SUPREME COURT NO. 99818-3

NO. 53374-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JERRELL POSEY,

Petitioner.

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

The Honorable James Orlando, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Jerrell Posey seeks review of the Court of Appeals' unpublished decision in State v. Posey, No. 53374-0-II, filed March 30, 2021 ("Slip op."), which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Are archived social media posts "business records," subject to authentication by affidavit under ER 803(a)(6), RCW 5.45.020, and RCW 10.96.030?

2. To the extent any portion of an archived social media post could be classified as a "business record," can that portion be authenticated, under RCW 10.96.030, by an affidavit stating only that the "record" was produced in response to a search warrant?

3. Where an affidavit purports to authenticate archived social media posts by stating that the posts were furnished in response to a search warrant, is that affidavit "testimonial," triggering the Sixth Amendment right of confrontation?

C. STATEMENT OF THE CASE

1. Mr. Posey's Defense at Trial was Mistaken Identity

Mr. Posey was convicted of two counts of first-degree assault, with firearms enhancements, and one count of second-degree unlawful

possession of a firearm. CP 35-36, 86-87, 89-90, 92. The convictions arose from his alleged involvement in a shooting.

The prosecution's primary witness was Courtney Walters. 4 RP 217-80. Ms. Walters testified that she and a friend drove to a convenience store on 15th Street in Tacoma, where Ms. Walters parked and waited in the car while the friend went inside to purchase a cigar. 4 RP 223-27. As the friend exited the store, three young men standing outside started to hassle him. 4 RP 226, 237-38. From the car, Ms. Walters told them to stop. 4 RP 237-44.

Ms. Walters recognized one of the young men, Leeshawn Redic, as someone with whom she had attended juvenile drug treatment sessions several days per week. 4 RP 233. At trial, she testified that she had spent one to two hours in his company, three days per week, the year before the shooting. 4 RP 233.

She also testified that she recognized another young man as Mr. Posey, who had gone to her high school for a few months about two years before the shooting. 4 RP 231-32, 272-73. She testified that she never had any classes with Mr. Posey and never socialized with him, but that his image sometimes appeared in her Facebook feed. 4 RP 230-32, 260, 272-73.

Ms. Walters and her friend engaged the three young men in the parking lot for about three minutes, during which time Ms. Walters

observed Mr. Redic flash a black pistol in his waistband. 4 RP 240-44. Ms. Walters never got out of the car during this interaction. 4 RP 269. As Ms. Walters and her friend drove away, she saw Mr. Redic hand the gun to the young man she believed was Mr. Posey. 4 RP 246-47. She said this young man then aimed the gun at their departing car and fired, breaking the car's window. 4 RP 248-50.

A few minutes later, in a panic, Ms. Walters called 911 and reported the incident. 4 RP 252-52. When officers arrived shortly after that, she identified Mr. Redic by an incorrect name and could not recall Mr. Posey's name at all. 4 RP 256, 309. She identified Mr. Posey to officers only by scrolling through her Facebook feed and finding a picture of him. 4 RP 260-63. Indeed, even at the time of trial, Ms. Walters could not recall Mr. Posey's first name. 4 RP 229-30.

Mr. Posey's defense at trial was mistaken identity: he argued that, because Ms. Walters was vaguely familiar with the image in her Facebook feed and apparently believed the shooter resembled that image, she inadvertently made a false identification. 4 RP 275-77; 4 RP 497-99.

2. To Rebut the Mistaken Identity Defense, the State Offered Archived Facebook Postings; the Trial Court Ruled the Postings were "Business Records" Subject to Authentication by Affidavit

To rebut the mistaken identity defense, the prosecution sought to admit archived Facebook message logs, purportedly from Mr. Posey's Facebook account. 5 RP 418, 431-32; Ex. 28, 29. These time stamped messages indicated that, around the time of the shooting, the user of the account had possessed a black handgun and was communicating with Mr. Redic about "laying low." 5 RP 405-06, 414, 425-29, 433-36; Ex. 28, 29.

The prosecutor acknowledged that these "records" would have to be authenticated before they could be admitted at trial. 1 RP 12. But he explained that it is a "logistical nightmare" to subpoena a Facebook records custodian for live testimony, and he argued that the State should instead be permitted to authenticate the Facebook records with an "affidavit" or "certificate" consistent with RCW 10.96.030, which permits authentication by "affidavit, declaration, or certification" under certain circumstances. 1 RP 14-15.

