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STATE OF WASHINGTON
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NO. 97008-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN NICOLAS RUSSELL,
ALEJANDRO RAMIREZ and
DANIEL GALEANA RAMIREZ,

Appellants.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent.

B. COURT OF APPEALS DECISION

Petitioner Steven Russell petitions this Court to review the published in-part opinion in *State v. Ramirez*, 432 P.3d 454 (2019.)

In the Court of Appeals, as at trial, Russell's case was joined with co-Defendants, Daniel Galeana Ramirez (hereinafter Galeana) and Alejandro Ramirez. As of this writing, Galeana has also petitioned for review on substantially the same issue. Ramirez has remained silent.

C. ISSUES PRESENTED FOR REVIEW

Russell asks this Court to review the Court of Appeals' decision that he did not have a right to confront a person who extracted data from his cell phone under the sixth amendment of the Constitution of the United States and article 1, section 22 of the Washington State constitution.

The State believes the Court of Appeals' decision was substantively correct, and opposes review for the reasons set forth herein. However, should this Court grant review, the State seeks cross-appeal of the Court of Appeals' determination that the cell phone extraction

technician was a “witness” for confrontation clause purposes (as opposed to a “witness against”) despite having made no statements whatsoever that were admitted into evidence.

D. STATEMENT OF THE CASE

Agustin Morales Gamez¹ is a 51-year-old man from El Salvador. RP 6/29/2016 at 88. Jose Leiva Aldana is also from El Salvador. RP 6/30/2016 at 92.² At the time of this incident, the two men lived in Aberdeen, and picked bear grass and salal for a living. *Id.* at 89.

On October 24, 2015, Mr. Morales and Mr. Leiva had gone to a bar, and left for home sometime between 11:30 p.m. and midnight. RP 6/29/2016 at 91; RP 6/30/2016 at 93. On their way home, in an alley, they were assaulted by multiple individuals. RP 6/29/2016 at 92; 6/30/2016 at 94.

At trial, Mr. Morales described the incident as “a problem.” RP 6/29/2016 at 90. He testified that he was hit in the head with something

¹ Several names in this case conform to traditional Spanish language naming conventions in which the first surname (the patronymic) is considered the “last name,” and the second surname is used as frequently as a middle name. Therefore, Agustin Morales Gamez will be referred to as Mr. Morales, Jose Leiva Aldana will be referred to as Mr. Leiva and Daniel Galeana Ramirez as Galeana.

² The State’s copies of the Report of Proceedings for June 30, July 1, 6 & 7, 2016 all have the same cover page, which erroneously indicates the dates of January 4, 2016 and June 17, 2016. The references to the dates are based upon the contents of those volumes.

metal and fell to the ground. RP 6/29/2016 at 93. He said “they” wanted his money and wallet. RP 6/29/2016 at 92. He said they took his phone. RP 6/29/2016 at 95. He also said that he defended himself with a knife. RP 6/29/2016 at 96.

Mr. Leiva testified that the young men tried to rob them and beat them up. RP 6/30/2016 at 94. He said there were four assailants. RP 6/30/2016 at 110. He said the assailants asked for money and tried to get in their pockets and take their wallets. RP 6/30/2016 at 95. He said that the assailants had something black, like a weapon. *Id.* He said that it was a type of “arm” and that they had hit his *compadre* with it. RP 6/30/2016 at 96. Mr. Leiva also said that Mr. Morales had struck at the attackers with his knife. RP 6/30/2016 at 145.

This event was captured on video cameras installed at the nearby Aberdeen Fire Department, which was introduced at trial as exhibits 62 and 63. RP 7/1/2016 at 340; 345. The video shows two assailants who run at Mr. Leiva and Mr. Morales from behind and accost them. After two individuals (later identified as Aaron Johnson and Nicole Smith) come out of their house nearby, the two assailants run off from the direction from which they came. *See Exs. 62 & 63.*

Mr. Johnson found a smashed cell phone was in a puddle of water at the scene and gave it to a police office. RP 6/30/2016 at 14-15. Detective Dave Cox sent the phone to Dixie State University for a “chip off” examination to extract data from the phone. RP 6/30/2016 at 17. Detective Cox had never used this institution’s service, and had no knowledge of the Aberdeen Police ever using it before. *Id.* Detective Cox testified that he received the same phone back on February 9, 2016 with a computer disc which contained several hundred pages of data. RP 6/30/2016 at 22.

