97270-2

SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent,
v.
VANDAD BARZIN RAD, Petitioner and Defendant

PETITION FOR REVIEW

Vandad Rad, Pro Se

1111 Chancellorsville Parkway, Grand Prairie, TX 75052
214-460-8955

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Constitutional Provisions

Statutes

Regulations and Rules

Other Authorities

A. IDENTITY OF PETITIONER

Vandad Rad asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals affirms that the testimony by Diane Wright, claiming that social media messages contained within exhibits 5, 6, 7, 8, and 9, is a sufficient prima facie basis of authentication for a reasonable trier of fact to attribute the requirements set forth in ER 901 (b) (10) to Vandad Barzin Rad. A copy of the decision is in the Appendix at pages A-1 through 9. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at pages A-10. The Court of appeals unpublished opinion was filed on February 5, 2019. The Court of appeals filed denial for the motion to reconsider on April 30, 2019.

C. ISSUES PRESENTED FOR REVIEW

Pierce County Superior court granted Diane Wright a Domestic Violence Order for Protection by solely relying on a petition, submitted by Ms. Wright, containing elements pertaining to the nature of Ms. Wright's and Mr. Rad's relationship to each other. The statements within Wright's petition allude to serious allegations with no due process given for discernment between fact and hearsay character evidence. In light of Wright's and Rad's fully impersonal relationship, is not special consideration needed to substantiate the nature of their relationship under RCW 26.50.010? Did the state neglect the need to accurately designate Mr. Rad's relationship to Ms. Wright?

On December 16th of 2016 at around 12:30 AM, Rad was awoken by police banging on a door at his Grandfather's estate home, for which he was acting as steward. In an alarmed and tired haze Rad rushed to the door to find two Police officers shouting and flashing a light through the pain glass door. Rad opened the door only to be abruptly wrestled to the ground with his arms and legs clasped to his back and then handcuffed. Upon raising Rad to his feet

one officer exclaimed that they are there by a warrant. The officers never disclose the warrant for Rad to review and he is abruptly taken into custody at Tacoma Municipal jail. He is then subsequently released 3 days later on bail, set by Tacoma Municipal Court, and charged with violating a no-contact order. Upon reviewing the police reports, it was stated that Rad was not seen within Ms. Wright's vicinity nor expected to be at the times when her 911 calls were made. Was the warrantless arrest of Rad, at his home, a violation of his first and fourth amendment rights?

On January 10th of 2017, the King County Superior Court held an arraignment for the defendant, Vandad Rad, on one count of Felony Stalking CP 1-2; RCW 9A.46.110; RCW 10.99.020. In this hearing, the court cited screen captures of messages, purported to have been sent by Rad, as an evidentiary basis for the charge of felony stalking CP 1-8. At the arraignment, Rad's appointed attorney, Matthew Pang, was not in attendance and was substituted by the supervising attorney from Pang's law department. Custody of Rad lasted from the date of the arraignment to November 10, 2017, with no detention order issued nor the occurrence of a detention order hearing to review the basis for Mr. Rad's prolonged detainment, pursuant to RCW 10.21.040. The initial bail was set by the warrant at $200,000, which was subsequently lowered to $150,000 on January 8th, 2017. This initial bail hearing, on January 8th, was not attended by counsel to Rad nor Rad himself. The result of this initial bail hearing, which took place prior to Rad's arraignment hearing, gave the court the precedence to deny an additional bail hearing after Rad was taken into custody. Given that Rad had no criminal history, and showed no propensity for violence, was his right to an expedited review of the detainment under RCW 10.21.040 violated? Was Rad's bail set excessively high under the presumption that the prima facie evidence merrited the advancement of a charge of gross misdemeanor stalking to felony stalking? Was Rad denied his right to a bail hearing?

The first instance on which the case schedule setting took place was February 28, 2017. Additionally, in the following days after setting the case schedule, Pang ordered a mental health evaluation in an effort to deem Rad mentally incompetent. Rad met with Pang where they disagreed upon taking this action. Rad stated to Pang that he did not agree with the need for the mental health evaluation to which Pang replied that he was going to proceed despite Rad's wishes. At the subsequent hearing before the Judge, Pang declared his wishes to have Rad deemed

mentally incompetent and would need to delay court proceeding for several months while the mental health evaluation proceeded. Rad expressed before the court that he did not agree to the mental health evaluation and requested for a change of counsel, due to the fact that Pang was acting against his wishes. Upon completing the mental health evaluation, through which Rad was reviewed by two mental health experts, Rad was deemed mentally competent. Additionally, after several months of delays, by the mental incompetence diversion, while in detention, Rad was assigned new counsel. Rad raised all of the issues found in this petition, prior to trial, with both of his publicly appointed counsel, while in custody at the King County Correctional Facility. Matthew Pang and Rose Duffy, associates of the SCRAP division within the Department of Public Defense, disregarded Rad's request to motion for a review of the detention order and hearing before a judicial officer, pursuant to RCW 10.21.040 and 7.36.160. In response to non-compliance by both Mr. Pang and Mrs. Duffy, Rad requested with both counsel, on separate occasions, to declare a writ of habeas corpus, pursuant to RCW 7.36.010. Both counselors disregarded Mr. Rad's request. Mr. Pang refused to request for a bond hearing from the judicial officer at each hearing. Mrs. Duffy requested a bond hearing in early September 2017, which was denied, by the prosecution via email, on September 11, 2017. The reason given for denying the bond hearing was that the bond had already been lowered on January 8, 2017. After being detained in custody at King County Correctional facility for 288 days, awaiting trial, was Rad's right to a speedy trial violated? Was Rad subjected to ineffective assistance of counsel through deficient performance by counsel and subsequent resulting prejudice of the jury, which was presented a defendant that had spent over 9 months incarcerated and was not afforded a complete defense?

Within the trial proceedings the defense filed a motion in limine seeking to "exclude social media testimony per ER 901." CP 38-40. The trial court held that "screen captures of social media or other electronic communications will be admissible if sufficient evidence is presented to establish their relevance and that they are what they purport to be." RP 45. Thereafter, the jury instructions contained no language indicating the prima facie nature of the message evidence. Is the presentation of prima facie evidence found in the social media messages, without giving the jury instruction as how to scrutinize the prima facie nature of the evidence, a violation of due process and right to a fair trial under protections within the sixth amendment?

Exhibits 5, 6, 7, 8, and 9, presented by the prosecution, lack a higher form of authentication for the social media messages and were admitted on a prima facie basis. Rule ER 901 (b) (10) states electronic mail may be admissible if the proponent declares to have knowledge that (i) the e-mail purports to be authored or created by the particular sender or the sender's agent; (ii) the e-mail purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.Wright, in her testimony, declares to have knowledge that the defendant is the author, sent the messages from an account under his possession, and fulfills distinctive characteristic traits to satisfy the proponents claim. In the Court of Appeals unpublished opinion, the court states in citing: "the requirements in RULE ER 901 are met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." State v. Danielson, 37 WN. App. 469, 471-472, 681 P.2d 260 (1984). When making a determination as to authenticity, the trial court is not bound by rules of evidence. Bradford, 175 Wn. App. at 928. "A trial court may, therefore, rely upon...lay opinions, hearsay, or the proffered evidence itself in making its determination." State v. Williams, 136 Wn. App. 486, 600, 150 P.3d 111 (2007). The information must be reliable, but it need not be admissible. Id." The above citing, found within the Court of Appeals unpublished opinion, states that if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification the court need not rely on evidence rules when determining authenticity of evidence. In citing the ruling under State v. Danielson, 37 WN. App. 469, 471-472, 681 P.2d 260 (1984), the court is granted the precedence to "rely upon...lay opinions, hearsay, or the proffered evidence itself in making its determination." Does the court overextend the precedence of admitting prima facie evidence under ER 902 (j) by disregarding the requirement of knowledge under ER 901 (b) (10)?

Was Rad's right to a fair trial, under protections within the sixth amendment, violated by his prolonged and unsubstantiated detainment? Was placing the burden of proof on the defense, to obtain competing evidence to rebut the prosecution's claim that the social media messages were authored and sent by Rad, a violation of due process

and Rad's fifth amendment rights?

D. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Vandad Rad with one count of domestic violence felony stalking. CP 1. The jury convicted Rad of felony stalking, but did not find domestic violence. CP 98, 123. The court sentenced Rad within the standard range. CP 127-30. Rad timely appeals.

2. SUBSTANTIVE FACTS

(a) Diane Wright's Version of Events

In the Fall of 2014, complaining witness Diane Wright moved from Seattle to Tacoma, where she sought her "Master of Arts in teaching" from the University of Puget Sound. RP 201, 203. She rented an apartment and lived alone. RP 201. Busy with school, she had only evenings and weekends free. RP 203. She found it difficult to meet people other than her classmates, so she joined "Tinder," which she described as "a dating app on your phone where you just get matched with somebody who also matches you, and then you can start talking to them through the app." RP 203. She explained the app allows users to upload photographs and biographic information, presumably about themselves, and then let the app find other users with similar interests, and those matched users can each review the other's profile and indicate interest, or not. If both users indicate an interest, communication is allowed between them through the app. RP 204-06. Wright testified she connected directly with approximately 50 other users during her time on Tinder. RP 206. Wright and Rad matched on Tinder in February 2015, and both indicated interest in the other, so communications between them began through the Tinder app. RP 206-07. Rad eventually asked Wright out on a date, she accepted, and they exchanged phone numbers. RP 207-08. Each arrived at and departed separately from the restaurant where they had their first date. RP 208.

