP 303.

Deputy Cappetto and other officers went into the store to apprehend Ms. Martin. RP 303-04. Over Ms. Martin's hearsay and confrontation clause objections, Deputy Cappetto testified that after five minutes of unsuccessfully looking for Ms. Martin, a store worker said that the woman they were looking for was in the bathroom and had been in there since she came in. RP 304.

Deputy Cappetto located Ms. Martin in a bathroom stall and arrested her. RP 306. Ms. Martin was compliant, but appeared confused and asked why she was under arrest. RP 307, 315. Deputy Cappetto told her it was for possessing a stolen vehicle. RP 319. Deputy Cappetto found the key fob to

the car in Ms. Martin's pocket. RP 327. Ms. Martin had not tried to flush it down the toilet. RP 327.

Ms. Martin agreed to speak to the deputy and said she did not know the car was stolen. RP 307, 327. Ms. Martin stated that she got the key fob from a man named Sean at Tammie's house. RP 308-09, 327, 420. Ms. Martin described Sean as a "sketchy" person, so it did not surprise her to learn the car did not have license plates or tags. RP 309, 317-19. Ms. Martin provided an address so Deputy Cappetto could go talk to Sean to corroborate what she was saying, but the Deputy refused to go and no other officers went to the house to investigate. RP 326, 332.

Meanwhile, another deputy stopped the U-Haul truck that Ms. Martin had been in. RP 340. Tammie Wright was the driver and sole occupant of the truck. RP 340-41, 343.

Deputy Ernest Cedillo met with Mr. Mondry and evaluated the condition of the car before turning it over to Mr. Mondry. RP 371. According to Deputy Cedillo, Mr. Mondry

told the officer there was no new damage to the car since it had gone missing. RP 372, 375. Deputy Cedillo did not recall whether there was damage to the windshield of the car. RP 373, 377.

Mr. Mondry testified, contrary to Deputy Cedillo, that his car had been damaged, including that the windshield had been cracked. RP 278-80. He submitted an invoice for repairs totaling over $10,000. RP 265. But none of these repairs were for broken windows or damage to the starting device, which was by push button and key fob. RP 282-83.

Mr. Mondry testified that law enforcement failed to take pictures of his car and did not take into evidence additional items he found in his car. RP 229-231. He testified that the police, who "were hemming and hawing about" it, did not want to deal with these items, which included a TV in the trunk, so he took the items and disposed of them. RP 229-30.

Mr. Mondry testified he later located surveillance footage showing his car being stolen. RP 227. Mr. Mondry did not turn

over this footage, but told police it showed a large man getting into his car and driving it away. RP 228-29.

Defense counsel argued to the jury there was reasonable doubt as to whether Ms. Martin knew the car was stolen. Ms. Martin's friend dropped Ms. Martin off at Ms. Wright's house to help her move, and they were given permission from Ms. Wright's roommate to use the car to get the moving truck. RP 426. Ms. Martin had the key fob so she could drive the car back to Ms. Wright's house. RP 430. Nonetheless, the jury convicted Ms. Martin of the charge. RP 440.

On appeal, Ms. Martin argued that the trial court erred in admitting testimonial hearsay from Deputy Cappetto about what the store employee told her. The Court of Appeals ruled the confrontation right violation was not preserved. The Court further ruled that out-of-court statement was admissible hearsay under the Rules of Evidence as a present sense impression. The Court of Appeals, however, agreed with Ms. Martin that she was entitled to de novo resentencing. The opinion is attached.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Ms. Martin objected to a law enforcement officer "reporting hearsay from [a witness] that we can't examine." This Court should grant review to decide whether this preserved for review a confrontation clause violation and whether Ms. Martin's constitutional right to confrontation was violated.

