No. 45826-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AYALNEH ANEBO,

Appellant.

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

The Honorable Christine Schaller, Judge
Cause No. 13-1-00443-1

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial courts admission of State's Exhibit 16, a map labeling a building "Olympic View Elementary School" violated Anebo's right of confrontation.

2. Whether Anebo was prejudiced as a result of his defense counsel's failure to prevent the admission of a map displaying a school ground.

3. Whether the trial court erred in admitting the State's Exhibit 16, a map displaying a school ground labeled "Olympic View Elementary School" under the business record exception to the hearsay rule.

B. STATEMENT OF THE CASE.

The State accepts Anebo's statement of the case.

C. ARGUMENT.

Standard of Review

A trial court's decision to admit evidence is reviewed for abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Abuse of discretion occurs when the court's decision is "manifestly unreasonable or based upon untenable grounds." Id. at 25-26. A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no

reasonable person would take," and arrives at a decision "outside the range of acceptable choices." Id.

1. The admission of State's Exhibit 16, a map displaying a building labeled "Olympic View Elementary School," was not a violation of Anebo's Right of Confrontation

Anebo argues that the trial court violated his right to confront witnesses testifying against him by admitting a map into evidence. The map was created by a geographic information systems technician employed by the Thurston County Geodata Center. RP 210. The technician used mapping software containing highly precise data that is relied upon by agencies across the country. RP 212. The map showed that the drug transaction for which Anebo was charged occurred within 1,000 feet of a school ground by labeling a building "Olympic View Elementary School." RP 236-38. The issue is whether the Confrontation Clause requires testimony from a person who can address the accuracy of computerized map data. Contrary to Anebo's claim, the map was properly admitted into evidence because the only analyst who compiled inculpatory evidence testified at trial and therefore Anebo's right of confrontation was not violated.

RCW 69.50.435(1)(d) provides for a sentence enhancement for someone who delivers controlled substances "[w]ithin one thousand feet of the perimeter of school grounds." To establish that the offense occurred within 1,000 feet of a school ground, the State may provide "a map produced or reproduced by any municipality, school district, [or] county ... for the purpose of depicting the location and boundaries of the area... within one thousand feet of any property used for a school." RCW 69.50.435(5). This map shall be admissible "if the map or diagram is otherwise admissible under court rule." RCW 69.50.435(e). The map admitted into evidence during Anebo's trial was otherwise admissible because it constituted a business record exception to the hearsay rule.

The United States Constitution's Sixth Amendment Confrontation Clause guarantees that "the accused shall enjoy the right... to be confronted with the witnesses against him." The primary mission of the Confrontation Clause is to advance the accuracy of the truth-determining process in criminal trials. Dutton v. Evans, 400 U.S. 74, 89, 91 S. Ct. 210, 27 L.Ed.2d 213 (1970). Statements of an absent witness may not be admitted if the statement is testimonial in nature. State v. Mares, 160 Wn. App. 558, 562, 248 P.3d 140 (2011). This right is subject to exceptions

such as the business records hearsay exception. Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 857, 292 P.3d 779 (2013). The business records hearsay exception is addressed in section 3 below. The right to confront a witness has consistently been interpreted not as a rigid law, but rather one that allows testimony so long there is no material departure from the underlying reasons for the constitutional right. State v. Dault, 25 Wn. App. 568, 570, 608 P.2d 270 (1980); State v. Ortego, 22 Wn.2d 552, 563, 157 P.2d 320 (1945); State v. Kreck, 86 Wn.2d 112, 116-17, 542 P.2d 782 (1975). There are further exceptions to the Confrontation Clause that can be modified and supplemented, so long as the purpose of the rule is not hindered. Kreck, 86 Wn.2d 117. This means the exceptions can even be enlarged "if there is no material departure from the reason of the general rule." Id. (quoting Snyder v. Massachusetts, 291 U .S. 97, 107, 54 S. Ct. 330, 78 L.Ed. 674 (1934)).

