70558-0

70558-0



No. 70558-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ROYAL WALLACE DRAYTON,

Appellant.

---

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

The Honorable Jean Rietschel

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# BRIEF OF APPELLANT

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1. The trial court abused its discretion when it admitted evidence about data extraction and cell tower mapping absent expert testimony.

2. The admission of Carlito King-Martinez's hearsay statements violated ER 607 as the State called him solely to impeach him and admit his otherwise inadmissible statements.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence that is outside the competence of the jury must be admitted by expert testimony. Data extraction from cellular phones and cell tower mapping are just such evidence. Evidence of data extraction and analysis from Mr. Drayton's cellular phone as well as cell tower mapping was admitted at his trial through the testimony of police officers, neither of whom qualified as an expert. Was the admission of this evidence erroneous requiring reversal of Mr. Drayton's convictions?

2. The State is barred from impeaching its own witness where the primary purpose for calling the witness is to admit otherwise inadmissible evidence. The State called Carlito King-Martinez who allegedly observed the shooting that was the subject of this prosecution, and who testified that he could not remember what occurred on the

night in question and otherwise provided no substantive evidence. The State was allowed to impeach him, thus admitting his previously inadmissible hearsay statements incriminating Mr. Drayton. Is Mr. Drayton entitled to reversal of his conviction and remand for a new trial for the erroneous admission of the hearsay statements?

C. STATEMENT OF THE CASE

On September 15, 2012, Ricky Wilturner and his good friend, Carlito King-Martinez, were at the club Noc Noc in Seattle. RP 570. At some point, Mr. Wilturner was shot and Mr. Martinez called 9-1-1 for his friend. RP 580-83. Mr. Martinez did not see who shot Mr. Wilturner. RP 583.[1] Mr. Martinez did tell the police that a person he knew as "Spongebob" was present during the shooting. RP 820.

Mr. Martinez was interviewed by the police detectives for approximately one and one-half to two hours immediately after the shooting.[2] RP 1024-26. Mr. Martinez initially lied to the police and

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[1] Mr. Wilturner did not testify and none of his statements were admitted at trial. Mr. Wilturner suffered a gunshot wound to his abdomen. RP 882. The bullet caused multiple small injuries to Mr. Wilturner's intestines and duodenum and was considered a "high risk injury" by the treating physician. RP 886. The physician removed a portion of the intestine and left the bullet inside Mr. Wilturner. RP 888.

[2] A recording of the interview of Mr. Martinez was played for the trial court as part of the pretrial hearings. RP 311-43.

identified himself as his brother, "Alberto" Martinez. RP 1022. The police did not discover this lie until several months later. RP 1022.

The investigation led to Royal Drayton, who was arrested on September 18, 2012. RP 839. Mr. Drayton was interviewed by Seattle Police and denied shooting Mr. Wilturner or being in the area where the shooting occurred. RP 828-31. The police seized Mr. Drayton's cellular phone from him at the time of his arrest. RP 841. Mr. Drayton was charged with first degree assault with a firearm enhancement and unlawful possession of a firearm. CP 1-2.

Mr. Drayton's cellular phone was provided to Officer Darin Sugai, a detective in the Technical and Electronic Support Unit. RP 1007. Officer Sugai connected the phone to his computer using a USB cable and ran a program called Cellebrite. RP 1009. The program generated a report putting the data from the cellular phone into a readable form. RP 1009-10. The report included a record of the incoming and outgoing phone calls as well as text messages, photos, and videos that were in the memory of the phone. RP 1011. Sugai admitted he had never worked for a computer company nor obtained a degree in computer science or engineering. RP 1015. Sugai also

admitted he had no idea how the Cellebrite program worked, only that it generated a report. RP 1015-16.

