70558-0

70558-0

NO. 70558-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROYAL WALLACE DRAYTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JEAN A. RIETSCHEL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The defendant contends that the State should have been precluded from calling a witness, Carlito King Martinez, because Martinez recanted on the stand and thus, according to the defendant, the State's only purpose in calling Martinez as a witness was to impeach him with his prior out-of-court statements. Should this Court reject the defendant's argument because (1) under the confrontation clause and evidence rules, the State was required to call Martinez as a witness in order for his out-of-court "statements of identification" to be admissible, (2) under the facts of this case, there was no way to know how Martinez was going to testify when he took the stand, and (3) despite recanting, Martinez still provided a great deal of substantive evidence that justified putting him on the stand?

2. The State obtained the defendant's cell phone, the defendant's cell phone records, and a list of the cell phone tower locations in the Seattle/eastside area. Was an expert witness needed (1) in order to present evidence that was obtained from the defendant's cell phone and (2) in presenting a demonstrative exhibit, a map showing the cell phone towers the defendant's phone used in making calls on the night of the shooting?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with first-degree assault while armed with a firearm, and first-degree unlawful possession of a firearm. CP 1-7. A jury found the defendant guilty as charged. CP 79-81. He received a standard range sentence of 198 months. CP 116-24.

2. SUBSTANTIVE FACTS

At approximately 3:00 a.m. on the morning of September 15, 2012, Ricky Wilturner was shot outside the Noc Noc club at Second Avenue and Pine Street in downtown Seattle. 4RP[1] 529-32; 5RP 673. When officers arrived at the scene, they found Wilturner bleeding from his abdomen and barely conscious.[2] 5RP 741-43. Wilturner was being helped by his friend, Carlito Martinez. A white Buick was parked along Second Avenue, with broken glass near

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[1] The verbatim report of proceedings is cited as follows: 1RP—11/20/12 & 1/2213; 2RP—1/23/13; 3RP—1/24/13 & 2/5/13; 4RP—2/6/13 & 2/7/13; 5RP 2/11/13; 6RP—2/12/13; 7RP—2/13/13; 8RP—2/19, 2/20, 4/12, 5/6, 6/28 & 7/10/13. Additional portions of the record were subsequently transcribed. The volumes included *voir dire* and opening statements. These volumes are cited by reference to the portion of the trial they pertain followed by the page number, e.g., *voir dire* at 20.

[2] Wilturner underwent emergency surgery at Harborview Medical Center and survived the shooting. 6RP 882-86. Doctors did not remove the bullet. 6RP 888. Wilturner was uncooperative with the State and thus a material witness warrant was issued for his arrest. CP ___, sub # 27. He was not located and thus he did not testify at trial. 7RP 1103.

the front quarter panel. 4RP 534, 537. Although the broken glass was consistent with safety glass used in car windows, the windows of the white Buick were not damaged. 4RP 538.

The first officer on the scene, Sergeant Chris Hall, contacted Martinez. 5RP 671, 673, 678. His conversation with Martinez was recorded via Sergeant Hall's lapel microphone. 5RP 676. The recording of the conversation was admitted at trial as substantive evidence -- an "excited utterance" under ER 803(a)(2). 5RP 694; Exhibit 16. According to the exhibit and Sergeant Hall's testimony, Martinez told him that he had been standing on the corner and had seen what happened. 5RP 700-01; Exhibit 16. Martinez told Sergeant Hall that his "cousin," who went by the moniker Bob, tried to take his car because the two of them bought it together, when his "cousin" Ricky "was like, no," and broke the window of Bob's car. Id. Asked if Bob was the guy who shot Ricky, Martinez said that he was. Id. He also said that Bob left in his purple car and that it had a broken window. Id.

Martinez was then handed over to Officer Travis Loyd, who placed the witness in to his patrol car where his conversation with the officer was recorded. 5RP 723, 725; Exhibit 20. A portion of this conversation was admitted as substantive evidence as a

"statement of identification" under ER 801(d)(1)(iii). 5RP 727. Martinez told Officer Loyd the suspect went by the name Bob, that he had short hair, not cornrows as was being broadcast on the police radio, and that Bob drove away in a burgundy Buick with no rims on the car. 5RP 728-30.

Detectives then arrived on the scene and transported Martinez to police headquarters where he was interviewed by Homicide Detectives Don Waters and Thomas Janes, in an interview room that is video and audio recorded. 5RP 819; 6RP 1024-26. A portion of the interview was admitted as substantive evidence as a "statement of identification" under ER 801(d)(1)(iii). 5RP 820; 6RP 1027.