Joan Runs Through, the assistant director of Dixie State’s Computer Crime Institute and a lab examiner, provided foundational testimony for introduction of the data.³ RP 6/30/16 at 24-25. Ms. Runs Through testified that Dixie State keeps records of all the phones that are examined there, and that she was the custodian of records. RP 6/30/16 at 32. Ms. Runs Through also explained that she routinely reviews the work of others, since she instructs others on how to perform this process. RP 6/30/16 at 59. Ms. Runs Through said that data cannot be written to the chip in the process, but the data could be destroyed if the process was performed incorrectly, or the chip could be accidentally erased. RP

³ The State had moved *in limine* to admit the data without any live testimony, but the trial court denied the motion. *See* RP 6/22/2016 at 58-59.

6/30/16 at 39. She testified that the reports generated by the software they use extracts every app in the phone, and every database that app has used, including contacts, text messages, phone logs, wireless networks and GPS data. RP 6/30/16 at 67-68.

Ms. Runs Through testified that she did not personally perform the exam, but confirmed the chip was removed and the data extracted at Dixie State University. RP 6/30/16 at 33. The work had been performed by William Matthews, who no longer worked for Dixie State University at the time of trial. *See* RP 6/30/16 at 42. Ms. Runs Through testified that Dixie State had received the phone from the Aberdeen Police on February 4, 2016 and the extraction was completed on the 5th. RP 6/30/16 at 33 & 52. She testified that she looked at the data that was extracted, and it appeared that the process had worked correctly. RP 6/30/16 at 61.

The cell phone data, which had been printed and marked as Exhibit #32, was identified by Ms. Runs Through. RP 6/30/16 at 68-69. She testified that she did not know the phone number or email address associated with the phone, and that she knew there were photos on the phone, but that she did not look at them. *Id.* She testified that the cell phone examiners do not typically look at the data they extract. RP 6/30/16

at 70. Ms. Runs Through never identified the Defendants or used their names in her testimony. *See* RP 6/30/2016 at 24-90.

Defense counsel objected to some of the information as irrelevant and potentially prejudicial, so individual pages were admitted. *See* RP 6/30/2016 at 62. Ms. Runs Through identified Exhibit #42 as the cover page, which was admitted without objection for authentication purposes. RP 6/30/2016 at 70.

Detective Cox then testified how he utilized the data in his investigation and linked the phone to the Petitioner and eventually to Defendant Ramirez. He identified Exhibit #52 as pages from the CD he received from Dixie State, and the exhibit was admitted. RP 7/1/2016 at 356-57. Detective Cox pointed out that the email addresses “snrussell.89@gmail.com” and “snrussell030489@gmail.com” appeared on the pages, associated with the calendar application. *Id.* at 357-58 *and see* Ex. 52. Detective Cox knew Defendant Russell’s birth date to be March 4, 1989 (which can be expressed 03041989.) RP 7/1/2017 at 358.

Detective Cox also identified Exhibit #65 as a page of the CD he received from Dixie State, which was also admitted. RP 7/1/2016 at 377. He testified the page was a list of instant messages, dates and times, with associated numbers and names, including Steven Russell’s. RP 7/1/2016

at 378 *and see* Ex. 65. From these clues, he deduced that the phone belonged to Russell. *Id.*

Detective Cox also explained how he found communications to Defendant Ramirez in the phone. He testified that Exhibit 64 was a printout of the received text messages, and Exhibit 58 were the sent text messages. RP 7/1/2016 at 379-80. Those exhibits were admitted during Detective Cox's testimony. *Id.* He testified that he saw messages from a contact named "Silent" whose phone number was (360) 581-0288 in the phone, dated the night of the incidents. RP 7/1/2016 at 382. Detective Cox testified that police records showed that the phone number had been affiliated with Defendant Ramirez in the past. RP 7/1/2016 at 384-85. Detective Cox also testified that he learned Defendant Ramirez had the word "Silent" tattooed on his right upper arm, and took photographs of the tattoo that were admitted. 7/1/2016 at 385-86 *and see* Ex. 3 & 4. Detective Cox testified that the messages appeared to be an invitation sent to Defendant Ramirez inviting him to come drink a beer at about 7:00 PM on the date of the incidents. 7/1/2016 at 387-88.