The cellular phone information was provided to Officer Rolf Norton, a homicide detective who also assists in analyzing cellular phone records. RP 1143-44. Taking the records generated from Mr. Drayton's cellular phone and a directory of the Sprint cell phone tower locations, Officer Norton engaged in cellphone tower mapping:

> Cell tower mapping is taking geographic data provided by cell antennas and determining location and it—and what antenna's involved in a certain communication. When a cell phone call is made, the cell phone reaches out to an antenna or tower, and data is then transmitted to the next tower to the receiving caller.
>
> Q: Okay. And tell me what records you use when you're doing cell tower mapping. What records do you need from the cellphone provider to create a picture of what towers are being utilized?
>
> A: So, I would need two types of records: the CDR, which is the call detail record, and that shows an individual phone number's call records. It shows numbers called, the time, the date. It shows what tower number was hit, show a duration. It will show the actual sector specific to that tower. The second type of record I need is, kind of, a-a general directory of cell tower locations and identifying numbers.

RP 1144-45. The officer described what his analysis entails:

> Q: Okay. And tell me how you go about mapping cell tower locations.

A: Well, there's kind of a two-pronged effort. I have a software program called Advanced Cell Tracking Systems, and that is a—a program that takes the data and automatically plugs it into a Google Earth map. So, it'll take the actual call records, each specific call made that you're interested in, and then it'll combine it with locations of cell tower—cell antennas and it will create graphics on a Google Earth map. So, you get to actually see the exact location. In addition to that, each antenna is broken up into sectors, and sectors have to do with the direction of the phone call as far as the direction of the cell phone in regards to where the antenna is. So typically, there's three sectors on one antenna, all right? And so, we divide a circle into three pieces of a pie. Say Sector 1 creates a-a-an angle like this. Calls in that pie are going to reach out and be in that sector. The next piece of the pie, Sector 2, calls made in that area are going to be part of that sector, and then finally the third sector, and that gives you some direction from the antenna as far as where the phone was located. Not-not-doesn't have anything to do with the direction of the call. It just gives you a little bit more specific information about where that phone physically was in relation to the antenna. So, this program breaks up that direction, too. It determines which sector was involved in a phone call.

. . .

Q: Okay. All right. And then after you plug the data into this 9 program—you indicated there was, sort of, two prongs—what's the second prong?

A Second prong is just to map it by hand, and that's—there's several places you go to do that. First off, on the cell tower location directory they give a physical address that corresponds to the cell tower number. Okay? So, you want to verify that address matches what the program indicated on the Google Earth map. And then what is more important and more accurate is the cell tower directory also gives you a latitude and longitude for each antenna. So, you want to plug that in and verify that location is the same that the program indicated where the antenna is.

RP1146-50.

The officer described the process in analyzing Mr. Drayton's phone records and correlated that to the cell tower locations:

> So, this is Tower 172, okay? The first number here indicates which sector is involved in this phone call. All right? Tower 172 is located at 6334 34th Avenue Southwest, and that's in High Point in West Seattle, and actually is nearly the high point of this city. All right? The point of the antenna, the location, is right here at the bottom of the pie, okay? This pie represents the sector involved in this call, okay? So, that—the cell phone more or less was generally located inside this shaded area when this call was made. Okay? And this is determined by each sector has a centerline called an azimuth and a beam width, and so there's a certain amount of degrees that each sector covers. All right? There is a small amount of wiggle room. So, a person could be standing just outside of this shaded area and still hit on that sector, because of some of the reasons I already talked about: obstructions, weather, volume, or whatnot. The ending line, the outer portion of the pie, that's an arbitrary line. That is just very subjective. It does not necessarily mean that the phone was inside or outside. In an urban area it's much more likely that it would be inside the shaded area and closer to the center point. Okay? This is a-a-I believe a three-mile radius-radius that we just set up when we plugged it into the program. The-the true line would be the middle point between this antenna and the next antenna over here, and most likely it is much less than three miles.

RP 1155-56. The officer described a series of phone calls allegedly made by Mr. Drayton in the downtown Seattle area at the time and near where the shooting of Mr. Wilturner occurred. RP 1156-62.