The United States Supreme court has attempted to address the extent to which the Confrontation Clause requires testimony, but a majority of the Court has not adopted a single theory. State v. Lui, 179 Wn.2d 457, 462, 315 P.3d 493 (2014). In absence of definitive U.S. Supreme Court authority, the Supreme Court of

Washington has recently articulated a test for expert witnesses based upon the plain language of the Confrontation Clause that guarantees a defendant the right to confront the "witnesses against him." Id. The test brings expert witnesses within the scope of the Confrontation Clause only when that expert is a "witness" and is "against" the defendant. Id. According to Lui an expert is a witness "only if he or she makes some statement of fact to the court (as opposed to merely processing a piece of evidence)" and the person is only against the defendant if the expert indicates facts that are adversarial in nature. Id. at 480. In establishing this test, Lui quoted the U.S. Supreme Court clarifying that the Confrontation Clause does not demand the live testimony of "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device." Id. at 481 (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311, 129 S. Ct. 2527, 2546, 174 L.Ed.2d 214 (2009)). While the prosecution is obligated to establish chain of custody, "this does not mean that everyone who laid hands on the evidence must be called," rather gaps in the chain of custody go to the weight of the evidence as opposed to the admissibility. Id.

In Lui the court applied this test to determine when the work of an analyst invokes Confrontation Clause concerns. The issue in Lui was determining which analysts involved in testing DNA at a lab were witnesses required to testify at trial. Lui, 179 Wash.2d 457. There are many steps in the analysis of DNA that can require multiple analysts and the court grappled with determining which ones the Confrontation Clause requires to testify. Id. at 488. DNA analysis requires analysts to take a sample of DNA, use chemicals to break down the sample, "chemically photocop[y] 13 different areas of DNA", process the DNA with a machine, and then interpret the machines output. Id. The final matter of observing the machine output and interpreting the data is the only step which involves the inculpatory element to satisfy being a "witness against" the defendant. None of the other steps, which also required other analysts to facilitate, involved the inculpatory element. Id. The final step in the DNA analysis only became inculpatory once the analyst compared the DNA to determine who it belonged to, thus precipitating the Confrontation Clause. Id. The analyst created her own "original product that can be tested through cross-examination." Id. (quoting United States v. Johnson, 587 F.3d 625, 635, (4th Cir.2009)).

Lui distinguished between the expert witness who attests to facts and the analyst who simply aids the expert witness in reaching an attestation of fact; only the expert witness who attests to facts falls within the Confrontation Clause. Id. at 489. The court summed up its analysis by stating "Bullcoming[1] guarantees the accused the right "to be confronted with the analyst who made the certification," 131 S.Ct. at 2710, and *not* the analysts whose work might have contributed to that certification." Id. at 490 (emphasis in original).

In the present case, Kelly Alfaro-Haugen, a witness for the State who works at the Thurston County GeoData Center, presented and testified as to a map made in the widely-accepted mapping program ArcGIS. RP 210, 219. Alfaro-Haugen testified that the software was "highly precise" when measuring distances. RP 218, 221. Alfaro-Haugen further testified that the software is highly accurate in locating schools, and the location data is trusted by the police department. RP 223-24. Anebo argues that his right to confront witnesses was violated because he was only able to cross-examine the person who made the map, and not a person who can attest to the underlying data used to make the map. Alfaro-Haugen

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1 Bullcoming v. New Mexico, 131 S. Ct. 2705, 180 L.Ed. 2d 610 (2011).

testified that these map layers are relied upon by the State of Washington and the local police department, agencies which need to know the location of all schools. RP 212, 223-24. The mapping layers are updated four times per year to maintain accuracy. RP 241.

Anebo's case falls squarely within the ruling of Lui. In Lui the only analyst who testified *examined* machine data, *created* a DNA profile, and made a *determination* regarding the DNA sampled. For Anebo's trial, Alfaro-Haugen *examined* map data, *created* a map, and then made a *determination* that the map showed that the drug transaction occurred within 1,000 feet of a school. The map created by Alfaro-Haugen was the only inculpatory evidence produced by an analyst in preparation for Anebo's trial. The underlying map data used by Alfaro-Haugen was not created to implicate Anebo. These map layers exist for all of the Thurston County GeoData Center to use and are updated regardless of any criminal trial. RP 240. Without the map layers being updated specifically for Anebo's trial there cannot be an inculpatory element against Anebo. Without any adversarial nature of the map layers there cannot be a "witness against" Anebo and therefore nobody who needs to testify at trial.