The State then offered a "Certificate of Authenticity of Domestic Records of Regularly Conducted Activity," which provided, in its entirety:

> I, Alexandro Verdugo, certify:
>
> 1. I am employed by Facebook, Inc. ("Facebook"), headquartered in Menlo Park,

> California. I am a duly authorized custodian of records for Facebook and am qualified to certify Facebook's domestic records of regularly conducted activity.
>
> 2. I have reviewed the records produced by Facebook in this matter in response to the Search Warrant received on January 27, 2018. The records include search results for basic subscriber information, IP logs, messages, photos, videos, other content and records UziLondon666, dope.bo92, weezyredic, leeshawn.redic.37, Robert.doss.7169 and 100002246579224.
>
> 3. The records provided are an exact copy of the records that were made and kept by the automated systems of Facebook in the course of regularly conducted activity as a regular practice of Facebook. The records were saved in electronic format after searching Facebook's automated systems in accordance with the above-specified legal process. The records were made at or near the time the information was transmitted by the Facebook user.
>
> 4. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Ex. 1; 1 RP 12-13. The Certificate was signed and dated January 24, 2019. Ex. 1.

The prosecutor explained that, in 2017 and 2018, the State was investigating "a large number" of unsolved shootings in the Hilltop area and obtained a search warrant for Facebook records associated with "a number of individuals," including Mr. Redic and Mr. Posey. 1 RP 20. That warrant

prompted Facebook to produce the "records" referred to in the Certificate. 1 RP 13, 20.

The prosecutor asserted that Mr. Posey used the name "Thatkidd Uzi" in his Facebook profile, and this name does appear in several of the message exchanges in the records the State sought to admit. 1 RP 23-24. But the prosecutor did not explain which of the apparently unique identifiers listed in paragraph 2 of the Certificate (UziLondon666, dope.bo92, weezyredic, leeshawn.redic.37, robert.doss.7169 and 100002246579224) was associated with Mr. Posey's account. 1 RP 23-24. The search warrant was not admitted into evidence. 1 RP 13-40.

The defense objected to the authentication by certificate, arguing that this method is inappropriate to social media archives:

> I think the reason that a witness from Facebook is necessary for authentication and later for confrontation is because Facebook records are different from any other kind of business record. They're dynamic, they're changing, and they're subject to data manipulation. What we are looking at are the records that were pulled by someone at Facebook at an unknown date and time. We don't know how they were compiled. We don't know what changes were made since the incident date or since the date of production of these messages, and we're left with no ability to question anybody about whether or not these messages could have been altered by someone before they were produced for trial. And that's where I think Facebook records differ from other business records, and that's why I believe the affidavit is not sufficient.

1 RP 17.

The prosecutor responded that live testimony from a Facebook employee would be a "waste of time":

> . . . There's a reason the statute exists. These types of witnesses are frankly a waste of time. You have to spend thousands of dollars to fly someone up from California for ten minutes of testimony when there is hardly ever any cross or any question as to authenticity of these records. And the types of argument that [defense counsel] . . . has, can be answered both through an interview and through questioning of the witness who will lay the foundation for these records.

1 RP 19-20. He also explained that he would "lay sufficient foundation through the lead detective in the case . . . to establish who was using these accounts, whose names these accounts are in." 1 RP 18.

The trial court concluded the Certificate satisfied RCW 10.96.030 and was therefore sufficient to authenticate the Facebook "records." 1 RP 22 ("I think the . . . declaration complies with the statute, at least it was the intent of the statute.").

3. The Lead Detective Testified that Exhibits 28 and 29 Must Be Mr. Posey's Postings from the Day of the Shooting, because the Search Warrant Sought Postings from Around that Time

At trial, Detective James Buchanan testified that he identified Mr. Posey's and Mr. Redic's Facebook accounts through Ms. Walters, who directed investigators to Mr. Posey's profile, and then "[o]btained a search warrant for the accounts associated with this case." 5 RP 410-11. He said he sought the warrant partly to determine Mr. Posey's and Mr. Redic's

"whereabouts" on the day of the shooting. 5 RP 415. The detective identified Mr. Posey's account as the account of "Thatkidd Uzi." 5 RP 411.

Detective Buchanan explained that Facebook maintains a "portal" through which it accepts search warrants, but when asked to elaborate on the term, "portal," he said he was "not computer smart enough to know." 5 RP 416-17.