Martinez told the detectives that the shooter went by the moniker Bob or SpongeBob. 5RP 820; 6RP 1028. He described the suspect as being 23 to 24 years old, short, 5-6 to 5-7, fat, with short black hair and that he was wearing a black hoodie, blue pants and white Nikes. 6RP 1029-30. He described the vehicle Bob was driving as a burgundy-ish or maroon colored older model Buick. 6RP 1031. While he said that he did not see the shot actually being fired, Martinez said he heard the boom and also saw the gun, which he thought was a 9mm – a gun he had seen Bob with before.

6RP 1032-33. Just after the shot was fired, Bob sped by Martinez in the Buick. 6RP 1033.

Detective Waters recalled that he had run across a person in the past who used the moniker SpongeBob – it was the defendant. 5RP 820. Detective Waters then prepared a montage using a photo of the defendant. 5RP 820. Martinez identified the defendant from the montage as the person he knew as Bob or SpongeBob. 6RP 1036, 1045-49; Exhibit 42. Detective Waters located a Renton address for the defendant and obtained warrants to arrest the defendant, to search his home and to search his vehicle – the maroon Buick. 6RP 1050-51.

At trial, Martinez testified that he was drunk the night of the shooting and that he currently remembered only a little bit of what happened that night. 4RP 553, 570. Still, he provided the following substantive testimony:

First, Martinez admitted knowing the defendant and that he referred to him as his cousin because they grew up together. 4RP 554, 567-68. Shown a photo of the white Buick parked on Second Avenue at the sight of the shooting, Martinez said that it was his car, that he bought it shortly before the shooting. 4RP 562. 574. Although he denied going in on the car with anyone else, he

admitted to knowing Wilturner and said that he was his roommate at the time of the shooting. 4RP 562-64. Martinez also provided his cell phone number that he had at the time of the shooting, a fact that would later be used to connect him with the defendant on the night of the shooting. 4RP 560-61, 587-88.

Martinez testified that on the night of the shooting he had been at home with Wilturner, drinking and smoking weed, and that he then drove them to the Noc Noc club in the white Buick. 4RP 571-73. He said that he and Wilturner met a couple of Russian girls outside the club and began drinking with them. 4RP 570, 575-76. Later, once inside the club, he claimed that Wilturner had gone outside for a smoke and that he followed him a few minutes later. 4RP 570, 581. He said that when he stepped outside, Wilturner was walking towards him, having just been shot – and that is all that he knew. 4RP 570, 581. He claimed that he did not see the defendant outside the club. 4RP 581.

Martinez claimed that he had not talked with the defendant that night. 4RP 578, 581. He said he did not know if the defendant went by the moniker Bob or SpongeBob. 4RP 554. Martinez admitted that he spoke to officers at the scene and detectives at the precinct, but he claimed to have no memory of what he said to

them. 4RP 588-89, 605. He was given the opportunity to review a transcript of the conversations but he claimed this did not refresh his memory at all about the conversations. 4RP 590. He said he did not remember identifying a suspect for the police or telling them what led to the shooting. 4RP 602-15. He said that he did not know if Wilturner and the defendant had ever met. 4RP 612.

The defense then made a motion to preclude Martinez from testifying further, claiming that because Martinez had recanted during a defense interview the State knew he would recant on the stand and thus the State had called him as a witness for the sole purpose of impeaching his testimony with the statements he had made to the police. 4RP 616-22. The court denied the motion, finding that Martinez had provided substantive testimony, despite his recantation as to having seen the shooter, that calling Martinez as a witness allowed the State to introduce "statements of identification" as to who the shooter was, and that impeachment was not the State's primary purpose in calling Martinez as a witness. 4RP 623-24. Still, in an abundance of caution, the court ruled that out-of-court statements of Martinez introduced as substantive evidence could be introduced by playing the actual recording of those statements, but that out-of-court statements of

Martinez introduced as impeachment had to be testified to by the officers – the actual recording of those statements could not be played for the jury. Id. The court felt that this would help the jury distinguish between evidence introduced for substantive purposes and evidence introduced for impeachment purposes only. Id. The court also indicated that it would give a limiting instruction prior to the introduction of any impeachment evidence. Id.; 5RP 652-53.

Defense counsel then questioned Martinez and got him to testify that despite the fact he did not remember what he had said to the police, he indeed had lied to them. 4RP 632-33. He professed that he told the police a story of what happened that night that was false and that he did so because he was drunk, nervous and because he had warrants out for his arrest. 4RP 633, 635. He said that he did not see the shooter, there was no dispute about his car, that he did not see any car leaving the scene, and that he was not currently in any fear for his safety. 4RP 636-37.