1. Testimonial statements from an absent witness are inadmissible, as is hearsay.

Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." ER 801(c). In general, hearsay is inadmissible. ER 802. Rationales for the inadmissibility of hearsay are many, including: "the out-of-court declarant was not under oath when making the statement in question, the declarant's demeanor cannot be observed, the declarant is not subject to cross-examination, and the witness who is recounting the declarant's statement in court may not recount the statement accurately." 5B Wash. Prac., Evidence Law and Practice § 801.2 (6th ed.).

"The use of hearsay impinges upon a defendant's constitutional right to confront and cross-examine witnesses."

State v. Hudlow, 182 Wn. App. 266, 278, 331 P.3d 90 (2014). Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, guarantee defendants the right to confront witnesses. U.S. Const. amend. VI; Const. art. I, § 22. This is a "bedrock constitutional protection[]." *Hemphill v. New York*, 595 U.S. 140, 150, 142 S. Ct. 681, 690, 211 L. Ed. 2d 534 (2022).

The confrontation right "applies to 'witnesses' against the accused–in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (citation omitted). Absent unavailability and a prior opportunity for cross-examination, testimonial statements from a non-testifying witness may not be admitted. *Id.* at 59. Exceptions to this rule are very limited because the only exceptions are those established at the time of the founding. *Hemphill*, 142 S. Ct. at 683.

Included among the "core class" of testimonial statements are (1) statements that a declarant would reasonably

expect to be used prosecutorially and (2) statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Crawford,* at 541 U.S. 51-52. "Statements are testimonial when they are made to establish past facts in order to investigate or prosecute a crime. *State v. Burke*, 196 Wn.2d 712, 726, 478 P.3d 1096 (2021). In other words, statements are testimonial when "the primary purpose of the statements was to establish or prove past facts for use in a criminal prosecution." *Id.* at 727. Statements made to law enforcement officers are more likely to qualify as testimonial under the primary purpose test than statements made to other persons. *Id.* at 727-28.

Whether or not the statement is hearsay is a question of law reviewed de novo. *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006). Similarly, whether the admission of a statement violate a defendant's confrontation rights is a constitutional question reviewed de novo. *Burke*, 196 Wn.2d at 725.

2. The arresting deputy's testimony that a store worker said that Ms. Martin was in the bathroom and been there since Ms. Martin came into the store was testimonial hearsay.

Before trial, Ms. Martin moved to exclude testimonial statements that would violate Ms. Martin's constitutional right to confrontation. CP 27-32. The court granted the motion. CP 111; RP 25-29.

During Deputy Cappetto's testimony, the prosecutor asked her about the events leading up to her arrest of Ms. Martin. This included a question about how long Deputy Cappetto was in the grocery store looking for Ms. Martin. RP 303. Deputy Cappetto testified that she and other officers were looking for Ms. Martin in the store for about five minutes when a store worker told Deputy Cappetto the woman they "were looking for was located in the bathroom, and she had been in there ever since she came in." RP 303-04. Ms. Martin objected to the Deputy "reporting hearsay from the store clerk that we can't examine, and ask[ed] the Court to strike that from the

record and instruct the jury." RP 304. The trial court overruled the objection without explanation. RP 304.

The court erred on both confrontation and hearsay grounds. Starting with hearsay, the out-of-court statement from the store worker was admitted for the truth of the matter asserted, i.e., that Ms. Martin had gone directly to the bathroom since entering the store and was still in the bathroom.[1]

More critically, the statement by the store employee to Deputy Cappetto was testimonial. It was a statement to a law enforcement officer conducting a criminal investigation. The store employee was assisting law enforcement's investigation. There was no emergency and the store employee was not seeking help or assistance from law enforcement. Under the

[1] One might theorize the statement is admissible to explain why Deputy Cappetto acted as she did, but this is not relevant and the statement remains inadmissible under the hearsay rules. *State v. Rocha*, 21 Wn. App. 2d 26, 32, 504 P.3d 233 (2022); *Hudlow*, 182 Wn. App. 278-280. Moreover, the trial court did not purport to admit the statement for a non-hearsay purpose, as shown by the lack of any limiting instruction.

primary purpose test, the statement was testimonial because it was made to "assist police in investigating or prosecuting a crime." *Burke*, 196 Wn.2d at 738; *see also id.* at 725-29.