Through Detective Buchanan's testimony and over defense counsel's renewed objection, the court admitted two exhibits consisting of Facebook "records" obtained through the search warrant.[1] 5 RP 418-20, 431-32; Ex. 28, 29. Detective Buchanan then described the images and messages contained in the exhibits, and the "corrected" time stamps associated with each. 5 RP 421-29, 431-43. He described a message exchange allegedly between Mr. Posey (going by the profile name "Thatkidd Uzi") and Mr. Redic, which included a reference to "'lay[ing] low,'" and testified that it took place about 35 minutes after the shooting on October 12, 2017. 5 RP 424-31. He also testified that, separate from the search warrant, he had obtained some "[s]creen captures" from the

[1] These exhibits were marked 28 and 29, but they consisted almost entirely of Facebook records that appeared in exhibits 2 and 3, discussed at the February 5, 2019, hearing.

Facebook account of "Thatkidd Uzi" while investigating this case. 5 RP 445-46. The court admitted these screen captures as Exhibit 6. 5 RP 446.

On cross-examination, Detective Buchanan acknowledged that the "Thatkidd Uzi" profile page in Exhibit 6 indicated that the user had joined Facebook in February 2018, several months after the time frame covered by the warrant. 5 RP 456. When asked to explain this discrepancy, Detective Buchanan testified that he assumed a user could "adjust that." 5 RP 456. When asked for further clarification, he stated, "Because I did the search warrant from date of the incident and around the incident, until when [Mr. Posey] was captured in 2018. So the chat was from then." 5 RP 456-57.

On redirect, Detective Buchanan again explained that he did not know whether a Facebook user could adjust the "joined" date on a Facebook profile, because "I don't work for Facebook." 5 RP 463. And he again asserted that the profile for "Thatkidd Uzi" must have been in use in 2017 because the search warrant had yielded "records" associated with that name. 5 RP 463.

In closing argument, the prosecutor told jurors that the messages in exhibits 28 and 29 were "not a coincidence," but instead proof that they could trust Ms. Walters's identification. 5 RP 492-94.

The jury convicted Mr. Posey as charged. CP 86-87, 89-90, 92. The trial court sentenced him to a total of 180 months confinement, followed by 36 months of community custody. CP 121-22.

4. The Court of Appeals Declined to Address Mr. Posey's Claims on the Merits, Purporting to Find Any Error Harmless

On appeal, Mr. Posey argued the Facebook message logs in exhibits 28 and 29 were not properly authenticated and that their admission therefore violated confrontation clause protections under the Sixth Amendment. Slip op. at 1, Br. of App. at 1, 11-13. The Court of Appeals declined to address either argument, finding any error was harmless. Slip op. at 1.

The Court reached that conclusion for four reasons: (1) Ms. Walters testified that she recognized Mr. Posey outside the convenience store and saw him take possession of the gun; (2) Ms. Walters was able to find a picture of Mr. Posey on Facebook and show it to law enforcement; (3) Ms. Walters again identified Mr. Posey in pictures police provided to her after she had already provided them with Mr. Posey's Facebook image; and (4) Ms. Walters again identified Mr. Posey at trial. Slip op. at 8. But none of these reasons rebuts Mr. Posey's mistaken identity defense.

As noted, there was no dispute that Ms. Walters believed the shooter was a person she recognized from Facebook. Instead, the defense theory was that Ms. Walters mistook the actual shooter for Mr. Posey, a distant

acquaintance whom she had not seen in years, save for in images from her Facebook feed. Ms. Walters's ability to locate those images, after the fact, was simply an extension of this original mistake. Thus, the Facebook identification did not corroborate her original identification (indeed, she never made any non-Facebook-based identification), but it did render all her subsequent identifications of Mr. Posey a forgone conclusion.

The Court of Appeals denied Mr. Posey's motion for reconsideration.

D. REASONS REVIEW SHOULD BE ACCEPTED

1. Review is Appropriate under RAP 13.4(b)(3) and (4)

Review is appropriate under RAP 13.4(b)(4) because the issue involves a constitutional question of first impression in Washington, and a matter of substantial public interest.

2. Admitting the Improperly Authenticated Facebook Exhibits Violated RCW 10.96.030 and Confrontation Clause Protections

Hearsay, defined as an out-of-court statement "'offered in evidence to prove the truth of the matter asserted,'" is inadmissible "'except as provided by [the Evidence Rules], by other court rules, or by statute.'" State v. Hamilton, 196 Wn. App. 461, 476, 383 P.3d 1062 (2016) (quoting ER 801(c), 802). RCW 5.45.020 provides one such exception for "business records," which are admissible

> if the custodian or other qualified witness testifies to [the record's] 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 [in question], and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

See also ER 803(a)(6) (providing that "Records of Regularly Conducted Activity" are "not excluded by the hearsay rule," pursuant to chapter 5.45 RCW).