With Martinez having recanted from the version of events he told the police immediately after the shooting, the court allowed the State to impeach his testimony with out-of-court statements that he made to Officer Loyd and to Detective Janes. When statements

made by Martinez to Officer Loyd were admitted as impeachment evidence, the judge instructed the jury as follows:

> Members of the jury, I'm going [to] read an instruction to you. The following testimony of Officer Loyd is being admitted in this case only for a limited purpose. The evidence may be considered by you only for the purpose of evaluating the credibility of Carlito Martinez's testimony. You may not consider the substance of the statements for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

5RP 732.

Contrary to his trial testimony, Martinez told Officer Loyd that he had gotten pretty close to the shooter, that the shooter was his cousin Bob who had come to get the car -- the white Buick, that Bob, Wilturner and he had gone in on together to buy. 5RP 733-35. He said that he was at the corner when he heard the gunshot and then saw Bob take off. 5RP 735. He said that while he did not actually see the shot being fired, it came from within Bob's car. 5RP 735, 737.

When statements made by Martinez to Detective Janes were admitted as impeachment evidence, the judge instructed the jury as follows:

> The following testimony of Detective Janes is being admitted in this case only for a limited purpose. The evidence may be considered by you only for the

> purpose of evaluating the credibility of Carlito Martinez's testimony. You may not consider the substance of the statements for any other purpose.

7RP 1104.[3]

Contrary to his trial testimony, Martinez told Detective Janes that he met the defendant, a person he knew by the moniker Bob, through Wilturner. 7RP 1105. He said that prior to the shooting, there had been a dispute with Bob about the ownership of the white Buick and that Bob had threatened to shoot him and Wilturner. 7RP 1106-09. Martinez told Detective Janes that Bob found them downtown, that he was on the corner, he heard a pow, and then Bob drove down towards him as he ran around the corner. 7RP 1106-09.

On September 18, 2012, the defendant was arrested at his home in Renton. 5RP 823, 839-40. When he was arrested, he had

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[3] At the conclusion of trial, the court read to the jury, and provided the jury with a written copy, an instruction that stated:

> Certain evidence has been admitted in this case for only a limited purpose. Prior to hearing this evidence during trial, you were read a limiting instruction by the court to help you differentiate this evidence from other evidence admitted. Alleged statements made by Mr. Martinez which were admitted after the limiting instruction was read to you were admitted solely for the purpose of assessing the credibility of Mr. Martinez's trial testimony. You may not consider the substance of those statements for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 96.

a cell phone on his person. 6RP 1052-53. The phone was admitted as evidence at trial as exhibit 29. Id.

The defendant was interviewed by Detective Waters and Janes, an interview that was audio and video recorded. 5RP 823; Exhibit 25. When asked about the shooting, the defendant insisted that at the time of the shooting, he was home asleep. 5RP 828, 834. The defendant denied knowing anybody by the name Ricky Wilturner, and when shown a photograph of Wilturner, he denied having seen him before. 5RP 831. He admitted that he used to go by the moniker SpongeBob but that it was quite some time ago. 5RP 832.

Introduced at trial were two 911 calls that were placed just six minutes prior to the shooting – the calls were made from the defendant's cell phone. 7RP 1096-1102. On the first call, the defendant tells the 911 operator that he is at Second Avenue and Pine Street and that he has just found his stolen car, a car he had just purchased. 7RP 1097-98. He says that his cousin took his car and that he is just across the street. Id. He identifies himself by name and says that he wants the police to respond. 7RP 1099.[4]

[4] In addition, the defendant's cell phone records confirmed it was his phone used to call 911. 6RP 1066-67. Additionally, a witness testified that it was the defendant's voice making the calls. 7RP 1096.

Moments later the defendant called 911 again. 7RP 1100. He again identifies himself and this time says that his cousin who stole his car is outside the car right now. Id. Six minutes later, Martinez called 911 from the same location stating that his cousin had just been shot. 7RP 1102.

In a search of the defendant's home, detectives found a box of 9mm ammunition with some of the bullets missing. 6RP 899, 901-02. No gun was found. A maroon Buick Century was impounded. 6RP 896, 910. Documents from the vehicle show it belonged to the defendant's girlfriend, Kelly Turner. 6RP 921-22. Window glass shards were found in the creases of the car seats. 6RP 928-35. Upon further inspection, detectives discovered that the front passenger window glass was from a different manufacturer than the other car windows. 6RP 938, 941-42. A representative from All-State Auto Glass testified that on September 15, at 11:00 a.m., approximately eight hours after the shooting, the company installed a new right front passenger window on the car. 7RP 1128-36.

