66694-1

66694-1

NO. 66694-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TYSON MONTE CLARK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether testimony of the emergency-room physician who treated the victim's injuries comports with the Confrontation Clause, where the physician's treatment and opinion as to the nature of the injuries was based in part on the non-testimonial result of a radiological test performed by a non-testifying physician for the purpose of facilitating treatment of the injuries.

2. Whether the medical record prepared by the testifying physician in the ordinary course of business comports with the Confrontation Clause, although it includes the non-testimonial result of a radiological test performed by a non-testifying physician.

3. Whether the trial court properly exercised its discretion in admitting the medical record prepared by the testifying physician as a business record.

4. Whether the trial court properly exercised its discretion in admitting the treating physician's reference to the non-testimonial result of a radiological test upon which he relied, because it was one fact upon which the treating physician's expert opinion was based.

5. Whether any error in admitting the radiologist's conclusion that the victim's nose was shattered was harmless, where substantial bodily harm was established by other overwhelming evidence, Clark conceded substantial bodily harm at trial, and the nature of the fracture was not inconsistent with Clark's theory of the case.

B. STATEMENT OF THE CASE

1. Procedural Facts

The defendant, Tyson Clark, and codefendant Todd Doerflinger both were charged with assault in the second degree relating to an assault on Steven Palmer on September 11, 2009. CP 1-2. Judge Leroy McCullough presided over a jury trial involving only defendant Clark. 1RP 1.[1] On December 9, 2010, a jury found Clark guilty as charged. CP 51.

The court rejected a defense request for an exceptional sentence downward and sentenced Clark to a standard range sentence of five months in jail. CP 83-89; 7RP 17. The court converted one month of the sentence to community restitution but

[1] The Verbatim Record of Proceedings is cited as follows: 1RP – 11/15/10; 2RP – 11/22/10; 3RP – 11/30/10; 4RP – 12/1/10; 5RP – volume including 12/6 and 12/7/10; 6RP – 12/8/10; 7RP – 2/4/11.

because this crime is a violent offense, the court did not have authority to do so; thus, an order modifying sentence was entered on June 7, 2011, reducing the term of custody by one month and increasing the community custody term to four months. Supp. CP __ (sub. #72, 6-07-11 Order Modifying Judgment and Sentence).

2. Substantive facts

On September 11, 2009, defendant Tyson Clark drove his friend Todd Doerflinger to the Puerta Vallarta restaurant and bar. 5RP 198, 223. Later that evening, Clark and Doerflinger taunted, threatened, and then assaulted Steven Palmer. 5RP 86-96. Clark punched Palmer in the face and then forced Palmer's head down and drove his knee into Palmer's face. 5RP 94-96. Palmer's nose was shattered, his right eye was swollen shut and he could not see out of it for four days, and he required stitches. 5RP 100, 105-06.

Steven Palmer is 5'7" tall and about 200 pounds. 5RP 77. He went to the Puerta Vallarta to meet a friend and had a few drinks, then went into the restroom. 5RP 78-81. Inside the restroom, he saw Clark and another man, and one of them loudly said, "Why are you pointing at me, faggot." 5RP 85-86. Palmer saw that the men were staring at him and asked if they were talking

to him; they responded: "we're going to beat your ass." 5RP 87. As Palmer tried to get out of the restroom he was pushed by Doerflinger.[2] 5RP 89-90. Palmer pushed Doerflinger's arm away and was moving toward the bar when Clark punched him in the side of the head. 5RP 94-95. Palmer was dazed by the blow. 5RP 96. Clark then grabbed Palmer by the back of the head, pushed Palmer's head down and kneed him in the face. 5RP 96. The knee strike knocked Palmer out briefly. 5RP 96, 99.

As a result of Clark's assault, Palmer's eye was swollen shut. 5RP 100; Ex. 1, 3. He suffered a laceration to his eyelid. 5RP 105. Responding police observed that Palmer's eye was swollen shut and bleeding, that his nose was swollen, and that Palmer was bloody and appeared dazed. 3RP 18-19, 35-36, 42. Deputy Smith photographed Palmer's face, knuckles and fist, noting that Palmer's knuckles and fist did not appear to be injured. 3RP 19-20, 44-45. A friend immediately took Palmer to Valley Medical Center for treatment. 5RP 104.