Just as the multiple other analysts who worked with the DNA in Lui did not invoke the Confrontation Clause, no other analysts were required to testify in Anebo's trial. In Lui the court distinguished between analysts who attested to facts as an expert witness, and the analyst who simply aided the expert in reaching the conclusion. Alfaro-Haugen was the only analyst who attested to facts as an expert witness and therefore the only analyst that falls within the Confrontation Clause. Her analysis was the only work that was adversarial in nature. None of the other work by analysts even remotely involves an inculpatory element against Anebo. Anebo alleges error because he couldn't cross-examine the accuracy of the map, but the Confrontation Clause does not demand live testimony of "anyone whose testimony may be relevant establishing ... accuracy of the testing device." Melendez-Diaz, 557 U.S. at 311. Additionally, gaps in the chain of custody at trial would only speak to the weight to be given the map, not its admissibility.

Anebo cites Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed. 2d 177 (2004), as authority for his argument that the map was improperly admitted. In Crawford the U.S. Supreme Court held that a statement by a nonexpert witness prior

to trial could not be used unless that witness testified at trial. Id. The Supreme Court in Crawford settled upon the primary purpose test for nonexpert witnesses; for expert witnesses, though, there is no controlling theory or test. Anebo's trial does not fit into the primary purpose test created in Crawford because at issue is the testimony of an expert witness which Crawford does not address.

Anebo notes that "there can be no question but that this map was prepared for use in Anebo's criminal trial." Petitioner Opening Brief at 9. This is true, as Alfaro-Haugen testified that she was the one who prepared the map, but the underlying data was not created for trial. RP 220. Anebo had the opportunity, and in fact did, cross-examine Alfaro-Haugen to determine the accuracy of the map. RP 238-41. Anebo is guaranteed the right to "be confronted with the analyst who made the certification, and *not* the analysts whose work might have contributed to that certification." Lui, 179 Wash.2d 509. Therefore Anebo's right to be confronted was not violated.

2. Anebo was not prejudiced by his counsel's unsuccessful attempts to object to the admission of evidence.

Anebo further alleges that he was prejudiced by his attorney providing ineffective assistance of counsel for failing to properly

object to the admission of the map admitted as Exhibit 16. Anebo's counsel did object multiple times to the admission of the map as evidence, all of which Anebo claims were improper objections that failed to protect Anebo's right of confrontation.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when but for the deficient performance, the outcome would have been different. In re the Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness

claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

A defendant must overcome the presumption of effective representation. Strickland, 466 U.S. 687; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); McFarland, 127 Wn.2d 334-35.

Anebo's trial counsel did, in fact, object many times to the admission of the map as evidence. Counsel made his first objection after the prosecutor laid a foundation for the map and moved to admit the map into evidence. RP 222, 228. Defense counsel objected to the evidence on the grounds that the map was hearsay and the court sustained, requiring the prosecutor to lay further foundation. RP 222, 227. In the process of the efforts to properly lay foundation, Anebo's defense counsel further objected three times to the manner in which the prosecutor was questioning the witness to provide further foundation. RP 225-26.

The State again moved to admit the map, at which time the defense counsel made another objection. Outside the presence of the jury, a colloquy was had regarding the admission of the exhibit, and Anebo's counsel made a lengthy argument objecting to admission. RP 228-30, 233-34. Counsel objected to the admission

of the exhibit as hearsay and argued that the witness' testimony did not fit into any of the exceptions. After the judge denied the motion Anebo's counsel made a standing objection.

> DEFENSE COUNSEL: Just - - just that I'd like to make a record that I'm making a standing objection to State's Exhibit 16. So I've made my record. Thank you, Your Honor.

RP 234.

While Anebo claims his counsel was ineffective for failing to properly object, the record shows that Anebo's counsel repeatedly attempted to exclude the map but was overruled by the court. One of the prongs of ineffective assistance of counsel requires that the appellant show his counsel's performance was deficient, which occurs when counsel's performance falls below an objective standard of reasonableness. The record reflects that from the moment the map is first introduced, Anebo's counsel attempted to prevent it from being admitted into evidence. From the initial objection by defense counsel which ensured the jury would not see the map, RP 219, until the final objection when defense counsel entered his standing objection into record, RP 234, there is nothing to suggest that performance fell below an objective standard of reasonableness.