The defendant did not testify. Additional facts are included in the sections below they pertain.

C. ARGUMENT

1. THE STATE PROPERLY CALLED CARLITO MARTINEZ AS A WITNESS

The defendant argues that Carlito Martinez should not have been allowed to testify because, he asserts, the prosecutor called Martinez solely for the purpose of impeaching him with his prior out-of-court statements. The defendant's argument should be rejected. First, the State was *required* to call Martinez as a witness pursuant to the confrontation clause and evidence rule 801(d)(1)(iii). Second, while Martinez recanted much of what he had previously told the police, he still provided substantive evidence important to the case. Third, under the facts of this case, it is clear that there was no way of knowing or predicting how Martinez was going to testify.

a. The Rule

Evidence rule 607 provides that, "[t]he credibility of a witness may be attacked by any party, *including the party calling the witness*." (emphasis added). The rule contains no express limitation on the right to impeach a witness. State v. Hancock, 109 Wn.2d 760, 763, 748 P.2d 611 (1988). Still, one limitation has been adopted by case law. Specifically, courts have held that

although the State may impeach its own witness, the State may not call a witness for the "primary purpose" of impeaching the witness with evidence that would otherwise be inadmissible. Id. This limitation was adopted out of the concern that a prosecutor might abuse the rule by calling a witness they know will not provide useful evidence for the primary purpose of introducing hearsay evidence against the defendant. "This tactic would seek to exploit a jury's difficulty in making the subtle distinction between impeachment and substantive evidence." Id.

The Hancock case is illustrative of the scope of the limitation on the rule. Hancock was charged with the rape of his young son. The State called Hancock's wife - the boy's stepmother, as a witness, and asked her if she ever suspected anything improper between her husband and the child, whether her husband had ever told her about any improper conduct between the two of them, and whether she had been threatened by him. After she replied negatively to these questions, the prosecutor asked whether she had made contrary statements to the investigating detective. She denied making any such statements and claimed not to remember discussing the matter with the detective. The prosecutor then called the detective as a witness. The detective testified about the

out-of-court statements made by Hancock's wife, that she suspected something was going on, that Hancock had admitted to her what he had done to his son, and that she was afraid of him.

Hancock argued that the prosecutor knew that his wife would not testify favorably and that the primary purpose in calling her as a witness was to admit her prior inconsistent statements under the guise of impeachment. The Supreme Court rejected Hancock's argument that his wife was improperly called as a witness and that his case should be reversed. First, the Court noted, "the State could not have been certain that Roberta Hancock's testimony would change. The State was entitled to expect her to testify under oath no differently from the apparently voluntary statement she gave to the detective." Id. at 765. Second, the Court noted that while she may not have provided much in the way of substantive evidence, Hancock's wife did provide some affirmative evidence and thus the primary purpose in calling her as a witness was not to impeach her. Id. at 764. And third, while the Court acknowledged the potential difficulty a jury has in distinguishing between impeachment and substantive evidence, a limiting instruction could have been requested by the defense but was not. Id.

b. The Confrontation Clause And Evidence Rule ER 801(d)(1)(iii)

Under ER 801(d)(1)(iii), out-of-court "statements of identification" are admissible as evidence at trial under certain circumstances. See State v. Grover, 55 Wn. App. 252, 255-59, 777 P.2d 22, rev. denied, 113 Wn.2d 1048 (1989). Specifically, the rule provides that statements of identification of a person made after perceiving the person are not hearsay. Id.

The identification need not be as direct as the witness pointing out a suspect to a police officer. Rather, the statement of identification, for example, can be of a person's name, nickname or moniker, a description of the person's clothing, a show-up or montage pick, or describing physical characteristics of the person. See, e.g., State v. Stratton, 139 Wn. App. 511, 517, 161 P.3d 448 (2007) (statements describing the physical characteristics of a person perceived by the testifying witness are admissible), rev. denied, 163 Wn.2d 1054 (2008); Grover, 55 Wn. App. at 256 (robbery victim's statement made shortly after the incident identifying the robber by name was admissible); State v. McDaniel, 155 Wn. App. 829, 877-78, 230 P.3d 245 (a montage identification is admissible at trial), rev. denied, 169 Wn.2d 1027 (2010), see also

United States v. Owens, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988) (assault victim's out-of-court identification of his attacker from a photographic montage admissible under the federal equivalent of ER 801(d)(1)(iii) -- even where the victim did not remember making the identification); State v. Jenkins, 53 Wn. App. 228, 233 n.3, 766 P.2d 499 (although the declarant must testify, the identification statements may be elicited from another person who heard or saw the identification, such as an officer who showed a victim a montage), rev. denied, 112 Wn.2d 1016 (1989).