William Guinn went to the Puerto Vallarta that night with his girlfriend. 5RP 15. He did not know Palmer or Clark. 5RP 21. He

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[2] Palmer did not identify the man with Clark as Doerflinger, but Clark testified that it was who was with him in the restroom. 5RP 201-02.

heard loud voices, turned around, and saw two people standing face-to-face, three to four feet apart. 5RP 17-19. No one was falling over or moving toward or away from the two men. 5RP 20. Within two seconds of Guinn turning to look, Clark punched Palmer "lightning fast," two or three times. 5RP 19-24. Clark then grabbed Palmer's head, pulled Palmer's head down and at the same time brought his knee up; Clark's knee connected with Palmer's face. 5RP 21-24. After Palmer was kneed in the face, he dropped to the ground on his hands and knees. 5RP 27. Clark calmly walked away and left. 5RP 29.

Guinn did not see Palmer swing at anyone or touch anyone. 5RP 25. Guinn saw that no one else was involved in the fight. 5RP 26. He did see another man standing behind Clark during the fight. 5RP 29. After Palmer went down, this other man, apparently Doerflinger, tried to get to Palmer, tried to swing at others in the bar, and broke a window. 5RP 29, 32, 35-36.

King County Sheriff's Deputy Victor responded to a radio call of a fight at the restaurant and contacted Clark about a block away. 4RP 120, 125. Clark claimed that he and Doerflinger left the restroom after two other men, and Doerflinger got into an argument with the younger man. 4RP 132. Clark said there was pushing and

shoving and Clark pushed the younger man, who had pushed Doerflinger. 4RP 132. Clark claimed the man came back and punched Clark in the temple, so Clark punched the man in the jaw. 4RP 132-33. Clark claimed that someone then stepped between them and broke up the fight and he walked away. 4RP 133. The Deputy did not note any injuries to Clark's face or hands. 4RP 131, 133, 139, 144-45.

Early in the trial, Clark successfully moved to exclude evidence of property damage caused by Doerflinger after the assault, repeatedly asserting that the defense was not based on defense of another. 3RP 27-30. However, Clark testified that he confronted and pushed Palmer because Palmer pushed Doerflinger down and Clark was concerned for the safety of Doerflinger. 5RP 204, 218-19.

Clark is 6' tall and, at trial, weighed about 208 pounds. 5RP 213. Doerflinger is 6' 1" or 6' 2" and about 200 pounds. 5RP 213. Clark worked as a casino dealer/ floor shift man when this incident occurred; by the time of trial, he was a doorman/ manager at an adult entertainment business. 5RP 198.

Clark testified that he saw Palmer and Doerflinger talking in the restroom but did not hear what was said. 5RP 202. He said

that he held open the restroom door for Palmer as he left, and that Palmer pushed past him and pushed Doerflinger down into the chairs on one side of a booth. 5RP 203-04. When Palmer advanced toward the prone Doerflinger, Clark was afraid for Doerflinger's safety, so he stepped between them and pushed Palmer away. 5RP 204, 218. Clark claimed that Palmer then started swinging at Clark, hitting Clark once, grazing him on the temple. 5RP 199, 204. Clark dodged a couple more punches and then hit Palmer once in the face, and Palmer fell to the floor. 5RP 199, 204. Clark claimed that he did not knee Palmer. 5RP 205. At trial, Clark testified that no one stepped between him and Palmer to break up the fight, contrary to his initial statement to police. 5RP 215.

Defense witness Edward Kabba presented a substantially different version of events. Kabba is a close friend of the Doerflinger family. 5RP 182. Kabba testified that as Palmer and Clark came out of the bathroom, Palmer was swinging at Clark. 5RP 176. Then Kabba testified that before the swinging started, Palmer pushed Clark, who pushed back; then Palmer swung at Clark, Clark punched Palmer in the face one time, and Palmer fell. 5RP 177. Although he saw Palmer and Clark come out of the

restroom, Kabba did not see Palmer push Doerflinger down into a booth.