Wright claimed she was no longer interested in Rad after the date, although she admitted it was she who reached out to Rad afterwards. RP 208-09. Wright said she eventually told Rad she was no longer interested in him, and contact between them ceased, until March 2015, when she testified Rad sent her a friend request on Facebook. RP 210-11. Wright denied the request, but felt bad, so she texted Rad later the same day to talk. RP 212-13. They exchanged text, and in the process agreed to meet up later that day, albeit just as "friends," at least as far as Wright was concerned. RP 213-14. Wright recalled driving to Rad's home, and then they walked to nearby Point Defiance Park. RP 214. Wright recalled having a drink at Rad's after the walk and that Rad asked her then if she just wanted to be friends, to which Wright agreed. RP 215. When Rad suggested they try one more date, however, Wright also agreed. Id.

About a week after their walk in the park, Rad picked Wright up at her place for the second date. RP 216. Wright recalled they "played mini golf, and we had dinner." Id. After dinner they returned to Rad's home, where they "kissed a little" and then Wright went home. Id. Wright claimed that after the second date she no longer wanted to date him, but she "would really like to be the guy's friend[.]" Id.

After the second date Wright and Rad became Facebook friends sometime in late March or early April 2015. Wright could not recall who initiated the friend request, her or Rad. RP 217-18. One of the messages Rad sent her through Facebook thereafter suggested they "just be friends." Id. Wright said she replied "that's great. That's what I want to." RP 217. Thereafter they met two or three times at Rad's place and would go for a walk in Point Defiance Park. RP 218. Wright specifically recalled meeting up with Rad on April 26, 2015, the day before her birthday, and walking in the park. RP 218-19. They returned to Rad's place after the walk and watched TV and ate burgers. RP 219. Rad smoked marijuana while they watched TV and offered Wright some, which she declined. RP 219-21. When they started watching YouTube videos, Rad offered Wright marijuana again, which she again declined, but then she accepted his offer of a marijuana soda, which she then consumed. RP 221-22. Wright said it made her feel "Very weird, and sick, and loopy in my head." RP 222. She told Rad how she felt and that she did not like it. RP 223. As a result of the marijuana soda, Wright lay on a couch while Rad played loud music and sat at her feet

singing along. Wright recalled Rad eventually getting on top of her and kissing her. She responded by kissing him back "for a little while[.]" RP 223. At some point, according to Wright, she was not feeling good and no longer wanted Rad to kiss her, so she said, "stop it, I don't want to do this." RP 224. Wright claimed Rad ignored her and instead started kissing her body and removing her pants and underwear. RP 224. Wright claimed she protested, but Rad ignored her, and instead performed oral sex on her. RP 224. When asked if she tried to push Rad away, Wright said she tried to keep her pants on, but was afraid to push or tell Rad to stop out of fear he might do "something crazy." RP 225. When Rad stopped the oral sex, he removed his clothes, to which Wright claims she responded, "I am saying no and if you have sex with me right now, you are raping me." RP 225. Wright recalled Rad "looked at me real surprised and he was like you don't want to have sex? Id. When Wright said no again, Rad allegedly continued with oral sex. RP 226. Wright eventually put her underwear and pants on and went to the bathroom, where she said she cried before coming out and informing Rad she was leaving. RP 226-27. Rad protested, noting she was in no shape to drive and promised to stop his sexual advances. RP 227. Wright then suggested they just go to bed, to which Rad agreed. Id. They lay on his bed and Wright fell asleep, until she claims Rad got on top of her in his sweats and started "humping" her. Id. Wright said she told Rad she was leaving, not to touch her and to get away from her, then she left. Id.

Rad texted Wright the following day, stating they needed to talk. RP 229. Wright replied that they had nothing to talk about, she never wanted to see him again and that he should never contact her again. Id. Over defense counsel's foundation objection, Wright testify that Rad messaged her on Facebook accusing her of overreacting and that what had occurred was consensual. RP 229-30. When Wright disputed this claim, Rad allegedly replied that he now saw that what Wright was doing was retaliating against him for suggesting they just be friends by first seducing him and then rejecting him. RP 230. Wright responded by blocking Rad's Facebook account. RP 231. Wright testified Rad did not contact her for the rest of April or May 2015, but that in June she got a text message on her phone asking, "how have you been," but it was from a number Wright did not recognize. A subsequent text from the same number claimed, "This is Vandad." RP 232. Wright did not reply, and got no such text again until August 2015, when she got a text from the same number as the June text that read, "Hi Diane." RP 233-34. Wright decided to block both

that number and the other phone number she had for Rad. RP 234. In September 2015, Wright recalled getting a friend request on Facebook from a different account listed under Rad's name, and with a picture of Rad she had never seen before. RP 235. Wright claimed she ignored the request and blocked the account. RP 235. She claimed that between September 2015 and February 2016, she had five to six similar contacts on various social media platforms (e.g., Facebook, Instagram), each with pictures of Rad associated with them that Wright had never seen before. RP 235-36. She also claimed each account indicated it was "Vandad Rad" by name. RP 236. Wright claimed Rad started using fake names for social media account to contact her in May 2016. RP 237. The first such incidence was on May 18, 2016, when Wright's sister noticed a Facebook message from Rad to their father's Facebook account, expressing regret for how he had treated Wright in the past, noting she had blocked him from contacting her on a number of platforms, and asked for advice on how to repair his relationship with Wright. RP 243-48. Believing Rad was "going to extremes to contact me," Wright filed for a protection order against him in Pierce County Superior Court on May 26, 2016, at which time a temporary protection order was issued, and a final order of protection went into effect on June 10, 2016, after a hearing at which Rad attended and spoke at. RP 248-49, 270-71, 278-79; Ex 3 (protection order). Wright claimed Rad was supposed to be served with a copy of the protection order by law enforcement. RP 271-72.

Wright recalled that on June 6, 2016, she was waiting for a friend to come over so they could go out to dinner, when Rad unexpectedly appeared at her door. RP 272-74. When she opened her front door expecting it to be her friend, it was Rad, "smirking at me." RP 274. Wright said she exclaimed, "Oh, God damn it," slammed the door shut, locked it and called 911. Id. Wright said police arrived about five minutes later and first spoke to Rad, who was milling around across the street from her apartment when they arrived, then spoke to her. RP 275- 76. She said Rad was arrested and charged with misdemeanor violation of a protection order. RP 277. After the June 10th order was issued, Wright recalled Rad did not try to contact her again for a while. RP 280-81. Having completed her Master of Arts, Wright moved to Seattle in August 2016. RP 281. She commuted to her job as a third-grade teacher at Chief Leschi Elementary School in Puyallup. RP 282. Wright claimed Rad starting trying to contact her again beginning on December 6, 2016. RP 284. She claimed she received message from Rad on her phone notifying her he had

added her as a friend to his "Snapchat app." RP 287-88. The message stated "Vandad" under the user name "vandude83" had added Wright, and invited Wright to add him as a friend, which she declined to do. Id.; Ex. 5 (screen captures of message).

Wright claimed she received another contact from Rad on December 8, 2016, this time on an Instagram account listed under "van44444." RP 289-90; Ex. 6 (screen captures). The message claims it is from "Vandad Rad," and includes a picture of Rad. RP Ex. 6. The defense objection to Exhibit 6 for lack of relevance, authentication and foundation was overruled. RP 289-90. The next contact Wright suspected was from Rad came on December 13, 2016. RP 292. One was from an Instagram account for "Vandad._Rad" with the same picture of Rad used in the "van44444" account, requesting to follow her. RP 293-94; Ex. 7 (screen captures). Another message that day indicated the sender was just outside Chief Leschi Elementary while Wright was inside teaching. RP 295-96. The same account was used the following day to inform Wright, "You win. I'll stop bothering you. Have a great life." RP 297. Wright called police. Id. Later that evening the account sent Wright a message stating, "Imma keep trying. I guess the judge can send me to jail on 4th of January." RP 299. According to Wright, Rad had a court date on January 4, 2017. Id. Wright also said she receive Facebook notices in December from a user named "Banlino Barz" with no picture. RP 301-02; Ex. 8. A message associated with that account states, This is Vandad Barzin Rad 12 days before Christmas, I don't know what gift to buy you yet. RP 303; Ex. 8. On December 24, 2016, Wright was at her parents' home in Prosser, Washington when she decided to check her Skype account. When she did, she found notification that "live:vrad132333" had tried to contact her. She assumed it was Rad. RP 304-08; Ex. 9. Wright claimed that upon returning to Seattle from Prosser after Christmas, she received more messages from accounts she attributed to Rad because the user names were titled "Vandad Rad or had variations of the name Vandad Rad." RP 309. Some included pictures of Rad. Id. Wright claimed one of the messages said, "this is a preemptive message to the judge. You might as well send me to jail forever because I will always find this person and message her." RP 310. Another message states the sender loves Wright and is "irked" at being arrested twice. Id. Wright testified that the unwanted messages she was receiving left her in a state of anxiety, constantly fearing Rad would appear and harm her. RP 311-12. In cross examination, Wright admitted she was capable creating false user accounts that

appeared to be associated with Rad instead of her. RP 329.

(b) Investigation by Police

Seattle Police Sergeant Mary Wollum was assigned the case on December 19, 2016. RP 176. Wollum noted one of the screen captures of messages provided by Wright from her phone referenced a January 4th court date, the same date Rad had a 9 am court appearance set. RP 184- 86; Ex. 4 (court docket). Wollum admitted on cross examination she never contacted the social media platforms associated with the case, nor any phone records, despite nothing preventing her from doing so. RP 189- 91, 197. She offered as an excuse that no one had asked her to. RP 190. On redirect and over a defense speculation objection, Woolum was allowed to testify that the names on the various accounts reported by Wright "were very similar" to Rad's name. RP 194, 196. When asked why she did not contact the various media companies to try and link the accounts directly to Rad, she was allowed to respond over defense objection that it was, "Because the records on her phone appeared pretty valid and consistent. . . over a period of time." RP 196-97.