Still, the Court of Appeals refused to review the confrontation right violation, reasoning that it was not preserved because Ms. Martin's attorney did not utter the word, "confrontation." Slip op. at 5. The Court of Appeals further ruled that the testimony was admissible hearsay under the Rules of Evidence as a "present sense impression." Slip. op at 5-6. This Court should grant review of these issues.

3. The confrontation right violation was preserved.

As argued by Ms. Martin in her briefing, Br. of App. at 16 n.1; Reply Br. at 1-6. the confrontation right violation was preserved for review because the constitutional ground for Ms. Martin's objection was readily apparent from the context. ER 103(a)(1); *State v. Swanson*, 181 Wn. App. 953, 958, 327 P.3d 67 (2014).

"The purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." *Blomstrom v. Tripp*, 189 Wn.2d 379, 394, 402 P.3d 831 (2017) (cleaned up). A party's objection may preserve an issue if the "ground for objection is readily apparent from the circumstances." *Id.* In *Blomstrom*, the party adequately stated his constitutional objection by citing to a Court of Appeal's case by name. *Id.* at 394-96. This is because of the context. *Id.* Other cases illustrate that context can be sufficient even if the specific ground is not explicitly stated. E.g., *State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (counsel's general objection to an expert's testimony preserved the issue of evidentiary reliability for appeal because the basis for the objection was evident in context); *State v. Powell*, 166 Wn.2d 73, 85, 90, 206 P.3d 321 (2009) (plurality opinion) (given context, defendant's objection to the mention of drugs before the jury raised a challenge to the evidence's prejudicial value); *Swanson*, 181 Wn. App. 958

(specific ground for the objection to the State's closing argument, that it misstated the law, was apparent from context).

Here, the prosecution elicited testimony from Deputy Cappetto that an unidentified employee of a grocery store told the deputy that the woman she and other officers "were looking for was located in the bathroom, and she had been in there ever since she came in." RP 303-04. Ms. Martin objected to Deputy Cappetto "reporting hearsay from the store clerk *that we can't examine*." RP 304 (emphasis added). Before trial, the court granted Ms. Martin's "[m]otion to exclude hearsay statements made in violation of the defendant's constitutional right of confrontation." CP 27, 111.

Given the context, the ground for objection is readily apparent. Ms. Martin was making both a confrontation right objection and hearsay objection. Ms. Martin objected not merely because the testimony was "reporting hearsay," but because she could not "examine" *the store clerk* who made the statement, i.e., an absent witness. This plainly raises a

constitutional confrontation right issue, not a mere hearsay issue. *See State v. Sumbundu*, noted 11 Wn. App. 2d 1045, 2019 WL 6869113, at *14 & n.13 (2019) (unpublished) (confrontation right violation preserved to witness testifying about jail call recordings through objection stating "she can't testify").

Indeed, the United States Supreme Court reasoned that a confrontation clause issue was preserved as a federal issue where the objection in state court stated in part, "I'm being deprived of the opportunity to examine Mr. Morris." *Hemphill*, 595 U.S. at 146, 148-49. The same is true here.

The Court of Appeals reasoned that Ms. Martin's objection was "ambiguous" because the objection could have been "a reference to the witness's unavailability under the hearsay rules." Slip op. at 5. This does not follow. Ms. Martin's objection logically does not apply to hearsay from testifying witnesses. Absent an exception, a testifying witness cannot testify about hearsay statements the witness made even though

the other party can examine that witness. ER 801(c) ("'Hearsay' is a statement, other than one made by the declarant *while testifying at the trial or hearing*, offered in evidence to prove the truth of the matter asserted") (emphasis added). For example, Deputy Cappetto could not repeat her own out-of-court statements for the truth of the matter asserted even though Ms. Martin was able to examine Deputy Cappetto in court.