Russell was convicted of Robbery in the First Degree, Attempted Robbery in the First Degree and Assault in the Fourth Degree (two counts), among other crimes. CP at 104.

E. ARGUMENT

1. This Court should not accept this case for review because it does not present a significant question of law.

Petitioner Russell claims his right to confront the witnesses against him was violated at his jury trial. He claims the person who extracted the data from the phone made statements that were introduced at trial, but fails to identify the statements to which he refers. This precludes analysis, and shows that Russell's dispute is largely factual, rather than a question of law that fits into one of the categories delineated in RAP 13.4(b).

Russell and his codefendants did have the opportunity to cross-examine Detective David Cox, who actually used the phone data to inculcate Russell and Ramirez. Russell's claim that Detective Cox repeated the cell phone examiner's conclusions is unsupported by the record.

a. This case does not fit the criteria of RAP 13.4 for acceptance of review.

This Court reviews decisions of the Court of Appeals only if the decision is (1) in conflict with a decision of this court; (2) in conflict of a published decision of the Court of Appeals; (3) is a significant question of law under the federal or state constitution's; or (4) contains an issue of substantial public interest. RAP 13.4(b).

Russell fails to apply RAP 13.4(b) in his Petition. He fails to show any conflicting opinions, or explain why this is a significant question of law. He merely repeats his assertion that his confrontation rights were violated, a contention which was rejected by the Court of Appeals.

Because he fails to justify to this Court why review should be granted, the Petition should be denied.

b. Russell’s factual claims are unsupported by the record, and he fails to cite or quote the statements he alleges were made.

Russell contends that two of the State’s witnesses, Detective Cox and Joan Runs Through, simply “parroted” the conclusions of the cell phone examiner. However, Russell fails to identify any statements attributable to the cell phone examiner, let alone conclusions. Petitions for Review should contain citations to the record for any factual assertion made. RAP 13.4(c)(6). Russell fails to identify a single statement made by the examiner in question.

The reason that no statement is quoted or cited to is simple: there are no such statements in the record. As Ms. Runs Through testified, the examiner’s “report” is simply a regurgitation of the information contained within the cell phone, organized by a computer program called Cellebrite. RP 6/30/2016 at 41-44. It is data generated by the cell phone and its user.

The process is either performed correctly, and the data are extracted, or the data are lost, as Ms. Runs Through testified. RP 6/30/2016 at 51-52.

Because there are no statements to begin with, there is no explanation of why the cell phone examiner is a “witness against” Russell “testimonial,” as that term has been used in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) and its progeny. As this Court has observed, “merely laying hands on evidence, DNA or otherwise, does not a ‘witness’ make.” *State v. Lui*, 179 Wn.2d 457, 481, 315 P.3d 493, 504 (2014).

Were there any statements to apply confrontation clause analysis upon, this might be a relevant question of law. However, because Russell fails to identify what statements he believes were admitted in violation of his right to confront, the question is simply whether the 800 pages of data⁴ contains any statements by the examiner. That task was already performed by the courts below, who found that Russell’s rights were not violated.

The fact that Russell disagrees with the factual determinations made below does not mean that this case meets this Court’s criteria for review. Russell fails to make a case as to why review should be accepted,

⁴ Double-sided.

as required by RAP 13.4(c)(7). This Court should leave the decision below undisturbed.

c. The Petitioner and his co-defendants were able to confront the witness that interpreted and gave meaning to the data: Detective Cox.

Russell cites to *State v. Lui*, 179 Wn.2d 457, 315 P.3d 493 (2014) for the proposition that “cross examination of an expert witness is required where the witness gives meaning to raw data.” Petition for Review at 10. The State agrees with this point of law wholeheartedly. But as the record reflects, the witness who gave meaning to the data contained in the cell phone was Detective Cox.

To illustrate, one of the ways Detective Cox identified who the phone belonged to was by decoding an email address found in the data with information he knew about Russell.

Q. Okay. And is there anything in there in particular that - anything in - in that section of what's on there that led you to believe who might be owner of that phone?

A. Yes. On the - which is Page 3 of this - on - under calendar it says, snrussell.89@gmail.com.

...

Q. Okay. Is there anything else?

A. Yes. That same e-mail address shows up about halfway down the page, snrussell.89@gmail.com and then there's also another one snrussell030489@gmail.com.