Officer Norton, like Officer Sugai, admitted he did not have a degree in engineering or computer science, never worked for a cellular phone provider, and had a week's worth of formal training on cell tower mapping. RP 1162-63. Based upon the information supplied by Officer Sugai via the Cellebrite computer program and Officer Norton, Officer Janes testified at length about the data found on Mr. Drayton's cellular phone, including photographs, as well as a number of phone calls, the time of the calls, and the general location of Mr. Drayton when making the calls. RP 1055-72.

Prior to trial and prior to the officers' testimony, Mr. Drayton moved to exclude the testimony because the officers were not experts and the evidence was required to be admitted through expert testimony. RP 488-98, 759-66; 993-1005.[3] After hearing argument, the trial court allowed the testimony:

> I-I will permit the testimony. I think it is relevant. I think if the-I think there's a sufficient showing if they have the records of what cell phone towers were hit by the calls that were made, and there is a certified record that that can be admitted, I think it is permissible to make a showing based on another cell phone and what cell phone towers were hit. I think that is relevant and admissible evidence.

[3] Mr. Drayton did not contest the admission of the cellular phone records as a business record. RP 378.

> I don't see that that is-there is a split of authorities, and I don't think it is the same as some of the other cases that talked about cell phone tracking. I think it is a more of a comparative test, and I will allow the State to use the evidence.

RP 1005-06.

Based upon a pretrial interview with Mr. Martinez, Mr. Drayton also moved to exclude the testimony of Mr. Martinez on the basis that the State was calling him solely to impeach him. RP 428-30. The court reserved ruling awaiting Mr. Martinez's testimony. RP 432.

Mr. Martinez testified that he lied to the police when he gave them his brother's name when he was initially contacted after the shooting because he was drunk. RP 553. Martinez denied telling the police his nickname was "King of Pigs" and remembered very little of his interview with the police. RP 554. Mr. Drayton immediately moved again to exclude Mr. Martinez as a witness because the State had called him merely to impeach him with his prior statements to the police. RP 556-58. The court denied Mr. Drayton's motion but agreed to his request to give the jury a limiting instruction regarding the impeaching statements. RP 558.

The State attempted to refresh Mr. Martinez's recollection with a copy of the transcript of his interview with the police. RP 560.

Martinez denied that review of the transcript refreshed his memory. RP 560. Nevertheless, the State soldiered on, asking Martinez innocuous questions unrelated to the incident. RP 560-67. Martinez admitted knowing Mr. Drayton and admitted being at club Noc Noc on September 15, 2012, but remembered very little of the night. RP 567-70. Mr. Martinez testified that at some point, Mr. Wilturner went outside to smoke a cigarette, and when he went outside to join Mr. Wilturner, he discovered Mr. Wilturner had been shot. RP 579-82. Mr. Martinez admitted calling 9-1-1, but could not remember any of his conversations with the responding police officers. RP 584-89. Mr. Martinez continued to not remember much of what allegedly happened on September 15, 2012. RP 601-08, 610-15.

Mr. Drayton renewed his motion to exclude Mr. Martinez's testimony and to bar the State from impeaching him with his prior statements. RP 616-17, 620-23. Nevertheless, the court allowed the State to impeach Mr. Martinez:

> So, I can't find that there was no purpose other than to provide impeachment evidence. He did provide other evidence that the State had a reason to admit—to call him for. So, I believe that there is sufficient grounds to allow the State to use impeachment evidence. However, that does not mean that the Court is going to allow the State to play all of the tapes as one because I believe that allows the jury to infer improperly from the tapes. This

> jury has to distinguish which evidence is being offered for impeachment and which evidence is substantive evidence. And if the Court allows the State to play the tapes as one, either-the Court is going to have to be giving limiting instructions every other minute, which will be very confusing.

RP 623-24. Over Mr. Drayton's continued objection, the State then impeached Mr. Martinez with his prior statements through the testimony of Seattle Police Officer Travis Loyd, who initially spoke to Mr. Martinez at the scene of the shooting, and Officer Thomas Janes, who interviewed Mr. Martinez at the police headquarters. RP 1028-38, 1041-49.