(c) Closing Arguments

The prosecution elected in closing argument to rely only on those alleged communication from Rad to Wright that occurred between December 6 and December 28, 2016. RP 375, 379-80; see also RP 350 (during colloquy on jury instructions, prosecutor states it is the messages received by Wright between December 6 and December 28, 2016 that prove commission of the crime). The prosecution argued the jury could rely on Wright's testimony, the Pierce County protection order and the screen capture corroborating Wright's claims as a basis to find Rad guilty as charged. RP 379-92. Defense counsel argued that what really occurred was Wright regretted the evening she spent with Rad when she drank the marijuana soda, having failed to be the "good and strong" "modern woman" society expected her to be. RP 392-95, 401. To make up for this, Wright took the view that Rad drugged her and took advantage of her. RP 395-96. Counsel also emphasized that the police investigation failed to look into the actual source of the alleged offending messages by getting cell phone records and account user information. RP 397-98. In rebuttal, the prosecution noted defense counsel's argument that juror could have "reasonable doubt" that Rad sent

the alleged offending messages, and replied that for such reasonable doubt to exist, jurors must conclude someone else sent them. RP 410. Over defense "vouching" objection, the prosecution also claimed that to find reasonable doubt, jurors had to conclude Wright was "not credible." RP 413.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. DOMESTIC VIOLENCE ORDER FOR PROTECTION ASSIGNED TO A STRANGER-STRANGER RELATIONSHIP

By granting Wright a Domestic Violence Order for Protection, Pierce County Superior court affirms all uncorroborated allegations contained within Wright's petition. Rad alleges that no evidence presented within the Petition for a Domestic Violence Order of Protection sufficiently implies the characteristic nature of family or household members. Additionally, Rad claims that Ms. Wright was granted the protection order under a misrepresentative description of their relationship. Thus leading the Pierce County Superior court to allow the designation of the Wright and Rad's relationship to be pronounced solely by Wright's testimony. Such a designation should rely upon the states definition sort forth under RCW 26.50.010. Rad claims that his relationship to Ms. Wright is more accurately represented by the stranger-stranger designation.

2. WARRANTLESS ARREST WAS A VIOLATION OF FIRST AND FOURTH AMENDMENT RIGHTS

By arresting Rad at his home with the notion that probable cause was given through allegations, made by Wright, that Rad violated a Domestic Violence Order for Protection, the Tacoma Police gave imperative notion to an interventionary arrest prior to the issuance of a warrant on December 29th, 2016. Rad claims that the nature of this interventionary arrest was a violation of the first amendment rights to freedom of speech. As was stated in the police report as well as Wright's recorded statement Rad was not seen in her vicinity nor expected to arise in person. No clear and present danger was posed by the allegations that Rad was sending Wright messages. Additionally, the context of the messages contain no threatening or ominous

language. By acting upon a basis for probable cause derived from Wright's allegations the Tacoma Police violated Rad's fourth amendment rights, protection from unusual search and seizure.

3. DETENTION OF RAD WITH NEGLECT OF THE RIGHT TO REVIEW OF DETAINMENT ORDER, EXCESSIVELY HIGH BAIL, AND DENIAL OF RIGHT TO BAIL HEARING

The court effectively made it impossible for Rad to obtain pre-trial release by, setting the bail excessively high, issuing no detention order and subsequent review, as well as denying Rad the right to a bail hearing. Rad claims that with no criminal history and no propensity for violence an expedited review of the detainment order was highly likely to grant him pre-trial release. Rad claims that setting the bail at $200,00 and then at $150,000 was excessively high because the foundation of the charge was elevated to a higher status by the presumption that the alleged behavior occurred on multiple occasions. However, Rad has no previous convictions, which the prosecution was aware of at the time of the arraignment. Also, the only evidence presented to the courtroom was of a prima facie nature and does not discreetly infer advancement of the charge of stalking from a gross misdemeanor to a felony. Had the charge been appropriately designated as a gross misdemeanor the bail would have been at $1000, pursuant to the Washington State bail schedule and RCW 9A.46.110.

4. VIOLATION OF RIGHT TO SPEEDY TRIAL PROTECTIONS UNDER THE SIXTH AMENDMENT

Rad argues that detention of 288 day before the beginning of his trial was excessively long and not reasonable, given the type of delays and diversions utilized against his interest. Rad signed two continuances, as suggested by his counsel Matt Pang, between January 31, 2017 through February 14, 2017. Thereafter every delay of the trial date was set by the court or by Rad's publicly appointed counsel, against his preference. Additionally, when Mr. Pang motioned for the Mental health evaluation (placed under seal) the courtroom granted Rad's own defense a diversion that extended the delay for over 3 months.

Rad contested the motion for a mental health evaluation before the courtroom, yet was disregarded by the presiding judicial officer. Rad claims that after the case setting on February 28, 2017 every delay of trial granted by the court was contested with Rad's opposition.

5. INEFFECTIVE ASSISTANCE OF COUNSEL

Both of Mr. Rad's publicly appointed counsel, Matthew Pang and Rose Duffy, proved to be ineffective assistance of counsel. Pang took action against Rad's preference by submitting a motion to have Rad's mental health evaluated in an effort to have Rad admitted to a Washington state mental health clinic. This action exacerbated the violation of Rad's right to a speedy trial and diverted Rad's ability to build a defense based on the pertinent issues posed by the prosecution. In disregarding Rad's requests, to motion for a hearing to review Rad's detainment order, declare a writ of habeas corpus, and motion for a bail hearing, both Pang and Duffy underrepresented Rad. The imperative of the defense to obtain pre-trial release was disregarded by both publicly appointed counsel, inhibiting the defense from acquiring competing evidence to contest the prima facie evidence that was admitted at trial.

6. LACK OF JURY INSTRUCTIONS INDICATING THE PRIMA FACIE NATURE OF SOCIAL MEDIA MESSAGES IS A VIOLATION OF DUE PROCESS AND RIGHT TO A FAIR TRIAL UNDER PROTECTIONS WITHIN THE SIXTH AMENDMENT

The admittance and presentation of prima facie evidence, in the form of social media messages, compels the jury to infer the authenticity of exhibits 5, 6, 7, 8, and 9. Thus leading to the standard for a reasonable trier of fact to be inferred, with no uncertainty prepositioned by the lack of a higher standard of authentication given by forensic data investigation. A reasonable trier of fact will find that exhibits 5, 6, 7, 8, and 9 are screen captures of messages, which does not fulfill the requirements of RULE ER 901 (b) (10). RULE ER 901 (b) (10) addresses the knowledge of authorship, possession of the account/username, and the distinctive characteristic traits that make up the contents of the messages. Additionally, a reasonable trier of fact, when considering the authenticity of a message and it's sender, would not solely subject the screen

capture of a message to the rule of authenticity but also all three of the requirements set forth in RULE ER 901 (b) (10). By neglecting to instruct the jury, in regard to the prima facie basis for admitting the screen captured social media messages, an inferred bias is allowed to proliferate amidst the jurors. This inferred bias inaccurately correlates the claim that the messages are what they are purported to be, in addition to the false notion that they were admitted by a higher form of authentication. With this inferred bias the jury was lacking the necessary instruction to sustain an impartial status throughout the trial.

7. ADMITTING THE MESSAGES AS SELF-AUTHENTICATING PRIMA FACIE EVIDENCE IN DISREGARD OF THE PRECEDENCE OF KNOWLEDGE SET FORTH IN ER 901 (b) (10)

Without a higher standard of authentication, the authorship of the messages was declared by the proponent only as opinion. Without further means of associating a link from the address/username to the defendant, the address/usernames that proponent purports the messages are sent from, are subject to the same form of opinionated declaration. Additionally, the distinctive characteristic traits that are found within the messages are non-associative, and while the proponent declared the messages to contain information that she believes can be associated to Mr. Rad, the messages did not provide the court with anything more than publicly available information. With no other form of corroboration to substantiate the proponents claim, the courtroom is erroneously compelled to take the proponents non-expert testimony as fact. The distinctive characteristic traits found within the messages contain associative facts that cull to the Mr. Rad's identity. However, the sole point that the distinctive characteristic traits are associative by the picture, arrangement of letters in the address/username, and listing of a physical address to Mr. Rad, does not fulfill the need for the requirements (i) & (ii) within RULE ER 901 (b) (10). Admitting the messages as evidence without fulfilling the requirements set forth in RULE ER 901 (b) (10) holds the basis for the proponent's knowledge on opinion, elevating the proponents opinionated claim to fact without a single factor of corroboration beyond Wright's testimony.

In the Court of Appeals unpublished opinion, the citing of State v. Danielson, 37 WN. App. 469, 471-472,

681 P.2d 260 (1984) and State v. Danielson, 37 WN. App. 469, 471-472, 681 P.2d 260 (1984) may grant the court the ability to authenticate that exhibits 5, 6, 7, 8, and 9 are in fact screen captures of messages. However, no additional facts may inferred from the contents of the messages from this initial prima facie inference. The fact that exhibits 5, 6, 7, 8, and 9 are screen captures of messages does not also infer their authorship. Additionally, the opinions presented by the proponent's claim do not substantiate a basis to attribute the requirements within RULE ER 901 (b) (10) to the defendant, nor do the proponents opinions corroborate with any other point of evidence to substantiate them as fact. Without the fulfilment of RULE ER 901 (b) (10), by the proponent, the messages may only be presented to the court as evidence that lacks factual substantiation of authorship, possession of the account/username, and the distinctive characteristic traits that make up the contents of the messages. Further, in order to adhere to the evidentiary rules within ER 901 (10), for the jury to adjudicate the facts of this case, prosecution may be limited to the presenting the the compact disks on which the screen captured messages are stored, but not the content of the compact disks. A reasonable trier of fact is strictly limited to divulgence of the content within the messages by the basis of fact set out by RULE ER 901. In erroneously admitting the social media messages as prima facie evidence, purported to be from Rad, the jury is disposed to a preconception of the notion that the messages are self-authenticating documents, pursuant to ER 902, that could only have been sent by Rad and that the context within the messages were authored by Rad.