The conclusion that the confrontation right violation is preserved is supported by Ms. Martin's motion in limine and the court's ruling granting that motion. CP 27, 111. Ms. Martin had already apprised the court she sought to exclude the admission of statements that would violate her constitutional right to confrontation. CP 27-32. The court granted this motion without qualification. CP 111. Regardless of whether this preserved the error, it certainly put the trial court on notice Ms. Martin was asserting her constitutional right to confrontation of the witnesses against her. *See In re Det. of Coe*, 175 Wn.2d 482, 504, 286 P.3d 29 (2012) (pretrial motion preserved

claimed error as to admission of hearsay). Her objection to Deputy Cappetto's testimony plainly invoked that right.

The Court of Appeals faulted Ms. Martin for not being specific enough in her objection given that her attorney knew how to explicitly invoke the confrontation right. Slip op. at 5. But that does not change the analysis which is whether the context makes the ground for the objection readily apparent. The trial court's grant of the motion in limine on confrontation grounds does not obscure the subsequent objection, it makes the ground readily apparent.

The Court of Appeals' decision conflicts with precedent, meriting review. RAP 13.4(b)(1), (2). And what is needed to preserve a confrontation right objection, in the absence of an explicit citation to that right, is an issue of substantial public interest meriting review. RAP 13.4(b)(4).

4. The Court should grant review to overrule State v. Burns, which incorrectly and harmfully held confrontation right violations cannot be raised as a matter of right as manifest constitutional error under RAP 2.5(a)(3).

If the confrontation right violation was not preserved, it was still properly raised as a matter of right as manifest error affecting a constitutional right. RAP 2.5(a)(3). Manifest constitutional error is established if the asserted error is of constitutional magnitude and there is plausible showing that the asserted error had practical and identifiable consequences. *State v. A.M.*, 194 Wn.2d 33, 38, 448 P.3d 35 (2019). This does not require "establishing an actual violation of a constitutional right" or proof that the error is prejudicial. *Id.* 39 (internal quotation omitted).

In *A.M.*, this Court reversed the Court of Appeals where the appellant made a violation of the right to self-incrimination argument for the first time on appeal, but the Court of Appeals erred by not addressing it. *Id. at* 38-40. In the trial court, *A.M.* objected to the admission of an inventory form upon booking at

juvenile detention center that she was a forced to sign listing "*my property*" as irrelevant under the Rules of Evidence. *Id.* at 40-41 (emphasis in original). In determining the error to be manifest, this Court emphasized that the defendant had argued for the exclusion of the evidence, "*albeit on different grounds*" than the privilege against self-incrimination. *A.M.*, 194 Wn.2d at 40.

Applying the same mode of analysis, the confrontation right violation is also manifest constitutional error. Ms. Martin objected to out-of-court statements from a non-testifying witness, albeit (at the least) on hearsay grounds under the Rules of Evidence.

But in a case decided several months before *A.M.*, a five-justice majority of this Court narrowly held that confrontation right violations cannot be raised as a matter of right as manifest constitutional error. *Burns*, 193 Wn.2d at 206-211.[2] The Court's

[2] Ms. Martin did not ask the Court of Appeals to disregard *Burns* because the Court of Appeals had no authority

holding was based on a decision from the Court of Appeals: *State v. O'Cain*, 169 Wn. App. 228, 279 P.3d 926 (2012). *Id.* at 208-211.

