No. 28755-6-III

Sweeney, J. (concurring) — The opinion of the court is probably correct. But it is correct only because a relatively minor problem in the trial court—a problem that was promptly, carefully, and properly addressed by the trial judge—has been characterized here on appeal as a violation of the Sixth Amendment right to confrontation.

Allan Turnipseed's right to confront this witness was not violated. His lawyer capably and thoughtfully cross-examined (confronted) this witness. The opinion of the court reflects a trend that is troublesome—the "constitutionalization" of most assignments of error in criminal cases. Criminal law is so largely based on constitutional principles that most claimed errors can be characterized as constitutional. *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). This case is a good example.

A garden variety videotaped deposition had a few garbled questions and answers. The trial judge listened to it (the same trial judge who sat through and listened to the whole trial), heard from counsel, put the offending sections of the recording in context, and then concluded that the defendant was not prejudiced by this problem. Mr. Turnipseed confronted the State's expert witness, maybe not as perfectly as he would have liked to because of the problems with the videotape, but a confrontation nonetheless. To accept his characterization of this error as the denial of the constitutional right to

confront a witness distorts the reality of what happened here and where this decision should have been made—in the trial court, not here in the court of appeals.

Our review, then, should be for abuse of discretion. Certainly, we exercise that discretion to decide whether a recording is sufficient to permit meaningful review on appeal. *State v. Johnson*, 147 Wn. App. 276, 282, 194 P.3d 1009 (2008).

Here, the trial court listened to the tape and concluded that Mr. Turnipseed was not prejudiced despite the problem with this tape. There certainly is no abuse of that discretion, if that were the standard. And that should have been the end of the analysis. But we are now tasked with reviewing the assignment of error de novo because Mr. Turnipseed characterizes the error as a denial of his right to confrontation. I understand why he does so. A defendant convicted of a crime always hopes that review of his assignments of error will be de novo. And certainly some should be. *State v. Williams*, 156 Wn. App. 482, 493, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011 (2010); *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). But this is not one of them.

We have struggled with this problem when trying to decide whether an error rises to the level of manifest constitutional error. *State v. Naillieux*, 158 Wn. App. 630, 638-39, 241 P.3d 1280 (2010). For me, the problem here is hardly of constitutional dimensions and a reviewing court dishonors the process by treating and reviewing it as

such. Indeed, there probably is no error here at all and it certainly is not an error of constitutional proportions. The court ruled that the recording was sufficiently complete to be admissible. Report of Proceedings (RP) at 501. The question should be whether there are tenable grounds or tenable reasons to support that ruling. I would have easily concluded that there were, were that the standard.

Mr. Turnipseed's defense was self-defense. He agrees he shot the victim twice. The particulars of the prejudice that Mr. Turnipseed claims because of the problems with the tape are left unsaid. Ultimately, this was a ruling on evidence, not the constitutional right to confrontation, and that is what we should be passing on. That said, I concur in the opinion of the court.

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Sweeney, J.