8. VIOLATION OF DUE PROCESS AND RIGHT TO A FAIR TRIAL THROUGH PROLONGED DETAINMENT; VIOLATION OF FIFTH AMENDMENT RIGHTS BY COMPELLING THE DEFENDANT TO TESTIFY

In admitting the social media messages as prima facie evidence, Rad's only ability to rebut that the messages were authored by someone other than Rad, sent from a social media account not under Rad's possession, and do not meet characteristic traits that associate to Rad would be to fulfill the requirements set out in RULE ER 901 (b) (10). In admitting the social media messages, the court is requiring Rad to rebut prima facie evidence with competing evidence. Prolonged detainment disallowed Rad the ability to

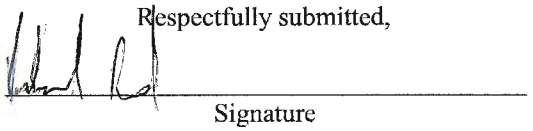
disprove the prima facie evidence presented by unauthenticated messages with competing evidence from the defense. Absent competing evidence Rad is then compelled by the court to testify as the the only means to rebut the claims made by Wright in her testimony, regarding the contents and authorship of the social media messages. This is a violation of Rad's fifth amendment rights which states "nor shall be compelled in any criminal case to be a witness against himself".

F. CONCLUSION

For the reasons stated, this Court should reverse Rad's judgment and sentence and dismiss the prosecution.

May 30, 2019

Respectfully submitted,



Signature
Vandad Rad, Pro se

Attorney for Vandad Rad

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. VANDAD BARZIN RAD, Appellant.	No. 77605-3-I DIVISION ONE UNPUBLISHED OPINION FILED: February 5, 2019

APPELWICK, C.J. — A jury found Rad guilty of felony stalking. Rad argues that the trial court erred in admitting screen shots of social media messages into evidence, because the State failed to properly authenticate them. We affirm.

FACTS

In February 2015, Diane Wright connected with Vandad Rad on Tinder, a dating app for cell phones. The two exchanged phone numbers and went on a date. About a month later, Wright received a friend request[1] on Facebook from Rad. Wright texted Rad, and the two went on another date. After their second date, they decided to be friends.

Rad and Wright saw each other two or three more times. While "hanging out" in April 2015, Rad gave Wright a marijuana soda, which made her feel sick after drinking it. Rad then performed oral sex on her, even though she told him to

[1] A "friend request" is a way of connecting two different Facebook accounts. Wright had used Facebook's privacy settings so that only her profile picture, her name, and the city she lived in could be seen by accounts not connected to her account.

stop. The next day, Wright texted Rad and told him that she never wanted to see him again, to not contact her again, and to leave her alone.

Rad then reached out to Wright through Facebook, and told her that she was overreacting. She responded and told Rad not to contact her again. After a few more messages, Wright again told Rad to leave her alone and blocked[2] him, so that he could no longer message her on Facebook. In June, Wright received a text message from a phone number she did not recognize that claimed to be from Rad. After receiving another text message from the same number in August, Wright blocked both that number and the other phone number she had for Rad.

Between September 2015 and February 2016, Wright received five or six friend requests on Facebook from accounts that displayed Rad's name and picture. She did not accept the requests. In March 2016, Wright's friend, an attorney, sent Rad a letter stating that if he continued contacting Wright, they would file for a protection order. In May, an account with Rad's name sent a Facebook message to Wright's father. In the message, the sender asked Wright's father for advice on how to reconnect with her. Wright also received Facebook messages from an account named "Vondod Pwrsyrs." The sender, who Wright understood to be Rad, stated that he was "enamored, obsessed, and addicted."

Wright then sought a protection order against Rad in Pierce County, where she was then living. She was granted a two week temporary protection order, lasting until June 10. On June 6, Rad showed up at Wright's door. She called 911

[2] When a Facebook user blocks another account, the blocked account can no longer find that user's account, send that user a friend request, or see that user's profile.

and police arrested Rad. Four days later, a judge granted Wright a protection order against Rad.

In December, Wright again received messages she believed were from Rad. She received the messages on various social media platforms, including Snapchat,[3] Instagram,[4] Facebook, and Skype.[5] She told police about them.

On December 29, 2016, the State charged Rad with one count of domestic violence felony stalking. Prior to trial, Rad moved to exclude the social media evidence in this case. The trial court determined that "screen shots of social media or other electronic communications" would be admissible if sufficient evidence was presented "to establish relevance and that they are what they purport to be." At trial, screen shots of Rad's alleged attempts to contact Wright in December 2016 were depicted in exhibits five, six, seven, eight, and nine. The trial court admitted into evidence exhibits five through nine over Rad's objections. In closing argument, the State relied on the December messages to prove that Rad committed the charged crime.

A jury found Rad guilty of felony stalking, but did not find domestic violence. Rad appeals.

DISCUSSION

Rad argues that the trial court failed to require sufficient authentication before admitting exhibits five through nine into evidence. He argues that there was

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[3] "Snapchat" is a cell phone app similar to text messaging except that the photos and texts sent through Snapchat disappear once they are seen by the recipient and are not preserved.

[4] "Instagram" is a social media platform for sharing photographs.

[5] "Skype" is a live video chat and long-distance voice calling service.

insufficient corroboration to conclude that he sent the social media messages, because the State presented only his name in some of the exhibits and his picture in others. He asserts that Wright's testimony that the messages were from him was based on speculation. And, he asserts that "none of [the messages] contained distinctive content," and "none were corroborated by other events or with forensic computer evidence."

This court reviews a trial court's admission of evidence for an abuse of discretion. State v. Bradford, 175 Wn. App. 912, 927, 308 P.3d 736 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Id.

Under ER 901(a), "[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." This requirement is met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." State v. Danielson, 37 Wn. App. 469, 471-72, 681 P.2d 260 (1984). When making a determination as to authenticity, the trial court is not bound by the rules of evidence. Bradford, 175 Wn. App. at 928. "A trial court may, therefore, rely upon . . . lay opinions, hearsay, or the proffered evidence itself in making its determination." State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007). The information must be reliable, but it need not be admissible. Id.

ER 901(b) provides examples of authentication that conform to the requirement in ER 901(a). These examples are "[b]y way of illustration only, and

not by way of limitation." ER 901(b). ER 901(b) does not specifically address social media messages. But, it does address methods for authenticating e-mails:

> Testimony by a person with knowledge that (i) the e-mail purports to be authored or created by the particular sender or the sender's agent; (ii) the e-mail purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

ER 901(b)(10).

Rad argues that courts "have imposed a heavier burden of authentication on messaging and social network postings because of the increased dangers of falsehood and fraud." He cites case law from other states to support this argument. Rad also argues that for "electronic communication like text messaging, Washington has followed the heightened requirements for authentication" He relies on Bradford and In re Detention of H.N., 188 Wn. App. 744, 355 P.3d 294 (2015).

In Bradford, another felony stalking case, the defendant did not have the victim's phone number and sent text messages to the victim's friend, Smith, who would forward the messages to the victim. 175 Wn. App. at 915-16, 919. This court held that, under ER 901(a), there was sufficient evidence to support a finding that text messages Smith received were written and sent by Bradford. Id. at 919, 928-29. First, Bradford sending the messages was consistent with his "desperate desire" to communicate with the victim. Id. at 929. Second, the content of the messages, for example, repeatedly mentioning the victim's name and demanding

that she call the sender, indicated that Bradford sent them. Id. Third, when Bradford was in jail, Smith did not receive any messages. Id. at 929-30. But, once he was released, Smith started receiving messages again. Id. at 930. Finally, Smith and the victim testified that they believed the messages were from Bradford. Id. This court did not apply heightened requirements for authenticating the messages. See id. at 928.

In H.N., this court held that, under ER 901(b), the State properly authenticated e-mailed screen shots of text messages read into the record by the State's expert witness. 188 Wn. App. at 748, 750, 759. First, there was testimony that H.N. acknowledged sending the messages. Id. at 758. Second, the sender's phone number matched H.N.'s contact information in her medical chart, and H.N.'s full name was displayed as the sender. Id. Third, the content of the messages, which referenced names of people in H.N.'s life, suggested H.N. was the sender. Id. Fourth, the messages were consistent with certain events in H.N.'s life. Id. Finally, the timing of the messages was consistent with H.N.'s hospitalization on the night her roommates found her unconscious. Id. at 758-59.

This court concluded that "[i]n sum, the requirements of ER 901(b)(10) are satisfied by analogy." Id. at 759. It noted that ER 901(b) does not specifically address text messages, but that the rule's examples provided proper bases for its determination. Id. at 752. Comparing ER 901(b)(10)'s treatment of e-mails to the text messages at issue, this court found that (1) the record established that the text messages were authored by H.N., (2) they were sent from the cell phone number associated with H.N., and (3) the distinctive characteristics of the messages, in

conjunction with the circumstances, were sufficient to support authentication. Id. at 759. Like Bradford, this court did not apply heightened requirements for authenticating the messages. See id. at 751.