Kabba claimed to have seen Palmer swing at Clark multiple times with each arm. 5RP 185. Kabba said that although he was only a couple feet away, he did not see if any of these blows landed. 5RP 184-86. Kabba testified that while Palmer and Clark were fighting, Doerflinger was fighting an older man; they were all fighting each other. 5RP 186-87.

Dr. Larry Kadeg treated Steven Palmer at Valley Medical Center, shortly after the assault. 4RP 24. Kadeg is an Emergency Medicine specialist with 25 years of experience. 4RP 18. The reason for the visit was that Palmer had allegedly been hit in the face multiple times. 4RP 29. Kadeg saw that Palmer's eye and nose were swollen, and inferred that there were at least two separate injuries. 5RP 30-32. Kadeg suspected a fracture and ordered a computerized tomography (CT) scan to establish the nature of any fractures, in order to determine the appropriate treatment. 5RP 31-33. Kadeg closed the eyelid laceration with stitches. 5RP 30, 34. Asked for his clinical impression, Kadeg stated, "I concluded that he had a nasal bone fracture." 5RP 36. Kadeg testified that he relied on the radiologist's interpretation of

the CT scan to give him a diagnosis of injuries apparent on the x-ray. 5RP 39.

Kadeg described in detail the preparation and use of medical records at Valley Medical Center. 4RP 21-23. The records are made in the ordinary course of business, to document the visit, the patient's medical condition, and the care administered. 4RP 21-22. Medical personnel often review old records when patients return to the medical center and the records may be available for a court case. 4RP 22-23.

Kadeg regularly gets readings from radiologists as part of his regular daily practice. 4RP 40. Kadeg testified that using the radiologist's reading and Kadeg's own examination of Palmer, Kadeg diagnosed Palmer as having a nasal fracture and a facial laceration. 4RP 40.

A two-page medical record of this emergency room visit was admitted, which included the reference: "LABORATORY: CT scan of facial bones shows comminuted old fractures noted, comminuted fracture of the nose, nasal bones." 4RP 52, 66; Ex. 13. The separate, complete report of the radiologist was detached from the general report and withdrawn by the State. 4RP 63, 67-68.

C. ARGUMENT

The claims raised on this appeal all involve the conclusion of a radiologist who performed a radiological scan of the victim's face at the direction of the emergency room physician who was treating the victim for the injuries suffered in the charged assault, immediately after the assault occurred. The radiologist performed a computer tomography (CT) scan and informed the emergency room physician that the victim had a comminuted fracture of his nose. 4RP 36-40. That conclusion was included in the testimony of the emergency room physician, Dr. Larry Kadeg, and was reflected in Kadeg's notes of his treatment, admitted through the medical record of that emergency room visit, created immediately afterward. 4RP 36-40, 43, 73; Ex. 13.

Clark claims that the evidence of the radiologist's conclusion violated the Confrontation Clause because the radiologist did not testify at trial. Clark also claims that this evidence was inadmissible hearsay. Both claims should be rejected. Medical records created for the purpose of providing treatment are not testimonial, so their admission is not controlled by the Confrontation Clause. The record and the radiologist's opinion were properly admitted as business records, and would also have been properly admitted as

statements upon which an expert relied, and as statements for purposes of medical diagnosis and treatment.

1. THE RADIOLOGIST'S CONCLUSION WAS A RECORD OF MEDICAL TREATMENT, NOT TESTIMONIAL HEARSAY, SO ITS ADMISSION DID NOT VIOLATE THE CONFRONTATION CLAUSE.

The Confrontation Clause of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause of the Washington Constitution provides: "In criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." WA Const. art. I, §22. Clark has not argued that the Washington Constitution provides any greater right than the Sixth Amendment in the context of the issues in this case.

In 2004, the United States Supreme Court altered the course of Confrontation Clause analysis in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Court explicitly limited the reach of the Confrontation Clause to testimonial statements. Id. at 68. The opinion in Crawford deferred any effort to set out a comprehensive definition of "testimonial,"

holding only that at a minimum it includes prior testimony and police interrogations. Id.