Officer Sugai testified that he took Mr. Drayton's cellular phone, plugged it into his computer and ran the Cellebrite program. RP 1008-15. In turn, Officer Sugai generated a report. CP Supp ___, Sub No. 55, Exhibit 45; RP 1009-14.

At the conclusion of the trial, the jury found Mr. Drayton guilty as charged. CP 79-81.

D. ARGUMENT

1. THE ADMISSION OF EVIDENCE OF DATA EXTRACTION FROM MR. DRAYTON'S CELLULAR PHONE AND CELL TOWER MAPPING WAS REQUIRED TO BE ADMITTED BY EXPERT TESTIMONY

a. Expert testimony is required where the evidence would be helpful to the jury and the evidence is outside the competence of lay persons. Expert testimony is admissible under ER 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The admission of lay opinion testimony is inadmissible where the sort of opinion expressed calls for that of an expert. *Ashley v. Hall,* 138 Wn.2d 151, 156, 978 P.2d 1055 (1999). Whether an opinion is a lay or expert opinion depends upon the source of the knowledge: an expert opinion is based in whole or in part on scientific, technical or specialized knowledge, whereas a lay opinion is based on personal knowledge (i.e., on knowledge derived from the witness's own perceptions, and from which a reasonable lay person could rationally infer the subject matter of the offered opinion). *State v. Kunze,* 97 Wn.App. 832, 850, 988 P.2d 977 (1999).

Expert testimony is admissible under ER 702 where it would be helpful to the jury in understanding matters outside the competence of ordinary lay persons. *Reese v. Stroh,* 128 Wn.2d 300, 308, 907 P.2d 282 (1995), *citing State v. Ciskie,* 110 Wn.2d 263, 279, 751 P.2d 1165 (1988). Under ER 702, "[e]vidence is helpful if it concerns matters beyond the common knowledge of a layperson and does not mislead the jury." *State v. King County District Court West Division.,* 175 Wn.App. 630, 637-38, 307 P.3d 765 (2013). Courts generally interpret possible helpfulness to the trier of fact broadly and favor admissibility in doubtful cases. *Miller v. Likins,* 109 Wn.App. 140, 148, 34 P.3d 835 (2001). A trial court's ruling on the admissibility of opinion evidence is reviewed for abuse of discretion. *State v. Blake*, 172 Wn.App. 515, 523, 298 P.3d 769 (2012), *review denied*, 177 Wn.2d 1010 (2013).

b. The evidence derived from the analysis of the data from Mr. Drayton's cellular phone as well as the cell tower mapping was beyond the competence of the jury and required expert testimony. Here, the evidence concerning cell tower mapping and the retrieval, and analysis, of the data from Mr. Dayton's cellular phone was beyond the competence of the jury because it was based in whole or in part on

scientific, technical or specialized knowledge. As a result, the evidence was required to be admitted through the testimony of an expert.

There are no reported Washington decisions regarding whether this type of cellular phone evidence must be presented through the testimony of an expert. Several courts in other jurisdictions have addressed this issue notably the decision of the Maryland Court of Special Appeals in *Wilder v. State,* where the court required testimony regarding cell tower mapping evidence be presented by an expert:

> we believe that the better approach is to require the prosecution to offer expert testimony to explain the functions of cell phone towers, derivative tracking, and the techniques of locating and/or plotting the origins of cell phone calls using cell phone records.

191 Md.App. 319, 365, 991 A.2d 172 (2010). In *Wilder*, a police detective testified over defense objection about cell tower locations and offered an interpretation of the defendant's cellular phone records. *Id.* at 347-48. The testimony of the detective mirrored the testimony of Officers Sugai and Norton here:

> In the second part, the part that pertains to this exhibit that [defense counsel] referred to, all Detective Hanna did was obtain certified cellular phone records from Sprint Nextel.
>
> Those certified records show inbound calls, outbound calls, the duration of the call. They show the date that the call was made, they show the originating number, they

show the number the call was placed to or came from, and they also show a code that corresponds to longitude and latitude, coordinates that can be plotted on a map to show cell tower locations.