Here, the State introduced a number of exhibits showing Rad's attempts to contact Wright in December 2016. Exhibit five shows a request from "Vandad," also listed as "vandude83," to connect with Wright on Snapchat. Exhibit six shows requests from "Vandad Rad (@van44444)" to send Wright a message and "follow" her on Instagram.[6] The Instagram account sent Wright a street address, which Wright recognized as Rad's address. And, the picture associated with the account was a picture of Rad.

Exhibit seven shows another request to follow Wright on Instagram, this time from "Vandad Rad (@vandad._rad)." The picture associated with the account was a picture of Rad. Wright also received several messages from the account. The messages included a picture of Rad, and a picture of a global positioning system (GPS) in a car showing the car's location. Wright testified that the GPS indicator was "very close" to the school where she worked. The GPS picture was accompanied by messages that stated, "It's about 20 minutes [sic] drive right on home," and, "Let me know if I can take you home, please." She received more messages from the account the next day, stating, "You win," "I'll stop bothering you," "Have a great life," and "Ima [sic] keep tryin [sic]. . . . I guess the judge can send me to jail on 4th [sic] of January."

[6] An Instagram user has to request to send another user a message if that other user has not allowed them to follow their account.

Exhibit 8 shows a friend request Wright received on Facebook from "Banlino Barz." The same account tried calling Wright through Facebook, and sent her messages stating, "This is Vandad Barzin Rad," and "12 days before Christmas, I don't know what gift to buy you yet."

Finally, exhibit 9 shows a contact request Wright received on Skype from "Vandad Rad," also listed as "live:vrad132333" and "snowangel." The same account also tried calling Wright through Skype.

Unlike H.N., Rad did not acknowledge sending Wright the December messages. But, like Bradford and H.N., the content of the messages indicated that Rad was the sender. All but one of the accounts that tried to contact Wright listed "Vandad" or "Vandad Rad" as the sender. The one account named "Banlino Barz" sent Wright a message stating, "This is Vandad Barzin Rad." Wright received Rad's address from the Instagram account named "Vandad Rad." The other Instagram account named "Vandad Rad" sent Wright a picture of GPS coordinates near her workplace, asked if she wanted a ride home, said he would stop bothering her, but then said he would "keep tryin [sic]." The Facebook account named "Banlino Barz" sent Wright a message stating that he did not know what to buy her for Christmas.

This content, and the repeated attempts to connect with Wright on social media, comport with evidence of Rad's past obsessive behavior. Prior to December, Wright received five or six Facebook friend requests from accounts with Rad's name, and a Facebook message she understood to be from Rad, stating he was "obsessed" and "addicted." Wright's father received a Facebook

message from an account with Rad's name, asking how he could reconnect with Wright. And, Rad showed up at Wright's door after she was granted a temporary protection order against him.

Also, like H.N., one of the Instagram messages was consistent with events happening in Rad's life. The message stated, "Ima [sic] keep tryin [sic] . . . . I guess the judge can send me to jail on 4th [sic] of January." Rad had a court date on January 4. And, the statement "the judge can send me to jail" indicates that the sender knew he was not allowed to contact Wright. Last, like Bradford, Wright testified to her belief that the December 2016 messages in exhibits five through nine were from Rad.

Based on this evidence, a reasonable trier of fact could find that the December 2016 messages were what they purported to be, messages written and sent by Rad. Therefore, the State properly authenticated the messages. Rad's challenge to the admissibility of the messages is based solely on authentication. Accordingly, the trial court did not abuse its discretion in admitting exhibits five through nine into evidence.

We affirm.

WE CONCUR:

FILED
4/30/2019
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON,

Respondent,

v.

VANDAD BARZIN RAD,

Appellant.

No. 77605-3-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Vandad Rad, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, C.J.
Judge

77605-3

NO. 77605-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

VANDAD RAD,

Appellant.

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

The Honorable Sean O'Donnell, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The State failed to properly authenticate electronic social media posts introduced in its case-in-chief and the trial court erred by admitting those posts over defense objection.

2. Absent the improperly introduced social media posts, the evidence was insufficient to convict appellant of stalking.

Issues Pertaining to Assignments of Error

1. Fraudulent electronic communication are easy to create. Thus, courts must carefully review authorship prior to admitting them at trial. Authentication is a threshold requirement designed to assure the evidence is what it purports to be. Is reversal required where over defense objection the State introduced electronic media posts from various social media platforms that were never properly authenticated?

2. Where the State's prosecution of appellant for stalking was based on electronic media that should have been excluded as not properly authenticated, was the evidence insufficient to convict once the electronic media evidence is disregarded?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Vandad Barzin Rad with felony stalking, including a domestic violence allegation. CP 1-2; RCW 9A.46.110; RCW 10.99.020. The prosecution alleged that between June 10, 2016 and December 28, 2016, Rad repeatedly harassed Diane Lillian Wright, a woman he had briefly dated, in violation of a protection order by sending her numerous electronic social media messages. CP 1-8.

A trial was held before the Honorable Hollis Hill, Judge, October 25 through November 2, 2017. RP 1-424.[1] A jury convicted Rad of stalking but did not reach a verdict on the domestic violence allegation. CP 84; RP 419. Rad was sentenced on November 9, 2017 to "CFTS" (Credit For Time Serviced), no Community Custody, $500 victim penalty assessment, and a $100 DNA collection fee. CP 127-32: RP 439-40. Judge Hollis also entered a "Stalking Violence No-Contact Order" prohibiting him from contacting Wright for 10 years. Supp CP __ (sub no. 92I, Stalking Violence No-Contact Order, fled November 9, 2017). Rad appeals. CP 146.

[1] There are eight consecutively paginated volumes of verbatim report of proceedings referenced as "RP."

2. Substantive Facts

(a) *Diane Wright's Version of Events*

In the Fall of 2014, complaining witness Diane Wright moved from Seattle to Tacoma, where she sought her "Master of Arts in teaching" from the University of Puget Sound. RP 201, 203. She rented an apartment and lived alone. RP 201. Busy with school, she had only evenings and weekends free. RP 203. She found it difficult to meet people other than her classmates, so she joined "Tinder," which she described as "a dating app on your phone where you just get matched with somebody who also matches you, and then you can start talking to them through the app." RP 203. She explained the app allows users to upload photographs and biographic information, presumably about themselves, and then let the app find other users with similar interests, and those matched users can each review the other's profile and indicate interest, or not. If both users indicate an interest, communication is allowed between them through the app. RP 204-06. Wright testified she connected directly with approximately 50 other users during her time on Tinder. RP 206.

Wright and Rad matched on Tinder in February 2015, and both indicated interest in the other, so communications between them began through the Tinder app. RP 206-07. Rad eventually asked Wright out on a date, she accepted, and they exchanged phone numbers. RP 207-08.

Each arrived at and departed separately from the restaurant where they had their first date. RP 208.

Wright claimed she was no longer interested in Rad after the date, although she admitted it was she who reached out to Rad afterwards. RP 208-09. Wright said she eventually told Rad she was no longer interested in him, and contact between them ceased, until March 2015, when she testified Rad sent her a friend request on Facebook. RP 210-11. Wright denied the request, but felt bad, so she texted Rad later the same day to talk. RP 212-13. They exchanged text, and in the process agreed to meet up later that day, albeit just as "friends," at least as far as Wright was concerned. RP 213-14. Wright recalled driving to Rad's home, and then they walked to nearby Point Defiance Park. RP 214. Wright recalled having a drink at Rad's after the walk and that Rad asked her then if she just wanted to be friends, to which Wright agreed. RP 215. When Rad suggested they try one more date, however, Wright also agreed. Id.

About a week after their walk in the park, Rad picked Wright up at her place for the second date. RP 216. Wright recalled they "played mini golf, and we had dinner." Id. After dinner they returned to Rad's home, where they "kissed a little" and then Wright went home. Id. Wright claimed that after the second date she no longer wanted to date him, but she "would really like to be the guy's friend[.]" Id.

After the second date Wright and Rad became Facebook friends sometime in late March or early April 2015. Wright could not recall who initiated the friend request, her or Rad. RP 217-18. One of the messages Rad sent her through Facebook thereafter suggested they "just be friends." Id. Wright said she replied "that's great. That's what I want to." RP 217. Thereafter they met two or three times at Rad's place and would go for a walk in Point Defiance Park. RP 218.

Wright specifically recalled meeting up with Rad on April 26, 2015, the day before her birthday, and walking in the park. RP 218-19. They returned to Rad's place after the walk and watched TV and ate burgers. RP 219. Rad smoked marijuana while they watched TV and offered Wright some, which she declined. RP 219-21. When they started watching YouTube videos, Rad offered Wright marijuana again, which she again declined, but then she accepted his offer of a marijuana soda, which she then consumed. RP 221-22. Wright said it made her feel "Very weird, and sick, and loopy in my head." RP 222. She told Rad how she felt and that she did not like it. RP 223.

As a result of the marijuana soda, Wright lay on a couch while Rad played loud music and sat at her feet singing along. Wright recalled Rad eventually getting on top of her and kissing her. She responded by kissing him back "for a little while[.]" RP 223. At some point, according to

Wright, she was not feeling good and no longer wanted Rad to kiss her, so she said, "stop it, I don't want to do this." RP 224. Wright claimed Rad ignored her and instead started kissing her body and removing her pants and underwear. RP 224. Wright claimed she protested, but Rad ignored her, and instead performed oral sex on her. RP 224.

When asked if she tried to push Rad away, Wright said she tried to keep her pants on, but was afraid to push or tell Rad to stop out of fear he might do "something crazy." RP 225. When Rad stopped the oral sex, he removed his clothes, to which Wright claims she responded, "I am saying no and if you have sex with me right now, you are raping me." RP 225. Wright recalled Rad "looked at me real surprised and he was like you don't want to have sex? Id. When Wright said no again, Rad allegedly continued with oral sex. RP 226.