Q. Do you have any idea what the 030489 might be?

A. Yes.

Q. What?

A. Mr. Russell's date of birth.

Q. Do you know that to be his date of birth?

A. Yes.

RP 7/1/2016 at 357-58. Detective Cox went on to explain how he found information that indicated Russell had met up with his co-defendant Ramirez on the day in question using police records:

Q. Okay. Now the - on these exhibits, are there any indications of who Mr. Russell was associating with on the day in question on the 24th?

A. Yes.

Q. And what are you basing that on?

A. The contact name.

Q. I mean how - what's - what's bringing you to the conclusion that. . . Well, first of all, what's - the contact name that you're talking about?

A. Well, there's several here. Do you want me to list them all or. . .

Q. No. You said - I asked was there anything on those pages that gives you an indication of who Mr. Russell was hanging around with on the night in question?

MR. CARPENTER: Objection, Your Honor. Messages don't show your name.

THE COURT: Sustained.

Q. (BY MR. WALKER) The messages, the contact names in here, are - are they people's names who you know? Can you tell?

A. Yes. I - I - one in particular, yes.

Q. What's that one?

A. Silent.

Q. Silent is the name of the contact?

A. Yes.

Q. All right. And is Silent's phone number listed?

A. Yes.

Q. What is it?

A. (360) 581-0288.

...

Q. (BY MR. WALKER) Do you have any - police have a database of contact information for people?

A. Yes.

Q. Okay. And how are these records created?

A. The records are created - any time we have any type of contact with anyone we obtain as much information as we can. For example, if you complain about a barking dog, we get your name, address, phone number, any information we can obtain, that includes if you're a victim of a theft, if you were stopped for a traffic violation, if you - if you were arrested, if you were - any time we have a contact with a citizen we try to obtain as much information as we can.

Q. And as a police officer and a detective, do you input information into this database?

A. Yes.

Q. And in the course of your duties, when you need to contact a person for whatever purpose, what do you do?

A. We refer to that database to assist us in locating individuals, phone numbers, addresses.

Q. Okay. So you rely on it?

A. Yes.

Q. And in the course of your duties you have access to this information?

A. Yes.

Q. And can you query this information and get a response back based on, say, a phone number?

A. Yes.

Q. And did you look up that phone number in this database?

A. Yes, I did.

Q. And who was it affiliated with?

MR. BAUM: Objection. Hearsay.

THE COURT: Overruled.

Q. (BY MR. WALKER) Go ahead.

A. Alejandro Ramirez.

RP 7/1/2016 at 381-85. Detective Cox then went on to explain that he had discovered that Ramirez had the word "Silent" tattooed on his upper right arm, strengthening the implication that the contact "Silent" was Ramirez.

RP 7/1/2016 at 385-86.

As these passages demonstrate, the person who gave meaning to the data extracted from the cell phone was Detective Cox. Detective Cox figured out the cell phone belonged to Russell because he knew Russell's birth date. Detective Cox traced "Silent's" phone number back to Ramirez with his police database. Detective Cox discovered that Ramirez had

“Silent” tattooed on his arm. There is no indication in the record that anyone from Dixie State University, whether it be William Matthews or Joan Runs Through, possessed any of this information, or even knew who Steven Russell is. As the Court of Appeals observed, the examiner “merely ran a program that extracted data from the chip.” *State v. Ramirez*, 432 P.3d 454, 459 (Wash. Ct. App. 2019).

The Petitioner’s claim that Detective Cox was simply repeating “results of reports conducted by [the extraction technician]” are not grounded in fact. He fails to cite to any portion of the record that contains a statement by this person. As the Court of Appeals found, the Petitioner did have an opportunity to confront the witness against him: Detective Cox. *See Ramirez* at 459. The cell phone examiner was no more than a link in the chain of custody for the data.

Because Russell’s contention that Detective Cox parroted someone else’s conclusions is unsupported by the record, this Court should deny the Petition for Review.

2. The cell phone examiner was not a “witness” at all.

In the context of the confrontation clause, “[i]f the declarant makes a factual statement to the tribunal, then he or she is a witness.” *Lui* at 482. In this case, using this definition, the Court of Appeals did hold that the

cell phone extraction technician was a “witness.” *Ramirez* at 458. The basis for this was a finding that the examiner “...ran a test that created factual information for later use by the court.” *Id.* (emphasis added.)