Four justices disagreed with this holding, reasoning that a confrontation right violation may qualify as manifest constitutional error but did not under the facts presented in *Burns*. *Id.* at 212-24 (Stephens, J., concurring). These justices "strongly disagree[d] with the majority's decision to adopt the analysis from *State v. O'Cain*." Id. at 212. As Justice Stephens explained:

> Instead of rejecting *O'Cain's* flawed analysis, the majority embraces it and carves out a confrontation clause exception to RAP 2.5(a)(3) based on a confusing notion of "waiver" that is contrary to the rule's very purpose. It claims this approach furthers judicial efficiency and finality, but our established RAP 2.5(a)(3) analysis already

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to do so. *State v. Rogers*, 17 Wn. App. 2d 466, 476, 487 P.3d 177 (2021); *Needham v. Dreyer*, 11 Wn. App. 2d 479, 489, 454 P.3d 136 (2019). Given this context, Ms. Martin properly asks this Court to overrule *Burns*. *See State v. Robinson*, 171 Wn.2d 292, 304-07, 253 P.3d 84 (2011) (rules of issue preservation do not require defendants to make meritless arguments contrary to binding precedent).

> addresses these prudential concerns by limiting review of new claims on appeal to manifest error affecting a constitutional right. I would adhere to that sound analysis.

Id. at 212.

This Court "will overrule prior precedent when there has been a clear showing that an established rule is incorrect and harmful or when the legal underpinnings of our precedent have changed or disappeared altogether." *State v. Pierce*, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) (cleaned up). *Burns* should be overruled because it is wrong and demonstrable harmful, as this case and others prove.

The right to confrontation is "a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). It is an express constitutional right in both the state and federal constitutions, meaning "it is to be accorded the highest respect." *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978); *see also Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d

772, 780, 819 P.2d 370 (1991) (state constitution catalogs "those fundamental rights of our citizens" at its beginning.).

But *Burns* makes the right to confrontation essentially a non-constitutional right for purposes of RAP 2.5(a)(3). This discord has the effect of creating grave injustice to accused persons. *See State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988) ("Constitutional errors are treated specially because they often result in serious injustice to the accused.").

Moreover, *Burns'* underpinnings are undermined by this Court's subsequent opinion in *A.M.* That opinion addressed a violation of the right against-self-incrimination as manifest constitutional error even though the claim was not expressly made in the trial court.

This Court should grant review and overrule *Burns*. It is in conflict with this Court's precedent interpreting RAP 2.5(a)(3), meriting review. RAP 13.4(b)(1). Ensuring fair trials and vindicating the fundamental right to confrontation qualifies

as an issue of substantial public interest, further meriting review. RAP 13.4(b)(4).

5. The store employee's statement to law enforcement was testimonial hearsay and was not admissible under the state and federal constitutions or the Rules of Evidence.

The Court of Appeals did not address the merits of Ms. Martin's confrontation right argument. Br. of App. at 12-20; Reply Br. at 7-10. That issue presents a significant constitutional issue and matter of public interest. Review should be granted on that issue. RAP 13.4(b)(3), (4).

As for the Rules of Evidence, the State argued for the first time on appeal the store employee's statement was admissible hearsay under the present sense impression exception. ER 803(a)(1). The Court of Appeals adopted the State's position. Slip op. at 5-6.

The court erred. The present sense impression exception "requires that the statement be made while the declarant was perceiving the event, or immediately thereafter." *State v. Hieb*,

39 Wn. App. 273, 278, 693 P.2d 145 (1984), *reversed on other grounds,* 107 Wn.2d 97, 727 P.2d 239 (1986). An answer to an inquiry is not a present sense impression. *Id.*

Here, the statement concerned Ms. Martin going to the store bathroom immediately upon entry. The store worker's statement to police was not spontaneous. Rather, it was a response to an inquiry from law enforcement about a woman who had recently entered the store. See RP 303-04. Unless law enforcement announced they were looking for a woman who recently came into the store, the store employee would not know who the police were looking for. Because the store employee was answering a law enforcement inquiry, the present sense impression exception does not apply.

Moreover, the statement was made to law enforcement about five minutes after they were in the store. RP 303-04. Law enforcement entered the store sometime after Ms. Martin did, creating additional lag between the perceived event and the

statement by the employee to law enforcement. This is too long of a delay for the present sense impression exception to apply. Present sense impressions—Applying the rule, 5C Wash. Prac., Evidence Law and Practice § 803.4 (6th ed.).