The detailed testimony required under RCW 5.45.020—explaining when and how the business record at issue was produced—is necessary to authenticate that record,[2] *i.e.*, to prove that it is what the proponent claims it is.[3] Under RCW 10.96.030, that authentication may occur through an "affidavit, declaration, or certification," in lieu of live testimony, provided the document "attests to the following:"

> (a) The witness is the custodian of the record or sets forth evidence that the witness is qualified to testify about the record;
>
> (b) The record was made at or near the time of the act, condition, or event set forth in the record by, or from information transmitted by, a person with knowledge of these matters;

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[2] State v. DeVries, 149 Wn.2d 842, 847, 72 P.3d 748 (2003) (RCW 5.45.020 "does not create an exception for the foundational requirements of identification and authentication").

[3] State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) overruled on other grounds by State v. Guzman Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012) (citing ER 901(a)) ("It is fundamental that evidence must be authenticated before it is admitted. Authentication requires that the proponent produce proof 'sufficient to support a finding that the matter in question is what its proponent claims.'").

> (c) The record was made in the regular course of business;
>
> (d) The identity of the record and the mode of its preparation; and
>
> (e) Either that the record is the original or that it is a duplicate that accurately reproduces the original.

As noted, at Mr. Posey's trial the State invoked this statute to admit the "Facebook records" without live testimony by a custodian.

In a criminal case, the prosecution's reliance on affidavits for authentication is limited not only by the terms of RCW 10.96.030, but also by the Sixth Amendment right of confrontation. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307-08, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). Consistent with that right, the prosecution may not rely on an affidavit to authenticate a record when the affidavit, the record, or the combination thereof, is "testimonial." See id. at 322-24.

In this case, the admission of the Facebook "records" pursuant to the "Certificate of Authenticity" violated both RCW 10.96.030's requirements and Sixth Amendment confrontation clause protections.

a. To the extent any portion of exhibits 28 and 29 could be classified as a "business record," the "Certificate" used to authenticate them did not satisfy the requirements in RCW 10.96.030.

While no Washington case addresses the issue, courts considering Facebook "certificate[s]" with language identical to the one used at Mr. Posey's trial—referring to "records . . . 'made and kept by the automated systems of Facebook in the course of regularly conducted activity as a regular practice of Facebook . . . [and] made at or near the time the information was transmitted by the Facebook user'"—have held that such certificates are insufficient to authenticate message logs and other Facebook "records." E.g., United States v. Farrad, 895 F.3d 859, 865-66, 878-80 (6th Cir. 2018); United States v. Browne, 834 F.3d 403, 408-11 (3d Cir. 2016); People v. Glover, 363 P.3d 736, 741 (Colo. Ct. App. 2015).

Applying evidence rules equivalent to Washington's RCW 5.45.020, 10.96.030, and ER 803(a)(6), these courts conclude that Facebook postings and messages are not records of "'regularly conducted activity'" as contemplated in the rules permitting authentication of "business records" by affidavit. Farrad, 895 F.3d at 878-80; Browne, 834 F.3d at 409 (quoting Fed. Evid. Rule 803(6) and 902(11)); Glover, 363 P.3d at 740-41 (quoting Colo. Evid. Rule 902(11) and 803(6)).

This conclusion makes sense. As the Third Circuit explained in Browne, the business records exception applies to documents whose substantive accuracy an entity is motivated to ensure: documents on which the entity relies to conduct its operations. 834 F.3d at 410. But no Facebook employee can "purport to verify or rely on the substantive contents of [its user's] communications in the course of its business." Id. "At most," a Facebook records custodian could attest only that certain "took place between certain Facebook accounts, on particular dates, or at particular times." Id. at 410-11.

In Mr. Posey's case, no records custodian did this. Instead, the Facebook custodian submitted a "Certificate" attesting only that the records it references were obtained pursuant to a search warrant. Ex. 1 ("The records were saved in electronic format after searching Facebook's automated systems in accordance with the above-specified legal process."). That conclusory statement does not explain "the mode of [the records'] preparation," as required by RCW 10.96.030. Neither does the Certificate's vague reference to "the automated systems of Facebook" or assertion that "[t]he records were made at or near the time the information was transmitted by the Facebook user." Ex. 1. With respect to the records' mode of preparation, these statements raise more questions than they answer.