This conclusion is mistaken. There is nothing in the record to indicate the examiner ran any tests. There is nothing in the record to indicate the examiner created any facts. The record indicates that the examiner merely transferred data from one medium (the chip in the cell phone) to another (the CD received by Detective Cox.) All that data is either machine-generated by the cell phone, or Russell’s own statement.⁵ The statements of the Defendant are not testimonial, and there is no one to confront with regards to the machine generated data. *See State v. Ziegler*, 855 N.W.2d 551 (Minn. Ct. App. 2014). There is nothing in the record to indicate that the examiner “created” anything, and Ms. Runs Through’s testimony confirms that he could not have done so.

The Court of Appeals’ decision relied upon *Lui*, in which this court decided that a person who took the temperature of a corpse at a crime scene was a “witness.” *See Lui* at 505. The temperature was used by a testifying doctor who concluded from the measurement that it was “extremely difficult” to pinpoint the exact time of death. *Id.* at 464-65.

⁵ For example, in one introduced text message, Russell invites “Silent” (Ramirez) to “come drink a beer.” RP 7/1/2016 at 388 *and see Russell* at 457.

However, taking a measurement is different from simply transferring data like water from a spigot through a hose to a bucket.

The Court of Appeals of Minnesota's case *State v. Ziegler*, 855 N.W.2d 551 (Minn. Ct. App. 2014) is factually similar to the case at bar, albeit with a computer module from a car, rather than a cell phone. *Ziegler* dealt with a criminal motor vehicle collision. *Ziegler* at 552. The Minnesota State Patrol had extracted a "sensing and diagnostic module" from the causing vehicle. *Id.* Sergeant. Langford extracted the data from the device and provided a computer copy to Sergeant. Inglett. *Id.* at 552-53. Sergeant. Langford, who extracted the data, never testified, and Sergeant. Inglett testified he did not witness the data extraction. *Id.* at 553. Just as in the instant case, testimony established that the data could not be manipulated. *Id.* at 556-57. Sergeant. Inglett testified as to his own conclusions reached from the data. *Id.* On appeal, the defendant argued that she had a right to cross-examine Sergeant. Langford about his retrieval of the data. *Id.* at 557.

The Minnesota Court of Appeals observed that this argument conflated "evidentiary requirements based on authenticity and foundation with the constitutional right of confrontation." *Id.* at 557-58. The court pointed out that the reliability of the mechanical process was a

foundational question, and not a question of the mendacity of the operator. *Id.* at 558 (quoting *U.S. v. Lamons*, 532 F.3d 1251 (2008).)⁶

In *Ziegler* Sergeant Langford transferred data from the sensing and diagnostic module and did not testify about it. That data was given to Sergeant Inglett, who used it to develop a case against the defendant. In this case, William Matthews transferred data from a cell phone chip to a CD and did not testify about it. That data was given to Detective Cox, who used it to develop his case against Russell and Ramirez. Just as in *Zeigler*, the person who transferred the data made no statements of fact to the court; their role was merely a link in a chain of custody.

Because the Court of Appeals erred in concluding the cell phone examiner made a factual statement, and was therefore a “witness,” if this Court does accept review, the State asks that it clarify that the cell phone examiner was not a “witness” at all, for confrontation clause purposes.

F. CONCLUSION

Petitioner Russell fails to identify a legal reason that this Court should accept his Petition for Review. He fails to identify any reason in

⁶ In *Zeigler* the defendant claimed the machine-generated data implicated her confrontation clause rights. Russell has not made this claim. Rather, Russell claims that there are statements attributable to the human cell phone examiner, but never identifies them.


RAP 13.4 that his case merits review. Instead, he claims that statements were made against him, but never identifies those statements, either by citation or quotation. For this reason alone, this Court should deny review. Without statements to apply a legal analysis upon, the issue becomes one resting on questions of fact. Factual disputes about what was said by whom are not among the reasons governing acceptance of review.

What the record does reflect is that Russell and his codefendants were able to confront Detective Cox, who used data extracted from a cell phone to establish that it was Russell's phone, and that Russell had invited his codefendant, Ramirez, to come drink a beer on the night in question. Detective Cox was the "witness against" Russell for confrontation clause purposes, as the Court of Appeals correctly decided.

However, if this Court does accept review it should reconsider whether the person who extracted the data from the cell phone was a "witness" at all.

DATED this 29th day of April, 2019.

Respectfully Submitted,

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