Wright eventually put her underwear and pants on and went to the bathroom, where she said she cried before coming out and informing Rad she was leaving. RP 226-27. Rad protested, noting she was in no shape to drive and promised to stop his sexual advances. RP 227. Wright then suggested they just go to bed, to which Rad agreed. Id. They lay on his bed and Wright fell asleep, until she claims Rad got on top of her in his sweats and started "humping" her. Id. Wright said she told Rad she was leaving, not to touch her and to get away from her, then she left. Id.

Rad texted Wright the following day, stating they needed to talk. RP 229. Wright replied that they had nothing to talk about, she never wanted to see him again and that he should never contact her again. Id. Over defense counsel's foundation objection, Wright testify that Rad messaged her on Facebook accusing her of overreacting and that what had occurred was consensual. RP 229-30. When Wright disputed this claim, Rad allegedly replied that he now saw that what Wright was doing was retaliating against him for suggesting they just be friends by first seducing him and then rejecting him. RP 230. Wright responded by blocking Rad's Facebook account. RP 231.

Wright testified Rad did not contact her for the rest of April or May 2015, but that in June she got a text message on her phone asking, "how have you been," but it was from a number Wright did not recognize. A subsequent text from the same number claimed, "This is Vandad." RP 232. Wright did not reply, and got no such text again until August 2015, when she got a text from the same number as the June text that read, "Hi Diane." RP 233-34. Wright decided to block both that number and the other phone number she had for Rad. RP 234.

In September 2015, Wright recalled getting a friend request on Facebook from a different account listed under Rad's name, and with a picture of Rad she had never seen before. RP 235. Wright claimed she

ignored the request and blocked the account. RP 235. She claimed that between September 2015 and February 2016, she had five to six similar contacts on various social media platforms (e.g., Facebook, Instagram), each with pictures of Rad associated with them that Wright had never seen before. RP 235-36. She also claimed each account indicated it was "Vandad Rad" by name. RP 236.

Wright claimed Rad started using fake names for social media account to contact her in May 2016. RP 237. The first such incidence was on May 18, 2016, when Wright's sister noticed a Facebook message from Rad to their father's Facebook account, expressing regret for how he had treated Wright in the past, noting she had blocked him from contacting her on a number of platforms, and asked for advice on how to repair his relationship with Wright. RP 243-48.

Believing Rad was "going to extremes to contact me," Wright filed for a protection order against him in Pierce County Superior Court on May 26, 2016, at which time a temporary protection order was issued, and a final order of protection went into effect on June 10, 2016, after a hearing at which Rad attended and spoke at. RP 248-49, 270-71, 278-79; Ex 3 (protection order). Wright claimed Rad was supposed to be served with a copy of the protection order by law enforcement. RP 271-72.

Wright recalled that on June 6, 2016, she was waiting for a friend to come over so they could go out to dinner, when Rad unexpectedly appeared at her door. RP 272-74. When she opened her front door expecting it to be her friend, it was Rad, "smirking at me." RP 274. Wright said she exclaimed, "Oh, God damn it," slammed the door shut, locked it and called 911. Id. Wright said police arrived about five minutes later and first spoke to Rad, who was milling around across the street from her apartment when they arrived, then spoke to her. RP 275-76. She said Rad was arrested and charged with misdemeanor violation of a protection order. RP 277.

After the June 10th order was issued, Wright recalled Rad did not try to contact her again for a while. RP 280-81. Having completed her Master of Arts, Wright moved to Seattle in August 2016. RP 281. She commuted to her job as a third-grade teacher at Chief Leschi Elementary School in Puyallup. RP 282.

Wright claimed Rad starting trying to contact her again beginning on December 6, 2016. RP 284. She claimed she received message from Rad on her phone notifying her he had added her as a friend to his "Snapchat app." RP 287-88. The message stated "Vandad" under the user name "vandude83" had added Wright, and invited Wright to add him as a friend, which she declined to do. Id.; Ex. 5 (screen shot of message).

Wright claimed she received another contact from Rad on December 8, 2016, this time on an Instagram account listed under "van44444." RP 289-90; Ex. 6 (screen shots). The message claims it is from "Vandad Rad," and includes a picture of Rad. RP Ex. 6. The defense objection to Exhibit 6 for lack of relevance, authentication and foundation was overruled. RP 289-90.

The next contact Wright suspected was from Rad came on December 13, 2016. RP 292. One was from an Instagram account for "Vandad._Rad" with the same picture of Rad used in the "van44444" account, requesting to follow her. RP 293-94; Ex. 7 (screen shots). Another message that day indicated the sender was just outside Chief Leschi Elementary while Wright was inside teaching. RP 295-96.

The same account was used the following day to inform Wright, "You win. I'll stop bothering you. Have a great life." RP 297. Wright called police. Id. Later that evening the account sent Wright a message stating, "Imma keep trying. I guess the judge can send me to jail on 4th of January." RP 299. According to Wright, Rad had a court date on January 4, 2017. Id.

Wright also said she receive Facebook notices in December from a user named "Banlino Barz" with no picture. RP 301-02; Ex. 8. A message associated with that account states,

> This is Vandad Barzin Rad
>
> 12 days before Christmas, I don't know what gift to buy you yet.

RP 303; Ex. 8.

On December 24, 2016, Wright was at her parents' home in Prosser, Washington when she decided to check her Skype account. When she did, she found notification that "live:vrad132333" had tried to contact her. She assumed it was Rad. RP 304-08; Ex. 9.

Wright claimed that upon returning to Seattle from Prosser after Christmas, she received more messages from accounts she attributed to Rad because the user names were titled "Vandad Rad or had variations of the name Vandad Rad." RP 309. Some included pictures of Rad. Id. Wright claimed one of the messages said, "this is a preemptive message to the judge. You might as well send me to jail forever because I will always find this person and message her." RP 310. Another message states the sender loves Wright and is "irked" at being arrested twice. Id.

Wright testified that the unwanted messages she was receiving left her in a state of anxiety, constantly fearing Rad would appear and harm her. RP 311-12.

In cross examination, Wright admitted she was capable creating false user accounts that appeared to be associated with Rad instead of her. RP 329.

(b) *The Investigation by Police*

Seattle Police Sergeant Mary Wollum was assigned the case on December 19, 2016. RP 176. Wollum noted one of the screen shots of messages provided by Wright from her phone referenced a January 4th court date, the same date Rad had a 9 am court appearance set. RP 184-86; Ex. 4 (court docket). Wollum admitted on cross examination she never contacted the social media platforms associated with the case, nor any phone records, despite nothing preventing her from doing so. RP 189-91, 197. She offered as an excuse that no one had asked her to. RP 190.

On redirect and over a defense speculation objection, Woolum was allowed to testify that the names on the various accounts reported by Wright "were very similar" to Rad's name. RP 194, 196. When asked why she did not contact the various media companies to try and link the accounts directly to Rad, she was allowed to respond over defense objection that it was, "Because the records on her phone appeared pretty valid and consistent. . . over a period of time." RP 196-97.

(c) *Closing Arguments*

The prosecution elected in closing argument to rely only on those alleged communication from Rad to Wright that occurred between December 6 and December 28, 2016. RP 375, 379-80; see also RP 350 (during colloquy on jury instructions, prosecutor states it is the messages received by Wright between December 6 and December 28, 2016 that prove commission of the crime). The prosecution argued the jury could rely on Wright's testimony, the Pierce County protection order and the screen shot corroborating Wright's claims as a basis to find Rad guilty as charged. RP 379-92.

Defense counsel argued that what really occurred was Wright regretted the evening she spent with Rad when she drank the marijuana soda, having failed to be the "good and strong" "modern woman" society expected her to be. RP 392-95, 401. To make up for this, Wright took the view that Rad drugged her and took advantage of her. RP 395-96. Counsel also emphasized that the police investigation failed to look into the actual source of the alleged offending messages by getting cell phone records and account user information. RP 397-98.

In rebuttal, the prosecution noted defense counsel's argument that juror could have "reasonable doubt" that Rad sent the alleged offending messages, and replied that for such reasonable doubt to exist, jurors must

conclude someone else sent them. RP 410. Over defense "vouching" objection, the prosecution also claimed that to find reasonable doubt, jurors had to conclude Wright was "not credible." RP 413.

C. ARGUMENTS

1. RAD WAS DENIED A FAIR TRIAL BECAUSE THE PROSECUTION WAS ALLOWED TO INTRODUCE SOCIAL MEDIA MESSAGES ALLEGED TO HAVE BEEN SENT FROM RAD WITHOUT PROPER AUTHENTICATION.

As electronic communication replaces more traditional forms, courts are forced to grapple with applying traditional rules of authentication to modern technology. The ease in which electronic communication may be fraudulently created requires courts to carefully review authorship prior to their admission. Here, the trial court failed to require sufficient authentication before admitting the screen shots depicted in exhibits 5, 6, 7, 8 & 9. Because Rad was prejudice by this failure, reversal is required.

a. Authentication is required to prevent fraud and assure evidence is what it purports to be.

"Authentication is a threshold requirement designed to assure that evidence is what it purports to be." State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003). To satisfy the requirements for authentication under ER 901, the proponent of the evidence must introduce sufficient proof to

permit a reasonable fact-finder to find in favor of authenticity or identification. Id. Thus, the evidence must support a finding that the evidence in question is what the proponent claims it to be. Id. A court's admission of evidence is reviewed for abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

While ER 901 does not address social media, it does examine email messages, which is a similar form of electronic communication. ER 901(b)(10). For email messages, it requires:

> Testimony by a person with knowledge that (i) the e-mail purports to be authored or created by the particular sender or the sender's agent; (ii) the e-mail purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

ER 901 (b) (10).