The rule is not without restraint as to admissibility. The rule itself expressly states that the declarant must testify at the trial and be subject to cross examination concerning the out-of-court statement. ER 801(d)(1). See, e.g., State v. Ruiz 176 Wn. App. 623, 645, 309 P.3d 700 (2013) (even though relevant, the out-of-court identification by a witness was not admissible at trial because the witness was deceased at the time of trial and no hearsay exception applied), rev. denied, 179 Wn.2d 1015 (2014). Furthermore, the confrontation clause provides that: "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 bars the admission of "testimonial" hearsay

unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 62, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Statements made to police officers during the course of interrogation or investigation are generally testimonial. Crawford, 541 U.S. at 52.

c. Calling Martinez As A Witness

There are three primary reasons that the defendant's argument fails.

First, the defendant's claim that the State called Martinez with the primary purpose of impeaching him is without merit for a very obvious reason – the State was required to call Martinez as a witness. Under ER 801(d)(1)(iii) and the confrontation clause, in order to admit *as substantive evidence* Martinez's out-of-court "statements of identification" of the defendant,[5] the State was required to call Martinez as a witness and it was required that he be available for cross examination regarding the statements. This alone defeats the defendant's argument.

[5] His statements included at a minimum the providing of the defendant's moniker or nickname, his relationship to the defendant, providing a physical description of him, providing a description of his clothing, and a description of his car.

Second, Martinez provided useful and necessary substantive evidence. In State v. Lavaris,[6] the Supreme Court found no error in the admission of a witness' out-of-court statements where his testimony on direct examination provided important circumstantial evidence of the events leading up to the victim's murder. Thus, the Court said, it could not be said that State's "primary purpose" in calling the witness was to introduce inadmissible hearsay evidence. Lavaris, 106 Wn.2d at 346-47.

Here, on direct examination, Martinez provided a nexus between the victim and defendant, testifying that he knew both Wilturner and the defendant. He identified the white Buick at the scene of the shooting and said that he had just bought it, providing a nexus to the 911 calls made by the defendant just prior to the shooting regarding a dispute over a car he had just bought but claimed was stolen by his cousin. He testified that he and Wilturner had come to the Noc Noc club together in the Buick and he identified the victim of the shooting as Wilturner. This evidence was important evidence in the case, especially considering that there was still a material witness warrant out for Wilturner in the hopes that he could be located and called as a witness. Thus, the

[6] 106 Wn.2d 340, 721 P.2d 515 (1986).

court did not abuse its discretion in holding that the primary purpose in calling Martinez as a witness was not to impeach him.

Third, it is readily apparent that neither the State nor defense counsel knew exactly what Martinez was going to say on the stand. Martinez had provided multiple statements to the police, all recorded, wherein he described the events leading up to the incident and implicating the defendant in the shooting. He also expressed fear at the possibility of having to testify against the defendant. On January 14, 2013, Martinez was subjected to a defense interview wherein he apparently substantially disavowed much of what he had said in his prior statements. 1RP 41-42. This "recantation" admittedly surprised both the prosecutor and the defense attorney. 1RP 41, 45. According to the defense counsel, Martinez claimed he did not see the defendant at the scene of the shooting and, in fact, he claimed he did not even know who the defendant was.

Martinez was at best, a reluctant witness. A material witness warrant had been issued for his arrest in order to secure his presence at trial. CP ___, sub # 28 & 30; 1RP 41-42. He had expressed great fear at the possibility of having to testify against

the defendant.[7] Considering that his statements that incriminated the defendant were all recorded and were made at or near the time of the shooting, the State could reasonably expect that Martinez would testify consistent with his out-of-court statements when he was in front of a judge and under oath, rather than persist in an unconscionable and unsupportable claim of complete ignorance. See, e.g., Hancock, at 765 (the State could reasonably expect the witness to testify consistent with the voluntary statement made to the detective).