And Detective Hanna took the information from the certified cell phone records and he plotted the towers on a map of the relevant area of Baltimore County, and the certified records show that the calls in question utilized those particular towers.

THE COURT: All right. So these are records that are certified in what way?

[PROSECUTOR]: Certified from Sprint Nextel as business records.

THE COURT: Okay. So he's taken certified business records. So if they have the proper certification,—which [defense counsel] may look at—those records would come into evidence.

[PROSECUTOR]: Yes, Your Honor.

[DEFENSE COUNSEL]: And I'm not contesting that the records are not certified, Your Honor.

[PROSECUTOR]: I will let the Court know that Detective Hanna is, in fact, not an expert. And I am not attempting to qualify him as such, but he was able to do this just using the certified records.

All he did was look at the records and plot out the towers and the calls that correspond to the towers using just the information from the records, and that's all he's going to testify about with regard to this particular issue.

*Id.* at 351-52. The court concluded;

> In the case before us, Hanna's testimony implicated much more than mere telephone bills. He elaborated on the information provided by the cell phone records—the bills and records of calls-by his use of a Microsoft software program to plot location data on a map and to convert information from the cellular phone records in order to plot the locations from which Wilder used his cell phone. This procedure clearly required "some specialized knowledge or skill ... that is not in the possession of the jurors[.]"
>
> Following *Ragland,* the Court of Appeals has reiterated that "opinions based on a witness's 'training and experience ... should only [be] admitted as expert testimony, subject to the accompanying qualifications and discovery procedures.'" Hanna's description of the procedures he employed to plot the map of Wilder's cell phone hits was not commonplace. Because his explanation of the method he employed to translate the cell phone records into locations is demonstrably based on his training and experience, we conclude that he should have been qualified as an expert under Md. Rule 5–702, and that the State was obliged to fulfill its discovery obligations under Md. Rule 4-263(b)(4)(2006). The trial court ought not have permitted Hanna to offer lay opinion testimony about the cell site location, and to describe the map created based on the cellular telephone records.
>
> As we have concluded, the error in the admission of Hanna's testimony was not harmless beyond a reasonable doubt.

*Id.* at 368 (internal citations omitted).

Similarly, in *State v. Manzella,* the Missouri appellate court affirmed the trial court's refusal to allow the defendant to testify about his knowledge of cell towers as a lay opinion. 128 S.W.2d 892, 897-98

(2004). The State had introduced the testimony of a "radio frequency engineer" from Cingular that the defendant called the victim from his cell phone in the vicinity of the crime scene based on how the calls were relayed from cellular towers. *Id.* The defendant sought to rebut this evidence by offering his own expertise based on his life experiences and ten years as a customer of Cingular. *Id.* at 609. The appellate court found that the defendant had not demonstrated how his experiences as a Cingular customer qualified him to testify about cellular towers. *Id.* The court did allow him to testify about certain aspects of his cellular bill, such as calls made and received and the charges imposed. *Id.*[4]

There is little difference between what occurred here and what occurred in *Wilder, supra.* Officer Sugai plugged Mr. Drayton's cellular phone into his computer and ran the Cellebrite program which analyzed the data from the phone. Sugai admitted he had no idea how the program worked. Further, Officer Norton took the data, as Detective Hanna did in *Wilder*, and plotted it onto a map generated by the Google Map function of the Google website. As in *Wilder*, these

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[4] *But see Perez v. State*, 980 So.2d 1126, 1131-32 (Fla.Dist.Ct.App.) (holding that expert is not required "to explain the concept of a cell site and how it generally related to cellular telephone records."), *review denied,* 994 So.2d 305 (2008), *cert. denied,* 129 S.Ct. 1618 (2009).