When Mr. Posey pointed this out, at the pretrial hearing, the State persuaded the trial court that Detective Buchanan would fill in any gaps in the foundation. 1 RP 18. But when the detective testified, the authenticating testimony he provided for exhibits 28 and 29 was the same tautology: the messages must have come from the day in question, because the search warrant he submitted requested postings from that time period. 5 RP 410-11, 456-57, 463.

While no Washington case has squarely addressed this issue, the Ohio Supreme Court has held that similar testimony by an investigating officer cannot substitute for authentication by a records custodian. State v. Hood, 135 Ohio St. 3d 137, 141-47, 984 N.E.2d 1057 (2012).

In Hood, the trial court admitted cell phone records that had not been authenticated by any phone company custodian, pursuant to a detective's testimony that he obtained the records through an official subpoena process. 135 Ohio St. 3d at 141-42. Applying that state's equivalent of Washington's business records exception,[4] the Ohio Supreme Court held that the detective's testimony could not authenticate the records, since he

[4] Hood, 135 Ohio St. 3d at 146 (to be admissible under Evid. Rule 803(6), "a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, even or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the 'custodian' of the record or by some 'other qualified witness'") (quoting State v. Davis, 116 Ohio St. 3d 404, 880 N.E.2d 31 (2008)).

was not a proper custodian and was not familiar with the phone company's record-keeping protocol. Id. at 147. In other words, the court held that a law enforcement officer cannot authenticate a record simply by testifying that it was responsive to a warrant or other legal process. Id.

Mr. Posey's case differs from Hood in that, here, the State at least purported to authenticate the Facebook exhibits with the "Certificate" from a Facebook custodian. Ex. 1. But that "Certificate" was inadequate for the same reasons that the detective's testimony was inadequate in Hood: it provided no actual information about how the records were created. Instead, the Certificate said the "records" in question could be trusted because they were responsive to a warrant. Ex. 1 ("The records include search results . . . The records were saved in electronic format after searching Facebook's automated systems in accordance with the above-specified legal process.").

b. The "Certificate" purporting to authenticate exhibits 28 and 29 by reference to the search warrant was testimonial, triggering the Sixth Amendment right of confrontation.

In Melendez-Diaz, the United States Supreme Court held that the Sixth Amendment right of confrontation applies to affidavits or certificates that are "testimonial" for Sixth Amendment purposes, and that such

documents therefore cannot substitute for live testimony, without the defendant's waiver. Id. 557 U.S. at 311.

The Melendez-Diaz Court recognized that an affidavit could be used to authenticate a business record, provided the affiant attested only to "'the correctness of a copy of a record kept in his office,'" and did not offer "'his interpretation of what the record contains or shows, or . . . certify to its substance or effect.'" Id. at 322 (quoting State v. Wilson, 141 La. 404, 409, 75 So. 95 (1917)). In the latter circumstance, the Court reasoned, the affidavit essentially functions as expert witness testimony, and cross-examination is necessary to uncover that witness's "lack of proper training or deficiency in judgment." Id. at 320.

The "Certificate" at issue in this case implicates that reasoning. It repeatedly refers to a "search," which it asserts was "in accordance with" the "Search Warrant received on January 27, 2018" but does not otherwise explain. Ex. 1. Because the search methods are not explained, it is unclear to what extent they involve the "exercise of judgment" discussed in Melendez-Diaz, 557 U.S. at 320. Paragraph 2 of the "Certificate," which refers to "search results" and the "Warrant received on January 27, 2018," does not help; indeed, it appears to be missing one or more words. Ex. 1 ("The records include search results for basic subscriber information, IP logs, messages, photos, videos, other content and records UziLondon666,

dope.bo92, weezyredic, leeshawn.redic.37, Robert.doss.7169 and 100002246579224.").

Again, Hood is relevant. In that case, the Ohio Supreme Court held that the cell phone records in question were not properly authenticated as business records, "and that fact affects their status in regard to the Confrontation Clause." 135 Ohio at 147. The Hood court reasoned that, because the record did not indicate the records at issue "were prepared in the ordinary course of business . . . we cannot determine that they are nontestimonial," and thus their admission was constitutional error. Id.

Without live testimony by a Facebook records custodian—or at least a custodian's affidavit detailed enough to explain the records' creation *separate from the warrant*—several significant questions went unanswered at Mr. Posey's trial. These include why Facebook was able to return "Thatkidd Uzi" messages from 2017, when exhibits obtained through "screen grabs" indicated the "Thatkidd Uzi" account was not created until February of 2018, and why the records submitted with the Certificate showed that the picture Ms. Walters used to identify Mr. Posey in October 2017 had not been uploaded until December of that year. 1 RP 29; 5 RP 456.