Two years later, the Supreme Court further defined which police interrogations produce testimonial statements, in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The Court held:

> 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 indicate 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 prosecution.

Id. at 822 (footnote omitted).

Earlier this year, the Supreme Court reviewed these developments in application of the Sixth Amendment Confrontation Clause in Michigan v. Bryant, __ U.S. __, 131 S. Ct. 1143, 1152-55, 179 L. Ed. 2d 93 (2011). It noted that "there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." Id. at 1155. The Court held: "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the

Confrontation Clause." Id. at 1155, 1166-67. The relevant inquiry is the primary purpose that reasonable participants in a particular encounter would have had. Id. at 1156, 1162. The existence of an ongoing emergency is relevant to determine the primary purpose of the statements because the emergency focuses the declarants on something other than proving past events potentially relevant to later criminal prosecutions. Id. at 1157.

The Supreme Court again applied the primary purpose test to a determination of whether a statement was testimonial in Bullcoming v. New Mexico, __ U.S. __, 131 S. Ct. 2705, 2714 & n.6, 180 L. Ed. 2d 610 (2011)[3].

At issue here is the radiologist's statement to the emergency room physician treating Palmer, in response to that doctor's request for more information about the injuries to the bones in Palmer's face. Objectively viewed, the primary purpose of the radiologist's statement that Palmer had a comminuted fracture of nasal bone was to inform the treating physician of the nature of Palmer's injury,

[3] Justice Thomas was a member of the five-justice majority in Bullcoming and did not join in footnote 6. 131 S. Ct. at 2709. Justice Thomas has repeatedly stated his view that the scope of the Confrontation Clause is even narrower: that the Clause is implicated by extrajudicial statements "only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 2543, 174 L. Ed.2d 314 (2009) (Thomas, J., concurring).

so that it could be treated appropriately. Thus, the statement of the radiologist was not testimonial.

After Davis, the Supreme Court in Melendez-Diaz noted that medical reports created for treatment purposes are not testimonial and are not limited by the Confrontation Clause. Melendez-Diaz, 129 S. Ct. at 2533 n.2. The Court also noted that business records not created to prove facts at trial are not testimonial, distinguishing the reports of forensic analysts at issue in that case, which were prepared specifically for use at trial. Id. at 2539. The Supreme Court also has recognized that statements made by a victim to a physician in the course of receiving treatment are not subject to the Confrontation Clause because they are not testimonial. Giles v. California, 554 U.S. 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008); accord, United States v. Santos, 589 F.3d 759, 763 (5th Cir. 2009), cert. denied, 130 S. Ct. 2365 (2010).

Courts of at least three other states have held that lab tests ordered by treating physicians in the course of providing medical

treatment are not testimonial.[4] The Virginia Supreme Court held that a test for sexually transmitted infections requested by a doctor performing a sexual assault examination was a diagnostic test for a medical condition and the lab report reflecting the result of that test was nontestimonial. Sanders v. Commonwealth, 282 Va. 154, 166, 711 S.E.2d 213 (2011). The treating physician testified that she diagnosed the victim with Chlamydia (an infection) on the basis of the test results. Id. at 160. The court held that because the lab report was not testimonial, there was no confrontation violation. Id. at 166. The court noted that, unlike the forensic analysts in Melendez-Diaz, there was no basis to conclude that the person who performed the lab work would have understood that the primary purpose that the test was requested was the development of a statement for use at trial. Id. at 166-67.

The Supreme Court of Georgia has held that medical records prepared with the primary purpose of facilitating medical

[4] Many courts have considered the Confrontation Clause implications of statements made by alleged victims of child abuse or sexual abuse during the course of standard examinations performed when such allegations are reported. Their analysis also centers on the purpose of the examination or of the particular questions. See State v. Miller, ___P. 3d ___, 2011 WL 5110265 at *16-32 (Kan. Oct. 28, 2011) (surveying cases).

care are not testimonial. Bowling v. State, 289 Ga. 881, __ S.E.2d __, 2011 WL 4905698 at *5-6 (Oct. 17, 2011). The physician who treated the defendant after a shooting and vehicle crash ordered drug and urine screens for medical purposes; the physician testified at trial and medical records including the defendant's blood alcohol level were admitted. Id. The Court found that admitting the medical records did not violate the Confrontation Clause. Id. at *5.