Finally, it is important to note that the trial court gave an oral limiting instruction each time a witness testified about an out-of-court statement made by Martinez that was being elicited as impeachment evidence only. To further avoid the jurors being confused as to how to use the out-of-court statements admitted for substantive purposes and the out-of-court statements admitted for impeachment purposes, the court had the prosecutor elicit the

[7] After both parties had rested, Martinez contacted defense counsel and asked to testify again. 8RP 1219. Martinez told counsel that he had lied about the defendant having been near the scene of the shooting and that Wilturner and the defendant had been fighting over the car. 8RP 1221. Defense counsel then sought to reopen the defense case based on this new information. 8RP 1220. After a recess was taken for the State to interview Martinez, defense counsel informed the court that she had changed her mind and that she no longer wanted to recall Martinez as a witness. 8RP 1223. The prosecutor then put on the record that the State had obtained jail phone calls from the defendant to Martinez in which the defendant gave Martinez his attorney's phone number, directed him to come to court, and told him exactly what to say. 8RP 1227.

testimony from the witnesses separately and in a different manner. The prosecutor was allowed to play the actual recording of Martinez's out-of-court statements when the evidence was being admitted for substantive purposes, but when the statements were admitted only for impeachment purposes, a witness was required to recite what Martinez had previously said to them. Finally, at the close of the case, the judge read to the jury, and provided a written copy, of a limiting instruction telling the jury exactly how it could use the impeachment evidence.

While the defendant may argue that reasonable minds could disagree with the trial court's ruling here, that is not the standard on review. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). The trial court's determination here is reviewed for abuse of discretion. Hancock, 109 Wn.2d at 766-67. Thus, to prevail on appeal, the defendant would have to prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). The court did not abuse its discretion here. The State called Martinez as a witness was so that his statements of identification of the defendant would be admissible, to elicit from valuable testimony regarding

what led up to the shooting, and with the hope that he would testify consistent with his prior out-of-court statements.

2. EVIDENCE PERTAINING TO THE DEFENDANT'S CELL PHONE DID NOT REQUIRE EXPERT TESTIMONY

The defendant contends that certain evidence related to his cell phone was improperly admitted because it required expert testimony. Specifically, the defendant claims that an expert witness was required to testify (1) about information that was obtained directly from his cell phone, and (2) when the detective made a map showing the cell phone towers that the defendant's calls accessed. This claim has no merit. No evidence was presented that required expert testimony. In any event, any error was completely harmless.

a. Standard Of Review

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). To prevail on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. Robtoy, 98 Wn.2d at 42.

Evidentiary error is grounds for reversal only if it results in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255

(2001). An error is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Neal, 144 Wn.2d at 611. Additionally, a trial court's erroneous admission of hearsay statements is harmless when the jury has heard substantially similar testimony without objection. State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006).

b. The Evidence Admitted

When the defendant was arrested at his home in Renton, he had a cell phone on his person. 6RP 1052-53. At the time of his arrest, the arresting officer used the defendant's cell phone to call a relative who could come over and care for the defendant's children. 5RP 840. The phone was admitted at trial as exhibit 29. Id.

Subsequently, the State obtained the defendant's cell phone records, also referred to as "call logs," from Sprint, the defendant's cell phone service provider. 6RP 1052-56. Those records contained, among other things, out-going call numbers, incoming call numbers, the start time of each call, the end time of each call, the duration of each call, the cell tower used at the initiation of each call, the cell tower used at the end of each call, and the location of the cell towers in the Seattle/eastside area. Id. The cell phone

records were admitted as a business record without objection pursuant to RCW 10.96.030.[8]

In addition to the cell phone records, detectives performed what is commonly referred to as a "phone dump" using a device from the Cellebrite Company. 6RP 1007-14. In conducting a phone dump, a person merely plugs in a USB cable into the phone and downloads the information stored on the cell phone and puts it in printed form. Id. Here, the information downloaded from the defendant's cell phone included photos he had stored on the phone, text messages, his call log and his contact list. 6RP 1009.

When defense counsel objected and said that the information could not come in without expert testimony, the court asked why when all that the process did was duplicate the information from the phone in paper form, akin to what a Xerox machine does to printed copy. 5RP 760-61. Defense counsel's response was that the detective did not know how the program works, but she admitted that there was no case law prohibiting the admission of the evidence. 5RP 762, 843-44. The court denied the

[8] Under RCW 10.96.030, cell phone records are admissible as a business record without testimony from the custodian of records if accompanied by an appropriate affidavit, declaration or certification by the record custodian. State v. Lee, 159 Wn. App. 795, 817-18, 247 P.3d 470 (2011), rev. denied, 177 Wn.2d 1012 (2013).

defense motion, noting that the phone was in evidence and the accuracy of the records was easily verifiable by counsel by simply checking the phone. 5RP 845-46.