Because social media and electronic messaging are relatively new forms of communication, few courts have examined how they should be authenticated. See e.g., In re Detention of H.N., 188 Wn. App. 744, 751, 355 P.3d 294 (2015). However, electronic communications are essentially documents and should be subject to the same requirements for authenticity as non-electronic documents. Documents may be authenticated by direct proof, such as the testimony of a witness who saw the author sign the

document, acknowledgment of execution by the signer, admission of authenticity by an adverse party, or proof that the document or its signature is in the purported author's handwriting. See Com. v. Koch, 2011 PA Super 201, 39 A.3d 996, 1004 (2011) (citing McCormick on Evidence, §§ 219–221 (E. Cleary 2d Ed.1972)).

Courts have imposed a heavier burden of authentication on messaging and social network postings because of the increased dangers of falsehood and fraud. Judge Alan Pendleton, *Admissibility of Electronic Evidence A New Evidentiary Frontier*, Bench & B. Minn., October 2013, at 14, 16. In fact, courts have been wary of admitting social network messages in to evidence, recognizing the potential for access by hackers. See State v. Eleck, 130 Conn. App. 632, 638-39, 23 A.3d 818, 822 (2011) aff'd on other grounds, 314 Conn. 123, 100 A.3d 817 (2014) (The need for authentication arises because electronic communications, such as a Facebook message, e-mail or a cell phone text message, could be generated by someone other than the named sender). Proving only that a message came from a particular account, without further authenticating evidence, is inadequate proof of authorship. See, e.g., Commonwealth v. Williams, 456 Mass. 857, 869, 926 N.E.2d 1162 (2010) (admission of message was error where proponent advanced no circumstantial evidence as to security of page or purported author's exclusive access).

Maryland courts have suggested authentication may be perfected when the proponent of a document is able to search the device owned by the purported author for history and stored documents or by seeking authenticating information from the commercial host of the e-mail, cell phone messaging or social networking account. Griffin v. State, 419 Md. 343, 363–64, 19 A.3d 415 (2011). A New York court found messages to be authenticated where the police retrieved the records from the victim's hard drive and had an employee of the company which owned the messaging service verify the defendant had created the sending account. People v. Clevenstine, 68 A.D.3d 1448, 1450–51, 891 N.Y.S.2d 511 (2009) appeal denied, 14 N.Y.3d 799, 899 N.Y.S.2d 133, 925 N.E.2d 937 (2010).

In other jurisdiction where messages have been held authenticated, the identifying characteristics have been distinctive of the purported author and corroborated by other events or with forensic computer evidence. See, e.g., State v. John L., 85 Conn. App. 291, 298-302, 856 A.2d 1032 (2004); see also United States v. Siddiqui, 235 F.3d 1318, 1322–23 (11th Cir.2000), cert. denied, 533 U.S. 940, 121 S.Ct. 2573, 150 L.Ed.2d 737 (2001) (e-mails authenticated not only by defendant's e-mail address but also by inclusion of factual details known to defendant that were corroborated by telephone conversations); United States v. Tank, 200

F.3d 627, 630–31 (9th Cir. 2000) (author of chat room message identified when he showed up at arranged meeting); United States v. Safavian, 435 F. Supp.2d 36, 40 (D.D.C. 2006) (e-mail messages authenticated by distinctive content including discussions of various identifiable personal and professional matters); Dickens v. State, 175 Md. App. 231, 237–41, 927 A.2d 32 (2007) (threatening text messages received by victim on cell phone contained details few people would know and were sent from phone in defendant's possession at the time); State v. Taylor, 178 N.C.App. 395, 412–15, 632 S.E.2d 218 (2006) (text messages authenticated by expert testimony about logistics for text message receipt and storage and messages contained distinctive content, including description of the car the victim was driving); In re F.P., 2005 PA Super 220, 878 A.2d 91, 93 95 (2005) (instant electronic messages authenticated by distinctive content including author's reference to self by name, reference to surrounding circumstances and threats contained in messages that were corroborated by subsequent actions); Massimo v. State, 144 S.W.3d 210, 215–17 (Tex.App.2004) (e-mails authenticated where e-mails discussed things only victim, defendant, and few others knew and written in way defendant would communicate). *Compare* Griffin, 419 Md. at 347–48 (admission of MySpace pages was reversible error where proponent advanced no circumstantial evidence of authorship).

For electronic communication like text messaging, Washington has followed the heightened requirements for authentication. See State v. Bradford, 175 Wn. App. 912, 929-30, 308 P.3d 736 (2013). In Bradford, the court found sufficient authentication only where the witnesses testified they had received the text messages and where the State established sufficient corroborating evidence to connect the defendant to the messages, which included corroboration of the content and the defendant's ability to send the text messages. Id. In In Re Det. of H.N., the court acknowledged the significance of the sender's admission that the text messages had been sent by her, the identifying information in the text message, the content of the text messages and that the text messages were consistent with the time line of certain events in H.N.'s life. H.N., 188 Wn. App. at 758.[2]

b. The State failed to authenticate the social media messages depicted in Exhibits 5, 6, 7, 8, & 9.

Exhibits 5, 6, 7, 8, & 9 consists of screen shots Wright claimed she took from her cellphone and turned over to police whenever she received a

[2] The only other published case to address electronic communication in Washington appears to be State v. Young, 192 Wn. App. 850, 369 P.3d 205, 209 (2016). In Young, the trial court was found to have not abused its discretion in finding social media messages were authenticated based on evidence of personal knowledge about the sender coupled with message content and subsequent or preceding corroborating activities. 192 Wn. App. at 856-58.

message she believed was from Rad, and each was admitted over defense objection based on lack of authentication, relevance, hearsay and foundation. RP 237, 285-86, 289-90, 292-93, 301-02, 307. The State conceded it never attempted to subpoena or otherwise obtain from cell phone service providers, Snapchat, Facebook, Instagram, or Skype the ownership records for the account information and identity of the senders, although it admitted it could have. RP 189-90, 410.

In addition to trial objections, defense counsel also filed a motion in limine seeking to "exclude social media testimony per ER 901." CP 38-40. The trial court held that "screenshots of social media or other electronic communications will be admissible if sufficient evidence is presented to establish their relevance and that they are what they purport to be." RP 45. In further discussions the court indicated that if the message at issue contained Rad's name, that would be sufficient for admissibility. RP 48.

When defense counsel re-raised the issue at the pretrial hearing, she pointed out how easy it is to impersonate others through social media platforms, and that absent distinctive content or confirmation of account information, it is difficult to identify who sent a particular message. RP 59-61. The trial court responded by stating that those messages "that have Mr. Rad's name on them, or some version that looks like the name, there

is likely to be enough information to establish that it is that what it purports to be." RP 62. Defense counsel expressed her disagreement with the court's legal conclusion in this regard, and during the course of trial, defense objections to the admission of the social media screen shots depicted in exhibits 5, 6, 7, 8, & 9 were overruled. RP 237, 285-86, 289-90, 292-93, 301-02, 307. In each instance, Wright's reference to Rad's name in the screen shot, or an apparent variation on his names, was sufficient for the court to find them admissible. Id.

Authentication of digital media such as social media messages requires more than testimony that the witness looked at a page and saw a person's photograph or other personal information on it. At a minimum, there should be corroboration from a witness familiar with the particular account who can testify regarding ownership. See, e.g., Bradford, 175 Wn. App. at 929-30 (more than just a name or a picture required). Additionally, a page can be authenticated through statements made by the owner of the page, which are corroborated by real time events. See H.N., 188 Wn. App. at 758.

Here, there was insufficient corroboration to conclude the social media screen shots in exhibits 5 through 9 came from Rad. All the State presented was Rad's name in some and his picture in others. The court erred in allowing Wright to testify they were from Rad because she had no

basis to do so beyond speculating that because his name and/or picture appeared with the message, Rad must have sent them. More information was needed to authenticate the screen shots as coming from Rad. None of them contained distinctive content and none were corroborated by other events or with forensic computer evidence.

In contrast, the content of the Facebook post sent to Wright's father's Facebook account in May 2016 may have been adequate to authenticate that message as coming from Rad and therefore may have been properly admitted because it discussed in intimate detail the past relationship between Rad and Wright. See Safavian, 435 F. Supp.2d at 40 (e-mail messages authenticated by distinctive content); In re F.P., 878 A.2d at 93, 95 (instant electronic messages authenticated by distinctive content). But it was not a message sent within the charging period of June 10, 1016 and December 28, 2016. CP 1.

If fact, none of the messages the prosecution relied on to convict, all from December 2016, were sufficiently authenticated to be admissible. The trial court erred in overruling the defense objections to these exhibits and admitting them into evidence along with Wright's associated testimony about them.

c. The error was not harmless.

The error in allowing testimony and exhibits regarding the social media messages was not harmless. The exhibits and testimony unfairly allowed the prosecution to link Rad to the messages Wright claimed were sent in violation of the June 2016 protection order, and which allegedly put her in fear of physical harm. Absent this evidence, there is no basis to convict Rad of stalking because it was the only evidence the prosecution elected to proceed with in asking the jury to convict. RP 375, 379-80.

Because the error in allowing the jury to hear the testimony and view the exhibits of the social media messages was not harmless, reversal is required.