An appellate court in Massachusetts also concluded that medical records generated for evaluation and treatment purposes are not testimonial evidence triggering the Confrontation Clause. Commonwealth v. Dwyer, 77 Mass. App. Ct. 850, 934 N.E.2d 293, 298 (2010). An emergency room physician who treated the defendant testified to the results of a blood-alcohol analysis performed at the lab on the physician's order. 934 N.E.2d at 299-300. The court concluded that there was no confrontation violation -- the defendant did not have a constitutional right to cross-examine the analyst who performed the test. Id. at 297-300; accord, Commonwealth v. Lampron, 65 Mass. App. Ct. 340, 344-46, 839 N.E.2d 870 (2005), rev. denied, 446 Mass. 1103 (2006).

Clark's argument that the radiology result was testimonial is premised on a definition that is inaccurate. He asserts that a

statement is testimonial if a reasonable person would anticipate that the statement would be available to be used against a person in investigating or prosecuting a crime, citing Davis. App. Br. at 20. That factor is just a sub-part of the primary purpose test of Davis. 547 U.S. at 822. Clark also cites as authority for that rule State v. Jasper, 158 Wn. App. 518, 527, 245 P.3d 228 (2010), rev. granted, 170 Wn.2d 1025 (2011), which addressed whether an affidavit of a custodian of records, prepared for purposes of trial, was testimonial. Jasper mentioned that factor in its analysis, but relied on Melendez-Diaz, which concluded that affidavits of forensic analysts, created for purposes of trial, are testimonial. 158 Wn. App. a 527-32. The primary purpose test has been repeatedly applied by the Supreme Court and that test should be applied here.[5]

Finally, even if this court concludes that the radiology result was a testimonial statement, it was properly admitted through Dr. Kadeg's testimony, as a fact upon which the treating physician

[5] Clark also relies on State v. Hopkins, 134 Wn. App. 780, 142 P.3d 1104 (2006), rev. denied, 160 Wn.2d 1020 (2007), to support his characterization of the test. Hopkins was decided shortly after Davis and did not cite that case. Hopkins relies on the statement of "possible formulations" in Crawford, and has no relevance to application of the primary purpose test adopted in Davis. Hopkins, 134 Wn. App. at 790-91.

relied in reaching his own conclusion that Palmer's nose was fractured. This Court[6] applied that analysis in a case now pending in the Washington Supreme Court, State v. Lui, 153 Wn. App. 304, 221 P.3d 948 (2009), rev. granted, 168 Wn.2d 1018 (2010). This Court applied Melendez-Diaz and held that the Confrontation Clause does not preclude a qualified expert from offering an opinion that relies on another expert's work product. Lui, 153 Wn. App. at 318-19. The United States Supreme Court has accepted certiorari in a case that should resolve the issue of whether the Confrontation Clause is violated when an expert witness testifies about the (testimonial) results of forensic tests performed by non-testifying analysts. People v. Williams, 238 Ill.2d 125, 939 N.E.2d 268 (2010), cert. granted, 131 S. Ct. 3090 (2011).

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE RESULT OF THE CT SCAN.

Clark claims that even if admission of the radiology result did not violate the Confrontation Clause, it was an abuse of discretion because the result did not constitute a business record. This argument should be rejected. The result was admissible as part of

[6] Clark attributes Lui to Division Three, but he is mistaken.

a business record, as the trial court concluded. As the State argued at trial, the result also was admissible as a fact upon which the testifying expert reasonably relied, and as a statement for purposes of medical diagnosis or treatment.

a. The Radiology Result Was Properly Admitted As Part Of A Business Record.

Pursuant to RCW 5.45.020,[7] evidence in business records that would otherwise be hearsay is competent testimony. State v. Ziegler, 114 Wn.2d 533, 537, 789 P.2d 79 (1990). The underlying premise is that business records are presumptively reliable if made in the regular course of business and with no apparent motive to falsify. Id. The Washington Supreme Court has stated:

> As applied to hospital records, compliance with the act obviates the necessity, expense, inconvenience, and sometimes impossibility of calling as witnesses the attendants, nurses, physicians, X ray technicians, laboratory and other hospital employees who collaborated to make the hospital record of the patient. It is not necessary to examine the person who actually created the record so long as it is produced by one who has the custody of the record as a regular part of his work or has supervision of its creation.