The Court of Appeals' contrary ruling conflicts with precedent. RAP 13.4(b)(1), (2). Review is also warranted as an issue of substantial public interest so that trial courts and the appellate courts will properly apply the hearsay exceptions so that the rule against hearsay remains the rule, rather the exception. RAP 13.4(b)(4).

E. CONCLUSION

For the foregoing reasons, this Court should grant Ms. Martin's petition for review on all of the related issues, including the vital issue of whether this Court should over *State v. Burns*'s holding that constitutional violations of the right to confrontation never qualify as manifest constitutional error under RAP 2.5(a)(3).

This document contains 4,865 words and complies with RAP 18.17.

Respectfully submitted this 7th day of August, 2023.

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Appendix

Filed
Washington State
Court of Appeals
Division Two

July 9, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JENNIFER LORRIANE MARTIN, Appellant.	No. 57915-4-II UNPUBLISHED OPINION

VELJACIC, A.C.J. — Jennifer L. Martin appeals her possession of a stolen vehicle conviction, arguing that the allowed testimony violated the confrontation clause and the trial court erred in denying her hearsay objection during trial. Martin further argues that the State failed to prove by a preponderance of evidence her criminal history, the trial court erred in denying her request for an exceptional sentence below the standard range, and the court wrongly imposed a $500 victim penalty assessment (VPA) and a $100 deoxyribonucleic acid (DNA) collection fee. The State concedes that it failed to prove Martin's criminal history. In her statement of additional grounds (SAG) for review, Martin alleges prosecutorial misconduct and ineffective assistance of counsel. We affirm Martin's conviction but accept the State's concession regarding the sentencing error pertaining to Martin's criminal history, and remand for resentencing.

FACTS

Pierce County Sheriff's Department dispatched Deputy Carly Cappetto to investigate the report of a stolen vehicle. 2RP 292, 294. The vehicle's owner reported that he spotted the vehicle

and followed it to a U-Haul store. Cappetto was nearby and also observed the vehicle pull into the U-Haul store.

Cappetto observed Martin get out of the vehicle and walk over to a U-Haul truck. Cappetto approached the vehicle and confirmed that it was the stolen vehicle by checking the vehicle identification number. Martin was aware of Cappetto's presence and kept looking over at her.

Cappetto observed Martin get into the U-Haul truck with Tammie Wright and another individual and drive through an alley. Cappetto followed them and waited for backup. The truck stopped at a nearby grocery store and Cappetto observed Martin get out of the truck and go inside the store.

When backup arrived, Cappetto and the other deputies began looking for Martin. After about five minutes, a store employee approached the deputies and told them the individual they were looking for was in the restroom and had been in there the whole time. Cappetto located Martin in the restroom and arrested her.

The State charged Martin with unlawful possession of a stolen vehicle.

Prior to trial, Martin filed a motion in limine to exclude hearsay in violation of Martin's constitutional right of confrontation. Martin specifically requested that any reference to anything that Wright might have said should be excluded "[b]ecause [] Wright will not be present for trial." Clerk's Papers (CP) at 32. Martin's 45-page motion in limine does not mention the store employee's statement. During the hearing on Martin's motion, the court clarified that the objection was just focused on Wright and defense counsel replied, "Yes. Yes." 1 Rep. of Proc. (RP) at 37. The court granted the motion to exclude any statements by Wright.

During trial, Cappetto testified to the events that led up to Martin's arrest. When testifying about looking for Martin inside the grocery store, Cappetto stated that a store employee approached

the deputies and said, "the female [they] were looking for was located in the bathroom, and she had been in there ever since she came in." 2 RP at 304. Defense counsel objected, stating, "I object to her reporting hearsay from the store clerk that we can't examine." 2 RP at 304. The trial court overruled the objection.