Using the defendant's cell phone records, Detective Rolf Norton then created a trial exhibit using a software program and Google Earth map to show the locations of the cell phone towers. 7RP 1086-91, 1145-48. As was pointed out at court, the exhibit could have been made by hand, and the accuracy of the mapping could be verified by hand, but using a mapping program and Google Earth just makes it easier. 5RP 765. When the defense objected and said this too required expert testimony, the court again asked why. 6RP 999-1000. The court asked how this could be if the cell phone tower used by each call was part of the information in the defendant's cell phone records. Id. Counsel stated that any information regarding cell phone tower locations and which calls went through which towers requires expert testimony. Id. The court denied the defense motion. 6RP 1005.

Detective Norton testified that when someone makes a call from a cell phone, the phone reaches out to a cell tower antenna, usually the nearest tower but that there are a number of variables, including physical obstructions, weather conditions, volume of call

activity, to name a few. 7RP 1144-49. He testified that knowing the tower that a phone used was no guarantee as to a person's exact location. 7RP 1148. He then explained that he mapped the cell phone towers used by the defendant on the night of the shooting, as well as verifying by hand the call and location that was mapped. 7RP 1150-51.

Of particular importance, the 911 calls the defendant made on the night of shooting were using cell towers in the downtown area, as were other calls he made within that time frame. 7RP 1154-60. In addition, the call made by the detective from the defendant's Renton home, using the defendant's cell phone on the day he was arrested, used a cell tower in the Renton area. 7RP 1162.

Independent of the cell phone dump information, the records from Sprint showed that Martinez and the defendant called each other several times shortly before and shortly after the shooting. 6RP 1057-58. Both the Sprint records and data dump showed the exact times that the defendant and Martinez spoke with each other that evening. 6RP 1060-67. The information from the defendant's phone showed that at approximately 8:30 p.m. on the night of the shooting, the defendant texted a person with the moniker Bompton,

who happened to be with Martinez at the time, and said, "knock him out and take my car." 6RP 1071-72.

c. Harmless Beyond A Doubt

Instead of beginning by rebutting the defendant's argument that the above evidence should not have been admitted without expert testimony, the State will begin with a harmless error analysis because in this case, any error was harmless beyond any doubt.

In this case, cell phone evidence was admitted and used to prove three things: (1) to show that the defendant lied to the police when he said he was at home in Renton at the time of the shooting, (2) to show that the defendant was at the scene of the shooting in downtown Seattle, and (3) to show that the defendant and Martinez knew each other and had contact with each other both before and after the shooting. None of the evidence needed to prove these three things required the use of the information the defendant complains, thus, any error was harmless. Instead, all three purposes were met using non-objectionable and better evidence.

Specifically, two recorded 911 calls were played for the jury. The calls were made just prior to the shooting and were made from the defendant's cell phone (confirmed by the phone records and the CAD printout). 5RP 829-31, 836. In the calls, the defendant

identified himself by name and he told the operator he was at Second Avenue and Pine Street and wanted a police response because he found his stolen vehicle that his cousin had taken.[9]

Additionally, when the detectives first interviewed Martinez after the shooting, they obtained his cell phone number. It is a number that they subsequently used to contact him. The defendant's cell phone records show that calls were exchanged between Martinez and the defendant shortly before and shortly after the shooting.

Thus, without using any cell phone tower mapping or information from the phone dump of the defendant's phone, overwhelming evidence was presented proving that (1) the defendant lied when he said he was at home at the time of the shooting, (2) that he really was at the scene of the shooting, and (3) that he knew and had contact with Martinez around the time of the shooting. In short, any use of the cell phone tower information and information downloaded from the defendant's phone was cumulative of already very probative evidence on the same topic. Thus, any error in the admission of contested evidence is harmless.

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[9] In closing argument, defense counsel admitted that based on the 911 calls, "we know that Mr. Drayton was in the area of the shooting," he "says his name, gives his phone number. He says where he is." 8RP 1261.

d. No Evidence Required Expert Testimony

The defendant cites to ER 702 in arguing that lay opinion testimony is inadmissible where the sort of opinion expressed calls for that of an expert. Def. br. at 11. With the exception of a single statement, the testimony the defendant complains did not call for an opinion or expert explanation.

ER 702 provides for when expert testimony is admissible. Of note, the rule says nothing about when expert testimony is required. The rule provides as follows:

> 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.

ER 702.

Beginning with the information obtained via the phone dump, the defendant does not explain what it is that needed expert testimony or what opinion was improperly expressed. Rather, the defendant makes the conclusory statement that the "Cellebrite program" "analyzed the data from the phone." This is simply incorrect. Def. br. at 16. There is no evidence that the device analyzes anything. The device simply took the stored, observable,

and still retrievable information from the phone and put it in written form on paper. All of the information obtained was found on (and could be verified) simply by turning on the phone and, for example, scrolling to photos, calls received or the contact list. In other words, all the program did was duplicate what already existed on the phone. This did not require expert testimony. Rather, what the defendant seems to be talking about is authentication.