procedures clearly required "some specialized knowledge or skill . . . that is not in the possession of the jurors [.]" *Wilder*, 191 Md.App at 368. As a consequence, as in *Wilder*, the evidence should have been admitted by expert testimony.

c. The admission of the cellular phone testimony was not a harmless error. A trial court's evidentiary error is reversible where it causes prejudice to the defendant. *State v. Bourgeois,* 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) ("The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole."). An evidentiary error "is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *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 cellular phone evidence that was admitted through the testimony of Officers Sugai and Norton was critical to the State's circumstantial case. The cell tower mapping evidence established that, contrary to Mr. Drayton's claim, he was in the area of the shooting. Further, the evidence established that Mr. Martinez called Mr. Drayton

several times after he had given his initial statements to the police, thus inferring Mr. Drayton influenced Mr. Martinez's subsequent reticence to tell the police anything further.

The State made the information gleaned from Mr. Drayton's cellular phone and the cell tower mapping a focal point of its closing argument. RP 1248-49, 50-53. The State used this evidence to contradict Mr. Drayton's statement to the police as well as impeaching the credibility of Mr. Martinez, whose credibility was the linchpin of the State's case. *Id.* Given the importance the State placed on this evidence along with its use to bolster the credibility of the only witness to the event, the error in admitting the evidence of the data extraction and analysis by Officer Sugai, coupled with the cell tower mapping done by Officer Norton, was not harmless. Mr. Drayton's convictions should be reversed and remanded for a new trial.

2. THE STATE MAY NOT CALL A WITNESS SOLELY TO IMPEACH HIM AND ADMIT OTHERWISE INADMISSIBLE HEARSAY EVIDENCE

a. The State may not call a witness for the primary purpose of impeaching the witness in order to introduce otherwise inadmissible evidence. ER 607 states that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." This rule was substantially limited by the decision in *State v. Lavaris*, which held the State:

> may not impeach its own witness for the primary purpose of eliciting testimony in order to impeach the witness with testimony that would be otherwise inadmissible.

106 Wn.2d 340, 345-46, 721 P.2d 515 (1986), *citing State v. Barber,* 38 Wn.App. 758, 770-71, 689 P.2d 1099 (1984), *review denied,* 103 Wn.2d 1013 (1985). The Court found the decisions interpreting the equivalent federal evidence rule, Fed.R.Evid. 607, persuasive in adopting the rule. *Lavaris,* 106 Wn.2d. at 346, *citing United States v. Miller,* 664 F.2d 94, 97 (5th Cir. 1981); *United States v. DeLillo,* 620 F.2d 939, 946 (2nd Cir.), *cert. denied,* 449 U.S. 835 (1980). The *Lavaris* Court unfortunately did not articulate any guidelines for determining when there is a "primary purpose" to impeach. Tegland,

5A *Washington Practice, Evidence Law and Practice*, §607.3 at 380 (5th ed. 2007).

The *Lavaris* Court also embraced the rationale of the federal courts in adopting the rule limiting the State's impeachment of its own witness:

> [I]t would be an abuse of the rule [Fed.R.Evid. 607], in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence – or, if it didn't miss it, would ignore it. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant, which Rule 607 does not contemplate or authorize . . . .

106 Wn.2d at 344-45, *quoting United States v. Webster,* 734 F.2d 1191, 1192 (7th Cir.1984).

The State did just that here when it called Mr. Martinez for the primary purpose of impeaching him and placing his otherwise hearsay statements before the jury.

b. The State's primary purpose for calling Mr. Martinez as a witness was to put before the jury his otherwise inadmissible hearsay statements to the police. In *Lavaris,* while rejecting specific guidelines regarding when it is the State's "primary purpose" to call a witness to impeach, the Court did note that impeachment would be

improper where it "was employed as a mere subterfuge to place before the jury evidence not otherwise admissible." *Lavaris,* 106 Wn.2d at 346. Instructive on this issue are several prior decisions interpreting the rule predating the adoption of ER 607.