When asked about these issues, Detective Buchanan testified only that "Thatkidd Uzi" must have had a Facebook account in 2017, because

the search warrant asked for records from that year. 5 RP 463. That assumption, by a witness who disavowed knowledge of Facebook's record-keeping protocol, was insufficient to authenticate the social media postings. See Hood, 135 Ohio St. 3d at 147. Admitting the records on the basis of that assumption violated Mr. Posey's Sixth Amendment right of confrontation. Compare id. with 5 RP 454-56, 463.

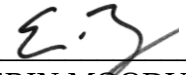
E. CONCLUSION

This Court should accept review under RAP 13.4(b)(3) and (4) and hold that, even if certain aspects of archived social media postings could be authenticated by affidavit as "business records," such an affidavit is never sufficient under RCW 10.96.030, and is testimonial, for purposes of Sixth Amendment protections, if it purports to authenticate those postings only by saying that they were furnished in response to a search warrant.

DATED this 25th day of May, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JERRELL ALLEN POSEY, Appellant.	No. 53374-0-II UNPUBLISHED OPINION

CRUSER, J. — Jerrell Allen Posey appeals his two assault convictions and his conviction of unlawful possession of a firearm. Posey argues that the trial court erred when it admitted exhibits 28 and 29, which were records from Facebook, without a witness to testify because the State did not satisfy the requirements in RCW 10.96.030(2)(d), which allows for the admission of business records without testimony from the custodian; that admitting the records without a witness violated his Sixth Amendment right to confrontation; and that his convictions should be reversed because the error was not harmless under either the constitutional or nonconstitutional harmless error standard.

We hold that even if the trial court erred or the Confrontation Clause was violated, any error was harmless under either the nonconstitutional or constitutional harmless error standard. Accordingly, we affirm.

FACTS

A. THE SHOOTING

On the afternoon of October 12, 2017, Courtney Walters and Marcel Walker drove together to a corner store on 15th street. Walker went into the store and Walters waited in the car with the window halfway down.

Walters noticed that there were three people outside the store. Walters recognized two of the three people. One person she recognized was Posey. Walters knew Posey because they had previously gone to the same high school and Walters had seen Posey around. Walters also testified that Posey would hang out with her cousin and associate with some of her family members. Walters was Facebook friends with Posey, but did not consider him a friend. Walters also recognized Leeshawn Redic. Walters knew Redic from the juvenile drug classes they had both attended. Walters did not know the third individual, but she had seen him in pictures with mutual friends. Although Walters recognized Posey and Redic, she did not engage them while waiting for Walker.

When Walker left the store, Redic asked Walker where he was from and "if he's a gang bang." 4 Verbatim Report of Proceedings (VRP) at 237-38. Walker replied that he did not bang.[1] Posey started to make gang signs. Walters told them, "[y]ou guys need to go to school" and "you guys just need to stop." *Id.* at 243. Redic then lifted up his shirt to reveal that he had a gun. The whole interaction was about "three to four minutes." *Id.*

Posey, Redic, and their friend left and walked across the street. As they were leaving, Walters and Walker started to drive away. Walters then saw Redic give the gun to Posey. Walters

[1] Walker was wearing a blue shirt and jacket. Blue is the color of the Hilltop Crip gang, which Posey appeared to have a connection with.

saw Posey point the gun at her car and heard shots being fired. A bullet hit the driver's door, and the back window on the driver's side broke. Walters would later testify to all these details at trial.

Walters drove to a nearby Safeway, called 911, and waited for the police. Walters was noticeably upset during the 911 call. When the operator asked Walters if she could identify who had the gun, Walters was unable to identify Posey as the shooter and struggled to remember Redic's name. At trial, the 911 call was played for the jury.

Walters testified she was very emotional when the police arrived and that it took her awhile to calm down. Officer White of the Tacoma Police Department responded to the call. White testified that Walters was "pretty much in a panic" and that it took time to get Walters to focus. *Id.* at 302. At the time, Walters could not remember Posey's or Redic's name. To help identify the shooter, Walter used Facebook to show White pictures of Posey. One picture, that she showed White to identify Posey, was uploaded by an account Thatkidd Uzi, which Walters testified was Posey's account. Walters testified that she showed Posey's picture to White in order to identify the shooter.