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[7] RCW 5.45.020 provides:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Id. at 538, quoting Cantrill v. American Mail Line, 42 Wn.2d 590, 608, 257 P.2d 179 (1953) (emphasis added). The trial judge's decision to admit or exclude business records is given great weight by the reviewing court and will be reversed only if it was a manifest abuse of discretion. Ziegler, 114 Wn.2d at 538.

The Washington Supreme Court in Ziegler held that lab reports included in hospital records are properly admitted business records. Ziegler, 114 Wn.2d at 540. In that case the treating physician ordered a test for Chlamydia, a sexually transmitted infection, and testified to the results. Id. at 537. The lab report also was admitted as a business record. Id. The Court found no error. It noted that the report was part of the patient's medical file and that the doctor relied on the results for purposes of his treatment. Id. at 539-40. The opinion of the Court also approved the holding of State v. Sellers, 39 Wn. App. 799, 695 P.2d 1014, rev. denied, 103 Wn.2d 1036 (1985), which affirmed a trial court's admitting, as a business record, the results of a blood test in the victim's medical records.

This Court also approved admission of a medical record as a business record in State v. Garrett, 76 Wn. App. 719, 887 P.2d 488 (1995). In that case, the victim of a sexual assault was examined

by a physician in the emergency room and the record of that examination was admitted as a business record through the testimony of a different physician who later treated the victim. Id. at 721. This Court noted that the purpose of the business records rule is to assure that evidence is reliable and that the trial court has considerable deference in making this determination. Id. at 725. It held that the record, prepared by a fellow physician in the ordinary course of business, on which the testifying physician routinely relies in treating patients, was properly admitted. Id.

These cases belie Clark's assertion that only business records that record clerical acts are admissible under RCW 5.45.020. The cases upon which he relies do not support this proposition. The sole Supreme Court case holds that an opinion as to causation that would not have been admissible even if the declarant testified, could not be admitted as a business record. Young v. Liddington, 50 Wn.2d 78, 84, 309 P.2d 761 (1957). As the Court noted, the statute provides a method of proof of an admissible fact. Id. Moreover, that case predated Ziegler by 30 years. Another cited case held that a psychiatric evaluation report was improperly admitted as a business record through a non-expert witness. In re Welfare of J.M., 130 Wn. App. 912, 125 P.3d 245

(2005). Another case cited noted that medical records "undoubtedly" can be admitted under the business records exception, but concluded that a social worker's report about an interview should not have been admitted because the proper foundation was not laid, and noted in dicta that in that case a proper foundation establishing reliability could not be laid without the testimony of the interviewer. State v. Hopkins, 134 Wn. App. 780, 789-90 (2006). None of these cases discussed Ziegler, and none establish that the result of a CT scan, concluding that a nasal bone was shattered, was not reliable or that the trial court abused its discretion in admitting it when the testifying physician stated that he relied upon that result in treating the patient.

b. The Radiology Result Was Properly Admitted As A Fact Upon Which An Expert Reasonably Relied, And As A Statement For Purposes Of Medical Diagnosis Or Treatment.

Even if the radiology result was not properly admitted as a business record, it would have been properly admitted on two other bases: as a fact upon which an expert reasonably relied, and as a statement for purposes of medical diagnosis or treatment. Admission of evidence on an incorrect basis does not constitute error if a proper basis existed for admission of that evidence. In re

Pers. Restraint of Grasso, 151 Wn.2d 1, 19, 84 P.3d 859 (2004); State v. Butler, 53 Wn. App. 214, 217, 766 P.2d 505, rev. denied, 112 Wn.2d 1014 (1989).