In *State v. Stingley,* two witnesses were called to testify and were asked solely about pretrial statements they had made to the police and prosecutor. 161 Wash. 690, 2 P.2d 61 (1931). Both claimed not to remember and each was subsequently impeached with their prior statements. The Supreme Court held the impeachment was improper because neither witness had given any substantive evidence, noting that "one is not allowed to prove his case by impeachment testimony." *Id.* at 697.

In *State v. Delaney,* a witness was called to testify and also stated he could not remember anything regarding what he had been asked. 161 Wash. 614, 297 P. 208 (1931). The State then impeached him with his prior inconsistent statements. The Supreme Court again reversed, finding the State's actions improper:

> [The witness] had not made an affirmative statement of any admissible evidentiary fact favorable to the defense or unfavorable to the prosecution which called for contradiction by impeachment or otherwise.

*Id.* at 618.

More relevant to the present case was the decision in *Kuhn v. United States*, 24 F.2d 910 (9th Cir.), *cert. denied sub nom Lee v. United States,* 278 U.S. 605 (1928). In *Kuhn,* the Government called a witness to testify who either had no knowledge of the events or was unwilling to testify against the defendants. The prosecution was allowed to impeach the witness with his prior statements to Government agents. *Id.* at 913. Although the testimony was later struck by the district court, the Ninth Circuit deemed it proper to express its disapproval of the Government's impeaching of its own witness. *Id.*

> A party whose cause is injured by the unexpected answer of his witness may, upon a showing of surprise, neutralize the effect of the adverse testimony by proving that at another time the witness made statements inconsistent therewith . . . . That being true, in cases, as here, where the witness gives no testimony injurious to the party calling him, but only fails to render the assistance which was expected by professing to be without knowledge on the subject, there is no reason or basis for impeachment under the rule.

*Id.*

In Mr. Drayton's case, Mr. Martinez proceeded much as the witnesses in *Stingley, Delany,* and *Kuhn* did: Mr. Martinez either offered no testimony injurious to the State or simply professed a lack of knowledge. Despite this fact, the trial court wrongly allowed the State to put before the jury multiple statements Mr. Martinez had made

previously to the police that would not have been otherwise admissible because they were hearsay statements without an exception. Admission of these statements violated ER 607.

c. The error in allowing Mr. Martinez's inadmissible hearsay statements before the jury was not a harmless error. An error in admitting evidence is prejudicial if, within reasonable probabilities, the trial's outcome would have been materially affected if the error had not occurred. *Bourgeois,* 133 Wn.2d at 403.

The State conceded in oral argument that the case against Mr. Drayton was based largely on circumstantial evidence. RP 1246-50. No witness identified Mr. Drayton as the person who shot Mr. Wilturner, nor did any witness identify Mr. Drayton as firing a shot. As a result, Mr. Martinez's credibility was an important issue before the jury. Martinez's hearsay statements which were admitted in violation of ER 607 corroborated the claim that Mr. Drayton was the person who shot Mr. Wilturner and filled in much of the detail concerning a possible motive for the shooting. Had Mr. Martinez's prior hearsay statements not been admitted, the jury would have heard only Mr. Martinez's statements to Officer Loyd, which were admitted as excited utterances. But even these statements failed to identify Mr.

Drayton as the shooter as Mr. Martinez candidly admitted he did not see the shooting. RP 729. Thus, within reasonable probabilities, the outcome of Mr. Drayton's trial would have been different absent the error. Mr. Drayton is entitled to reversal of his conviction and remand for a new trial.

E. CONCLUSION

For the reasons stated, Mr. Drayton asks this Court to reverse his conviction and remand for a new trial.

DATED this 28th day of February 2014.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

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| STATE OF WASHINGTON, | ) | |
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| Respondent, | ) | |
| | ) | NO. 70558-0-I |
| v. | ) | |
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| ROYAL DRAYTON, | ) | |
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| Appellant. | ) | |

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 28TH DAY OF FEBRUARY, 2014.

X_____

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