Anebo further argues that his counsel should have objected on Confrontation Clause grounds. To succeed on this argument Anebo would need to establish that he was prejudiced in addition to showing performance fell below a standard of reasonableness. Objections based on confrontation rights would have again been futile. As addressed above, Anebo's confrontation rights were not violated by the admission of the exhibit and therefore he would not be prejudiced by his counsel's failure to object based on confrontation grounds. Had counsel made the objection Anebo now claims he should have, it would have been overruled and the outcome of the trial would have been the same. Anebo is unable to show that his counsel's performance fell below an objective standard of reasonableness, let alone being able to show that he was prejudiced in any manner.

3. The trial court properly admitted State's Exhibit 16, under the business record exception to the hearsay rule.

As noted in section 2, the trial court overruled Anebo's objection to the State's admission of Exhibit 16 based upon the business record exception to the hearsay rule. Anebo claims that the trial court erred in allowing the evidence in under the business record exception. He argues that the State failed to provide

adequate foundation because no custodian of records testified about the accuracy and reliability of the map data. The rules of evidence and case law would suggest otherwise.

Hearsay, which is generally inadmissible absent a specific exception, is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c); ER 802. A statement can be written, oral, or in the form of conduct, but it must be intended as an assertion by the person making it. ER 810(a). The character of a statement as hearsay depends upon the purpose for which it is offered. State v. Fisher, 104 Wn. App. 772, 782, 17 P.3d 1200 (2001). There are multiple exceptions to the hearsay rule, one of which is the business record exception, is codified by RCW 5.45.020.

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.
>
> RP 234.

If the statutory elements are met, computerized records are treated the same as any other business record. State v. Ben-Neth, 34 Wn. App. 600, 603, 663 P.2d 156 (1983). It is not necessary that the person who actually made the record provide the foundation for admissibility. Id. "Testimony by one who has custody of the record as a regular part of his work or has supervision of its creation will suffice." Id. A witness may also rely on information to create a document, and he or she can provide the foundation for admission if he or she knows its mode of preparation and routinely relies on another source of information. State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005). Further the trial court has great discretion in determining the admissibility of evidence, and its ruling will be reversed only upon a showing of manifest abuse of discretion. State v. Crowder, 103 Wn. App. 20, 25, 11 P.3d 828 (2000). Abuse of discretion occurs when the court's decision is "manifestly unreasonable or based upon untenable grounds." Id. at 25-26.

Here the State's foundation witness established that her work consists of working with ArcGIS and that in the performance of her job she created the map which was admitted into evidence. RP 210, 220. The witness stated that she routinely uses ArcGIS,

even estimating to having used it thousands of times, and always relies on the map layers provided. RP 214-15, 218. The witness testified as to the accuracy, and wide-spread use of the map data in her work in Thurston County. RP 210, 214-15. The State's witness' statements meet all the elements required to provide foundation for the admission of the map that she made in the course of her business. There is no support in the record to question the reliability of the source information; this is the same source information that is relied upon by the police department as well as many other agencies nationwide.

Admissibility of evidence is within the discretion of the trial court, and the trial court heard arguments of both sides as well as took a recess to deliberate whether the map constituted a business record. RP 232. The trial court was satisfied that the evidence met the elements of a business record, RP 234, and there is nothing upon review of the record that would suggest the decision was a manifestly unreasonable error or that it was based upon untenable grounds.

Even if the map did not fit into the business exception, which the state does not concede, Anebo is arguing the admissibility of the evidence when the issue would be the weight of the evidence.

Complaints about the validity of expert testimony go to the weight of the evidence as opposed to the admissibility. State v. Copeland, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996). Questioning gaps in the chain of custody of evidence speaks to the weight of evidence, not admissibility. Melendez-Diaz, 557 U.S. 335. Therefore even assuming *arguendo* that Anebo is correct, the admission of Exhibit 16 into evidence would not be error.

D. CONCLUSION.

Anebo has failed to show that the process by which the map was admitted into evidence constituted any error. For all the reasons argued above, the State respectfully asks this court to affirm his convictions

Respectfully submitted this 23d day of July, 2014.

Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

July 24, 2014 - 7:59 AM

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