The jury found Martin guilty of unlawful possession of a stolen vehicle.

At sentencing, the State only summarized Martin's criminal history without providing evidence. The parties disagreed about Martin's offender score based on her prior criminal history. Martin conceded that she had a prior felony conviction for escape but argued that it washed out. The State argued that the conviction did not wash out because of subsequent misdemeanor convictions. Martin requested an exceptional sentence below the standard range based on her argument that the conviction washed out.

The trial court concluded that the prior felony did not wash out and calculated her offender score as a one. The court denied Martin's request for a mitigated exceptional sentence and imposed a low-end standard range sentence of two months.

The trial court imposed a $500 VPA fee and $100 DNA collection fee but waived the criminal filing fee based on the court's finding that Martin was indigent. The court ordered Martin to pay $500 in restitution to the vehicle's owner for damage to the vehicle.

Martin appeals.

ANALYSIS

I. CONFRONTATION CLAUSE

Martin contends her constitutional right to confrontation was violated by admission of Cappetto's testimony regarding what the store employee told her about Martin's location inside

the grocery store. The State responds that this issue was not preserved for appeal. We agree with the State.

Where a witness is absent but the State wishes to present his or her prior testimonial statements at trial, it can do so consistent with the federal and state constitutions only if the witness is truly unavailable and the defendant has had a prior opportunity for cross-examination. *State v. Price*, 158 Wn.2d 630, 639, 146 P.3d 1183 (2006); *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); U.S. CONST. amend VI; WASH. CONST. art. I, § 22. But a defendant must assert his right to confrontation at trial to preserve the challenge for appeal. *State v. Burns*, 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019).

In *Burns*, the Washington Supreme Court adopted a requirement that a defendant must object in the trial court to evidence that violates his or her right to confrontation. 193 Wn.2d at 210-11. The court held that "requiring an objection is in the interests of judicial efficiency and clarity, and provides a basis for appellate courts to review a trial judge's decision." *Id*. at 211. If a defendant does not object at trial, "'nothing the trial court does or fails to do is a denial of the right, and if there is no denial of a right, there is no error by the trial court, manifest or otherwise, that an appellate court can review.'" *Id*. (quoting *State v. Fraser*, 170 Wn. App. 13, 25-26, 282 P.3d 152 (2012)).

A general objection may not be sufficient. *State v. Dash*, 163 Wn. App. 63, 72, 259 P.3d 319 (2011). Moreover, a hearsay objection is not enough. *State v. O'Cain*, 169 Wn. App. 228, 245, 279 P.3d 926 (2012).

Prior to trial, Martin filed a motion in limine to exclude statements made by Wright based on constitutional confrontation clause grounds, but she made no mention of the grocery store employee's statement. Then, during trial, Cappetto testified that while looking for Martin inside

the store, a store employee approached the deputies and told them that "the female [they] were looking for was located in the bathroom, and she had been in there ever since she came in." 2 RP at 304. Martin objected, stating, "I object to her reporting hearsay from the store clerk that we can't examine." 2 RP at 304. She did not mention the confrontation clause in her objection. Use of the word "examine" is not enough to preserve this issue for review because it is ambiguous and could simply be a reference to the witness's unavailability under the hearsay rules. 2 RP at 304. Additionally, Martin raised the issue of confrontation previously in her motion to suppress Wright's statements and in so doing demonstrated awareness of the issue and ability to specifically raise it. She did not do so here. *See Dash*, 163 Wn. App. at 72. For this reason, we hold that Martin did not preserve her argument that her confrontation right was violated.

II. HEARSAY

Martin next contends that the trial court abused its discretion in allowing Cappetto to testify to the grocery store clerk's statement. We disagree.