The radiology result was properly admitted as a fact upon which the testifying physician relied in concluding that Palmer's nose was fractured. Dr. Kadeg testified that he suspected that Palmer's nose was fractured based on the appearance of his injuries and that he relied on the radiology result in reaching his ultimate conclusion that Palmer's nose was fractured. 4RP 31-32. An expert may testify in terms of opinion and give the reasons for his or her opinion. ER 705; e.g., In re Detention of Marshall, 122 Wn. App. 132, 146, 90 P.3d 1081 (2004), aff'd, 156 Wn.2d 150, 125 P.3d 111 (2005).

The radiology result also was properly admitted as a statement made for purposes of medical diagnosis or treatment under ER 803(a)(4).[8] This exception applies to statements "reasonably pertinent to diagnosis or treatment." ER 803(a)(4);

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[8] ER 803 lists evidence not excluded as hearsay, and subsection (4) provides:

> *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Grasso, 151 Wn.2d at 19-20. "Generally, to establish reasonable pertinence (1) the declarant's motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied on the statement for purposes of treatment." Id. at 20.

Statements admitted under ER 803(a)(4) are most commonly statements made by a patient to a person providing medical care. Admission of this hearsay is based on the belief that the statements are reliable because a person seeking medical care has an incentive to tell the truth to obtain proper care. State v. Bishop, 63 Wn. App. 15, 24 n. 8, 816 P.2d 738 (1991), rev. denied, 118 Wn.2d 1015 (1992). Statements made to a medical care provider by a person in a close relationship with the patient also may fall within the exception, when that declarant has a similar incentive to provide accurate information. E.g., Kuiper v. Givaudan, Inc., 602 F. Supp. 2d 1036, 1045 (N.D. Iowa 2009)(declarant was patient's daughter); State v. Pfaff, 164 Or. App. 470, 484-85, 994 P.2d 147, 156 (1999), rev. denied, 331 Or. 193 (2000)(declarant was patient's mother); Floyd v. State, 959 S.W.2d 706, 709, 712 (Tex. App. 1998)(declarant was girlfriend of patient's father).

At least two courts have concluded that statements made by one medical care provider to another medical care provider also may fall within this exception to the hearsay rule. See, O'Gee v. Dobbs Houses, 570 F.2d 1084, 1088-89 (2nd Cir. 1978)(doctor properly permitted to testify to other doctors' reports); Roberts v. Hollocher, 664 F.2d 200 (8th Cir. 1981)(court properly excluded non-testifying doctor's opinion that "excessive force" was used, because the conclusion as to fault did not serve to promote diagnosis or treatment by testifying doctor and the basis for that opinion was unknown). But see Field v. Trigg Co. Hospital, 386 F.3d 729 (6th Cir. 2004) (statement by physician who was consulted by treating physician was not admissible under this rule).

These statements fall within the terms of ER 803(a)(4), which does not limit the declarant to a patient, and the statements have similar guarantees of reliability. See McKenna v. St. Joseph Hospital, 557 A.2d 854, 857-58 (R.I. 1989)(statements of unidentified bystanders who observed victim's actions, made to rescue workers, admissible under this rule because of guarantee of trustworthiness inherent in good-faith recitation of symptoms to medical personnel). The only interest of the treatment provider is to provide appropriate care to the patient, so the statements are

reliable. The radiology result in this case was admissible as a statement for purposes of medical diagnosis and treatment.

In the trial court, the State argued that the radiology result was admissible as a business record, as the basis of Dr. Kadeg's opinion and as a statement for purposes of medical diagnosis or treatment. 4RP 56-64. If this Court concludes that the radiology result was not admissible as a business record, admission of the result nevertheless should be affirmed because it was proper under the other two exceptions to the hearsay rule.

3. ANY ERROR IN ADMISSION OF THE RADIOLOGIST'S CONCLUSION WAS HARMLESS.

If admission of the radiology result was error, it was harmless under the facts of this case, where there was uncontested evidence that Palmer suffered substantial bodily harm and the nature of the fracture was not inconsistent with Clark's theory of the case.

If admission of the radiology result violated the Confrontation Clause, the error was constitutional error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that it was harmless beyond a reasonable doubt. Jasper,

supra, 158 Wn. App. at 535. A constitutional error may be so insignificant in the context of a particular case that it is harmless. Id. On the other hand, non-constitutional evidentiary error is reversible only if "within reasonable possibilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Under either standard, if admission of the radiologist's statement was error, it was harmless.