B. PRE-TRIAL PROCEEDINGS

The State charged Posey with two counts of assault in the first degree and one count of unlawful possession of a firearm in the second degree.

Prior to the trial, Posey challenged the State's proposed method of authentication for certain Facebook records that the State sought to admit as business records.[2] The State offered a certification from a Facebook records custodian in accordance with RCW 10.96.030, in lieu of having a Facebook custodian testify at trial. The certification that the State presented was a "Certificate of Authenticity of Domestic Records of Regularly Conducted Activity." The witness for the document certified:

> 1. I am employed by Facebook, Inc. ("Facebook"), headquartered in Menlo Park, California. I am a duly authorized custodian of records for Facebook and am qualified to certify Facebook's domestic records of regularly conducted activity.
>
> 2. I have reviewed the records produced by Facebook in this matter in response to the Search Warrant received on January 27, 2018. The records include search results for basic subscriber information, IP logs, messages, photos, videos, other content and records UziLondon666, dope.bo92, weezyredic, leeshawn.redic.37, robert.doss.7169 and 100002246579224. [sic]
>
> 3. The records provided are an exact copy of the records that were made and kept by the automated systems of Facebook in the course of regularly conducted activity as a regular practice of Facebook. The records were saved in electronic format after searching Facebook's automated systems in accordance with the above-specified legal process. The records were made at or near the time the information was transmitted by the Facebook user.

Exhibit 1.

Posey argued that the State was required to produce a witness from Facebook because the records are "dynamic, they're changing, and they're subject to data manipulation." 1 VRP at 17. The trial court noted that authentication is a "relatively low standard of proof, especially with

[2] The State presented three types of evidence obtained from Facebook. First, there were the photos that Walters gave to the police. Second, there were the Facebook records that the State obtained from Facebook as a result of a search warrant. These records would become exhibits 28 and 29. Finally, there were screenshots that the State took of Posey's public Facebook profile. Prior to the trial, Posey only challenged the authentication of Facebook records that were obtained via a search warrant, exhibits 28 and 29. Additionally, on appeal, Posey only challenges exhibits 28 and 29.

regard to . . . social media." *Id.* at 21. The court also noted that the statute was enacted to eliminate the need for records custodians to come in to testify. The State explained that the detective could testify to the detective's use of Facebook in his investigation and how he determined certain accounts were Posey's and Redic's. The court determined that it was not necessary for a custodian to come to trial to testify.

C. TRIAL

At trial Walters, Walker, Detective James Buchanan, and White testified for the State. Walters testified consistently with the facts set forth above. Walters also identified Posey in the courtroom as the person she recognized outside of the convenience store. Walters testified that the person's last name was Posey, and said there was no doubt in her mind that Posey was the one who shot her car.

Buchanan, the lead detective on the case, met with Walters two months after the shooting. During the meeting, the detective showed Walters pictures of Posey, Redic, and the third individual. Walters correctly identified the three individuals from these photos.

Buchanan testified that Posey's Facebook page was public, and that Posey went by the name of Thatkidd Uzi on his page. Buchanan explained that when a Facebook page is public, anyone can look at the page and see the account holder's name, pictures, videos, posts, and anything else they decide to disclose to the public. By looking at Posey's Facebook page, Buchanan had independently found the same picture Walters had shown to police to identify Posey. Buchanan also produced screenshots of Posey's Facebook profile, which was visible to the public.

Buchanan also served Facebook with a search warrant for Posey's and Redic's Facebook accounts. The Facebook records included messages sent right before and after the shooting. In the messages from Posey right before the shooting, Posey says he is on the way to 14th. Exhibit 28 shows that Posey was sending messages shortly after the shooting. At first, Posey notes that no one would give him a ride. Later Posey states that someone "said I'm hot." Exhibit 28 at 7. Exhibit 29 also showed messages by Posey indicating that he was looking to get rid of a gun a couple weeks after the shooting.

White, who responded to Walters' 911 call, also testified that he was in the area when the shooting happened and heard gun fire. White saw bullet holes in the driver's door of Walters' car, and saw that a window was broken out. White testified that Walters told him there were three people involved, and that she knew one of them. White also testified that Walters had shown him a picture of the shooter.

Walker also testified about the incident. Although Walker was less clear about what happened and he could not identify Redic or Posey, his testimony was generally consistent with Walters' testimony. Specifically, Walker testified that he and Walters went to the store and some people approached him as he left the store. Walker also testified that Walters spoke with the people who approached him, and as Walters was driving away someone shot at the car. Following the shooting Walker and Walters stopped at a Safeway parking lot to wait for the police.