Generally, a decision to admit or exclude evidence is reviewed for an abuse of discretion. *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). A trial court abuses its discretion when it adopts a view that a reasonable person would not take, its decision is based on facts unsupported in the record, or its decision was reached by applying an incorrect legal standard. *Id.*

"Hearsay" is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. ER 80l(c). Generally, hearsay is not admissible unless an exception applies. ER 802. ER 803(a)(l) provides an exception for present sense impressions and the declarant's availability is immaterial. A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(l). "Present sense impression

statements must grow out of the event reported and in some way characterize that event." *State v. Martinez*, 105 Wn. App. 775, 783, 20 P.3d 1062 (2001), *overruled on other grounds by State v. Rangel-Reyes*, 119 Wn. App. 494, 81 P.3d 157 (2003). "The statement must be a 'spontaneous or instinctive utterance of thought,' evoked by the occurrence itself, unembellished by premeditation, reflection, or design. It is not a statement of memory or belief." *Id*. (quoting *Beck v. Dye*, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939)).

Here, deputies were at the grocery store looking for Martin. A store employee approached the deputies and told them Martin was in the restroom and had been in there since she came in. This statement was made within minutes of the deputies starting their search for Martin and was based on the store employee's observation of what was happening at the grocery store. The contemporaneous and spontaneous nature of the statement, including the timing, nature, and content, reduces the chance of misrepresentation or fabrication by the witness. Therefore, the statement was a present sense impression under ER 803(a)(l) and an exception to the hearsay rule. Accordingly, the trial court did not abuse its discretion in denying Martin's hearsay objection at trial.

III. SENTENCING

Martin contends that the State failed to prove her criminal history beyond a reasonable doubt. The State concedes the error. We accept the State's concession.

"In determining the proper offender score, the court may rely on information that is admitted, acknowledged, or proved in a trial or at sentencing." *State v. Cate*, 194 Wn.2d 909, 913-14, 453 P.3d 990 (2019). The State has the burden of proving the criminal history by a preponderance of the evidence. *Id.* at 912-13. A prosecutor's unsupported summary of criminal history does not satisfy the State's burden. *Id.* at 913.

Here, the State only summarized Martin's criminal history at sentencing without providing evidence. This is not sufficient to satisfy the State's burden. *Cate*, 194 Wn.2d at 913. Accordingly, we accept the State's concession and remand for resentencing.

Martin further contends that the trial court erred in denying her request for an exceptional sentence below the standard range and in imposing the $500 VPA fee and the $100 DNA fee. Because we remand for resentencing, Martin may raise these issues to the trial court on remand.[1]

IV. SAG

In her pro se SAG, Martin first appears to allege prosecutorial misconduct, arguing that the prosecutor wrongly requested that the trial court order restitution as part of her sentence even though defense counsel allegedly obtained information that the stolen vehicle's owner engaged in insurance fraud. Because we remand this matter for resentencing, we do not address this issue.

Martin next argues that she received ineffective assistance of counsel because counsel did not argue to the jury that Martin admitted driving the vehicle as she requested and counsel would not let Martin testify when she wanted to testify. But our record does not include evidence relating to these allegations. Because Martin's SAG claims rely on matters outside the record, we do not consider them on direct appeal. *See State v. McFarland*, 127 Wn.2d 322, 338, n5, 899 P.2d 1251 (1995) (declining to consider matters outside the record on an ineffective assistance of counsel appeal and holding that "a personal restraint petition is the appropriate vehicle for bringing those matters before the court.").

[1] The State requests that we reach the exceptional sentence issue to provide guidance to the trial court on remand. But, based on our disposition, any discussion regarding this substantive issue would amount to an advisory opinion, which is disfavored by Washington courts. *State v. Norby*, 122 Wn.2d 258, 269, 858 P.2d 210 (1993).

CONCLUSION

We affirm Martin's conviction but accept the State's concession regarding the sentencing error involving proving Martin's criminal history, and remand for resentencing. On remand, Martin may address her other sentencing issues before the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, A.C.J.

We concur:

Maxa, J.

Che, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 57915-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Washington Appellate Project

Date: August 7, 2024

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