To convict Clark of assault in the second degree, the jury had to find beyond a reasonable doubt that Clark intentionally assaulted Palmer and recklessly inflicted substantial bodily harm. CP 66; RCW 9A.36.021(1)(a). The State also was required to prove that the force used by Clark was not justified. CP 52; RCW 9A.16.020.

Any error in admitting the radiology result was harmless beyond a reasonable doubt because Dr. Kadeg testified to his own diagnosis that Palmer's nose was fractured. 4RP 36, 40, 72. Clark raised no objection to Dr. Kadeg's testimony as to his own diagnosis of his patient's (Palmer's) condition, except as to foundation, an objection that was overruled and is not raised on

appeal. Dr. Kadeg conceded that he did not know the cause of Palmer's injuries. 4RP 74-75. In closing argument, Clark conceded that Palmer's nose was fractured. 6RP 50, 62.

Although Clark notes that Palmer's nose had been fractured about a year earlier, he cites no authority for his suggestion that a doctor would have difficulty distinguishing a healed fracture from a new fracture. That information could have been elicited from Dr. Kadeg at trial, but was not.

There also was undisputed evidence that Palmer suffered substantial bodily harm independent of his shattered nose. Palmer's right eye was swollen shut as a result of Clark's assault. 3RP 18; 5RP 100. Photographs taken just after the assault show Palmer's eye swollen shut. Ex. 1, 3. Palmer could not see out of the eye that was swollen shut and that disability continued for four to five days. 5RP 106. The temporary but substantial loss or impairment of a bodily function constitutes substantial bodily harm. CP 65; RCW 9A.04.110(4)(b).

Although Clark argues that the jury could have relied on the radiologist's report to find that Clark used excessive force in defending himself (or Doerflinger), he does not explain how the nature of the injury would change that determination. The State

contended that Clark was the aggressor from the beginning of the encounter and that he threw the first punch and delivered a knee-strike. 6RP 35-36. The defense theory was that Palmer was the aggressor and that Clark threw and landed only one punch after Palmer threw several wild punches in Clark's direction. 6RP 48. There was no suggestion either that one blow could not have broken Palmer's nose, or that the broken nose itself established excessive force. Clark argued that the punch broke Palmer's nose,[9] and nothing in the radiology report contradicted that theory.

Finally, Palmer testified that he was not throwing punches at Clark when Clark began punching Palmer in the face (5RP 106-07, 122-23) and overwhelming evidence supported that testimony. Independent witness Quinn confirmed that sequence of events, observing that after a verbal exchange, Clark quickly punched Palmer twice in the face and then delivered the knee-strike. 5RP 19-26. At the hospital, Palmer reported that he had been struck in the face more than once. 5RP 29. Dr. Kadeg opined that Palmer suffered at least two blows to his face, based on the separate areas of swelling he observed. 5RP 32.

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[9] 6RP 50-51, 62-63.

Clark told police that Palmer punched him in the face, but Clark had no injuries and Palmer had no injury to his hands; by the time of trial Clark testified that Palmer only grazed him. 3RP 44-45; 4RP 131, 133, 139, 144-45; 5RP 199. While Clark testified that he had to defend Doerflinger after Palmer pushed Doerflinger down onto the chairs of a booth, defense witness Kabba testified that Doerflinger was participating in the fight while Palmer and Clark were fighting. 5RP 186-87, 203-04, 214. Guinn also testified that Doerflinger was standing near Clark during the assault. 5RP 30, 35-37.

Any error in admission of the radiology result was harmless beyond a reasonable doubt under either harmless error standard. The specific nature of the fracture was insignificant in the context of the case and the other evidence of substantial bodily harm was overwhelming.

D. CONCLUSION.

For the foregoing reasons, the State respectfully asks this Court to affirm Clark's conviction and sentence.

DATED this 12TH day of December, 2011.

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 Oliver R. Davis, 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, in STATE V. TYSON MONTE CLARK, Cause No. 66694-1-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

12-12-11
Date

Done in Seattle, Washington