In providing briefs to this Court, the parties type the brief on a computer, press the print button and an exact copy of the brief is printed onto paper. If a party sought to introduce a brief as evidence in a trial, an expert witness would not be required to testify how it is that pressing the print button created a paper copy of the brief that was in electronic form on the computer. What would be needed is for a witness to authenticate the document, to testify that the document is what it purports to be. This is governed by ER 901(a).

ER 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Under ER 901, the requirement of authentication or identification as a condition

precedent to admissibility is satisfied by testimony from a witness with knowledge "that a matter is what it is claimed to be." ER 901(b)(1); see State v. Kinard, 109 Wn. App. 428, 436, 36 P.3d 573 (2001), rev. denied, 146 Wn.2d 1022 (2002). "Rule 901 does not limit the type of evidence allowed to authenticate a document. It merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be." State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003), rev. denied, 150 Wn.2d 1028 (2004), accord State v. Bradford, 175 Wn. App. 912, 927-28, 308 P.3d 736 (2013), rev. denied, 179 Wn.2d 1010 (2014).

In Bradford, a phone dump generated a 280-page report itemizing each text message the witness sent or received during a certain time period. The full report was introduced over objection. This Court held that "[s]ufficient evidence was introduced to support a finding that the text messages that were read to the jury and contained in the 12-page examination report were what the State purported them to be: text messages written and sent by Bradford." Bradford, 175 Wn. App. at 928.

Here, the detective testified how he obtained the information by way of the phone dump and that the information consisted merely of the information currently on the defendant's cell phone -- the text messages, photos, call numbers and contact list information. The trial court was perfectly within its discretion to accept this fact for admission of the evidence.[10]

Next is what the defendant refers to as cell phone tracking. In reality all that Detective Norton did was plot the information from the defendant's cell phone records on a map. 7RP 1147, 1150. The records contained information on each call – when the call was placed, the cell tower it used upon the initiation of the call, the duration of the call, the cell tower used upon the completion of the call, and the location of each cell tower. Id. The fact that he used a computer program and Google Earth to create the map does not require the testimony of an expert. Additionally, all the information was contained in the phone records previously admitted and thus the accuracy of the map was completely verifiable.

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[10] It should be noted that an alleged lack of authenticity was not the basis for the defendant's objection below and that "a party may assign evidentiary error on appeal only on a specific ground made at trial." Bradford, 175 Wn. App. at 928 n.8 (quoting State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) and ER 103(a)(1)). Thus, even if the defendant were to raise this issue on appeal, his challenge would be considered waived. Id.

A good example is what the Supreme Court has said about the foundation necessary to admit video or photographic evidence. No witness is required to testify regarding how a video recorder or camera works. Rather, what is required is for a witness, not necessarily the person who created the video or photograph, to testify as to when, where, and under what circumstances the video or photograph was taken, and testify that it accurately portrays the subject illustrated. State v. Tatum, 58 Wn.2d 73, 75, 360 P.2d 754 (1961).

The only thing remotely arguable that constituted some sort of opinion where an expert could come into play is when Detective Norton testified that a cell phone will generally reach out to the nearest cell tower. Detective Norton, who has over 10 years' experience working with cell phone companies, added that you cannot know specifically where a person is when making a call because of a number of factors, for example, call volume on a particular tower, physical obstructions between the caller and the nearest tower, and weather conditions, are a few factors that he named. 7RP 1148-50, 1163. This testimony, however, is both common knowledge and information the detective possessed from

his experience. This is exactly the result reached in a similar case, Perez v. State, 980 So.2d 1126 (Fla. App. 3d Dist.) ("This testimony constituted general background information interpreting the cell phone records which did not require expert testimony...[the information in the record also was] sufficient for each juror to determine the location of the tower without the need for expert testimony.") rev. denied, 994 So.2d 305 (2008), cert. denied, 556 U.S. 1132 (2009).

Rule 702, Testimony by Experts, provides that "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." Could an expert have been called as a witness? The answer is likely yes, but the question here is was it required that an expert testify. The trial court ruled that an expert was not required. Under the facts here, the defendant cannot show that no reasonable judge would have so ruled.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's convictions.

DATED this 15 day of May, 2014.

Respectfully submitted,

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By: _____
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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 Thomas Kummerow, 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. DRAYTON, Cause No. 70558-0 -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.

Dated this 15 day of May, 2014

Name
Done in Seattle, Washington