In closing, Posey argued that Walters' identification of Posey as the shooter was not credible and questioned how well Walters really knew Posey. Posey also argued that the police investigation was inadequate and that the jury should conclude that the crime met only the elements

of assault in the second degree rather than assault in the first degree because "this wasn't a directed shot with intent to commit great bodily harm." 5 VRP at 503.

The jury returned verdicts of guilty on each count.

Posey appeals.

DISCUSSION

Posey argues that the trial court erred when it admitted exhibits 28 and 29, which were records from Facebook, without a witness to testify because the State did not satisfy the requirements in RCW 10.96.030(2)(d), which allows for the admission of business records without testimony from the custodian and that admitting the records without a witness violated his Sixth Amendment right to confrontation. Posey further contends that his convictions should be reversed because the error was not harmless under either the constitutional or nonconstitutional harmless error standard.

We disagree and hold that if there was error, the error was harmless.

A. EVIDENTIARY ERROR

We first address Posey's claim that the trial court committed evidentiary error in admitting the Facebook records contained in exhibits 28 and 29 that were obtained by the search warrant. Even assuming the trial court erred in admitting exhibits 28 and 29, the error was harmless. We consider a trial court's evidentiary ruling on evidence under the nonconstitutional harmless error standard. *State v. Barry*, 183 Wn.2d 297, 317, 352 P.3d 161 (2015). Under this standard, the party presenting the issue for review must show a reasonable probability that the error materially affected the outcome of the trial. *Id.* at 317-18.

Posey argues that exhibits 28 and 29 were central to the State's case because they bolstered Walters' "imperfect" identification of Posey. Br. of Appellant at 19. However, the State presented substantial evidence of Posey's guilt apart from the information contained in exhibits 28 and 29. As we note above, Walters testified that she recognized Posey while she was waiting outside the store, and that she knew Posey. Walters testified that the interaction with Posey lasted about "three to four minutes," long enough for her to make a later identification of him. 4 VRP at 243. Walters also testified that she saw Redic give Posey the gun, and Posey aim the gun at her moments before her car was hit.

While speaking with law enforcement after the shooting, Walters was able to locate pictures of Posey from Facebook and identified him as the person who shot at her. Two months after the shooting, Walters was able to identify Posey in a picture that the police provided to her. Finally, Walters identified Posey at trial and testified there was no doubt in her mind that Posey was the person who shot her car.

Exhibits 28 and 29 did little to support Walters' testimony and were not central to the State's case, particularly where Walters' account of the event was largely corroborated by White and Walker. Posey fails to show that the admittance of the challenged Facebook records materially affected the outcome of the trial in light of the substantial unchallenged evidence showing that Posey was the shooter. *Barry*, 183 Wn.2d at 317-18.

We conclude that any error in admitting exhibit 28 and 29 was harmless.

B. CONSTITUTIONAL ERROR

Posey also argues that the trial court violated Posey's Sixth Amendment right to confrontation by admitting exhibits 28 and 29 without testimony from the custodian of the records. Even if the admission of the exhibits violated the Confrontation Clause, the error was harmless.

"[I]f trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt." *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The error is harmless only if beyond a reasonable doubt the untainted evidence is so overwhelming that it "necessarily leads to the same outcome." *State v. Mayer*, 184 Wn.2d 548, 555, 362 P.3d 745 (2015). The reviewing court only considers the untainted evidence when making this determination. *State v. Watt*, 160 Wn.2d 626, 636, 160 P.3d 640 (2007); *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Here, for the same reasons articulated above, the error was harmless beyond a reasonable doubt. The untainted evidence proving Posey's guilt was overwhelming. Posey was known to Walters prior to the shooting, lessening the likelihood that her identification was mistaken. Additionally, Walters and Posey interacted with one another immediately before the shooting. And Walters then identified Posey at trial as the person who shot at her car. This evidence necessarily leads to a finding of guilt even in the absence of the Facebook records in exhibits 28 and 29.

We conclude that any error in admitting the challenged Facebook records was harmless beyond a reasonable doubt.

CONCLUSION

We conclude that even if there was an error, it was harmless. Accordingly, we affirm.

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

CRUSER, J.

We concur:

MAXA, P.J.

GLASGOW, J.

NIELSEN KOCH P.L.L.C.

May 26, 2021 - 10:25 AM

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