2. IN THE ABSENCE OF EXHIBITS 5, 6, 7, 8, & 9, THE EVIDENCE IS INSUFFICENT TO CONVICT RAD OF FELONY STALKING.

Due process requires the prosecution to prove every element of a charged offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). This Court will reverse a conviction when, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could find all elements of the charged crime were proved beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Id. at 16. Such inferences must

"logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption." Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

There are two alternative means of committing stalking: repeatedly harassing or repeatedly following another person. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Here, the State elected to proceed only on the repeatedly harassing[3] alternative, as indicated in the to-convict instruction, which provides;

> (1) That between June 10-December 28, 2016, the defendant intentionally and repeatedly harassed Diane Wright;
>
> (2) That Diane Wright was placed in reasonable fear that the defendant intended to injure her;
>
> (3) That the feeling of fear was one that a reasonable person in the same situation would experience under all the circumstances;
>
> (4) That the defendant
>
> (a) intended to frighten, intimidate, or harass Diane Wright; or

[3] "Harasses" means "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose." RCW 10.14.020(2); RCW 9A.46.110(6)(c). "The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner." RCW 10.14.020(2). "Substantial" means "'considerable in amount, value, or worth.'" State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (2002)).

> (b) knew or reasonably should have known that Diane Wright was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or to intimidate or harass her;
>
> (5) That the defendant acted without legal authority;
>
> (6) That the defendant's acts were in violation of a protective order protecting Diane Wright; and
>
> (7) That any of the defendant's acts occurred in the State of Washington.

CP 110 (Instruction 8); see also RCW 9A.46.110(5)(b); RP 375, 379-80 (prosecutor's closing discussing only the "repeatedly harass" prong). The jury was further instructed that it "need not be unanimous as to which of alternatives (4)(a) or (4)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt." CP 111.

The prosecution also elected to prosecute Rad for felony stalking based solely on his alleged contact with Wright in December 2016. RP 375, 379-80. The only evidence of such alleged contact, however, was in the form of exhibits 5, 6, 7, 8, & 9, and Wright's associated testimony in which she unfairly assumes the contacts are from Rad. RP 284-311. As discussed in §C.1. supra, the court erred in admitting these exhibits and Wright's associated testimony because the social media messages depicted in the exhibits were never properly authenticated as coming from Rad. When that

improperly admitted evidence is disregarded, there is no evidence of any harassment of Wright by Rad in December 2016, much less "repeatedly" or in violation of a protection order. In the absence of competent evidence to the contrary, this Court must reverse and dismiss the prosecution. Vasquez, 178 Wn.2d at 18.

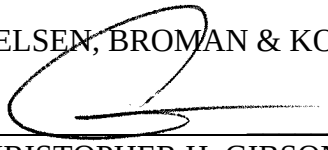
D. CONCLUSION

For the reason's stated, this Court should reverse Rad's judgment and sentence and dismiss the prosecution.

DATED this 13 day of April 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VANDAD RAD,

Appellant.

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

THE HONORABLE HOLLIS R. HILL, JUDGE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Other Jurisdictions:

Rules and Regulations

Federal:

Washington State:

Other:

Other Authorities

A. ISSUE PRESENTED

Did the State provide sufficient information for a reasonable fact finder to determine that electronic messages sent by Rad were what they purported to be?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Vandad Rad with one count of domestic violence felony stalking. CP 1. The jury convicted Rad of felony stalking, but did not find domestic violence. CP 98, 123. The court sentenced Rad within the standard range. CP 127-30. Rad timely appeals.

2. SUBSTANTIVE FACTS

D.W. lives in Seattle and works as an elementary school teacher. RP 199, 202.[1] Interested in finding a romantic partner, D.W. began using Tinder, a digital dating application. RP 202-03.[2] Around February 2015, D.W. connected with Rad on Tinder. RP 206. D.W. gave Rad her phone number and agreed to meet him for a date. RP 207-08. After an

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[1] The verbatim report of the proceedings in this case consists of eight consecutively paginated volumes, hereinafter referenced as "RP ___."

[2] A person creates a Tinder profile by inputting a photograph and some basic personal information. RP 203-04. Once a profile is active, other Tinder users can review it and attempt to establish a connection. RP 203-04. The program does not permit contact between individuals unless and until both have expressed interest in each other. RP 204. Communication through the program is text-based. RP 205. If the parties feel the relationship is worth pursuing, they can exchange phone numbers or arrange to meet. RP 205-06.

uninspiring dinner, D.W. was unsure if she wanted to see Rad again, but continued to occasionally message him. RP 208-09. D.W. told Rad she was no longer interested in seeing him after deciding she did not like him. RP 209-10.

For the next month, there was no further communication between them. RP 210. In March 2015, Rad sent D.W. a "friend request"[3] on Facebook. RP 211.[4] D.W. remained uninterested in Rad as a dating partner, and did not accept the request. RP 212. However, D.W. later decided to text Rad because she felt her rejection might have been too harsh. RP 212-13.[5] D.W. agreed to see Rad later that day, although they intended to meet only as friends. RP 213.

After meeting with Rad, D.W. hesitantly agreed to a second date, which occurred a week later. RP 214-16. After the date, she acquiesced to kissing Rad, despite feeling uncomfortable and still lacking romantic interest. RP 216. D.W. nonetheless decided to be friends with Rad, as she did not know many people in the area and found him adequately congenial. RP 216-17. She belatedly connected with him on Facebook.

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[3] Using Facebook's privacy controls, D.W. had restricted the general public's access to the information on her profile. RP 211-12. By sending a "friend request," Rad was asking to link their profiles together, which would allow him full access to any content she posted. RP 212.

[4] The profile bore Rad's name and photograph. RP 211.

[5] Rad acknowledged sending the "friend request," but denied seeking her out on Facebook, claiming the site had suggested they connect. RP 213.

RP 217. After Rad agreed they would be platonic friends, D.W. met with him a few more times. RP 217-18.[6]

One of these meetings occurred in April 2015. RP 218. While eating and watching TV at Rad's apartment, D.W. accepted what Rad told her was a marijuana-infused soda. RP 219-21.[7] After drinking the soda, D.W. felt "loopy" and not "fully aware of [her] thoughts" RP 222.[8] D.W. felt sick and laid down on Rad's couch. RP 223. Rad turned on loud music, crawled on top of D.W., and began kissing her. RP 223. Although she initially acquiesced, D.W. soon told Rad she "[didn't] want to do this." RP 223-24. Instead of pausing, Rad removed D.W.'s pants and underwear, ignoring her pleas of "stop" and "don't do that." RP 224. Rad then performed oral sex on D.W., continuing to ignore her demands to stop. RP 224-25. D.W. tried to pull her pants back on, but was unsuccessful. RP 225. Rad was acting "really aggressive," and D.W. was afraid he might do something "crazy" if she pushed him away. RP 225. When Rad completely disrobed, D.W. told him in no uncertain terms that he would be raping her. RP 225.[9] Rad refrained from penetration, but returned to

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[6] D.W. told Rad that she was "[v]ery relieved" that he agreed to just be friends. RP 217.

[7] Rad had already been smoking marijuana, but D.W. had declined to partake. RP 219.

[8] D.W. was familiar with the effects of marijuana from past use, but had never experienced these symptoms before. RP 219, 222.

[9] Rad claimed to be surprised by this statement, but apparently not enough to stop performing sexual acts against D.W.'s will. RP 225-26.

performing oral sex on D.W. RP 226. Rad had D.W. pinned to the couch, and she felt scared and disoriented. RP 226.[10]

D.W. eventually convinced Rad that she needed to use the bathroom, where she cried and took the opportunity to dress herself. RP 226. D.W. attempted to leave, but Rad insisted that she could not safely drive, which D.W. herself also believed. RP 226-27. Rad promised that if she stayed, he would let her sleep unmolested. RP 227. D.W. fell asleep in Rad's bed, but woke up to Rad "humping" her. RP 227, 322. Upset by the deception, D.W. fled the apartment. RP 227.

The next day, Rad reached out to D.W. via text. RP 229. D.W. asked Rad never to contact her again. RP 229. Rad nevertheless messaged D.W. on Facebook later that day, accusing her of over-reacting. RP 229-30. D.W. again told Rad to stop contacting her. RP 230. Rad insisted any sexual contact was consensual. RP 230-31. When D.W. told him it was not, Rad became angry, and accused D.W. of seducing him solely to reject him. RP 230-31. D.W. again demanded that Rad never speak to her again, and blocked him on Facebook. RP 231.[11]

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[10] While Rad was performing these acts, he was also "talking a lot," which D.W. described as "ranting." RP 226.

[11] When an individual "blocks" someone on Facebook, they can no longer see or contact the blocked profile, nor can that user see or contact them. RP 231.

Approximately one month later in June 2015, D.W. received a text message asking "how have you been." RP 232. Although the number was unfamiliar to D.W., the sender admitted to being Rad. RP 232-33. D.W. ignored the messages. RP 233. D.W. received another text message in August 2015, but again ignored it. RP 233-34. Feeling unsettled by this contact, D.W. blocked both of Rad's known phone numbers. RP 234.

In September 2015, D.W. received another Facebook "friend request" from Rad. RP 235. Although D.W. had previously "blocked" Rad, he had created a separate account to circumvent the restriction. RP 235. D.W. did not respond to the request, and blocked Rad's new account. RP 235. Over the next several months, D.W. received 5-6 additional friend requests from Rad on various social media platforms, each bearing Rad's name or photograph. RP 235-36. D.W. did not accept any of these requests, but saved images of them to document what was occurring. RP 237.

D.W. sought advice from a personal friend who happened to be an attorney. RP 237-38. They drafted a formal letter on the attorney's office stationary admonishing Rad to stop contacting D.W. RP 239-40. The letter stated that D.W. would seek a protection order if necessary. RP 239-42.

After D.W. helped draft the letter, contacts from Rad ceased for a few months. RP 241.[12]

In May 2016, Rad sent a Facebook message to D.W.'s father. RP 243-44. The message stated Rad's continuing romantic interest in D.W., and sought her father's advice "as to how I may be able to reconnect to her … [and] better understand the state of her feelings." RP 246-48.[13] D.W. felt "violated" that Rad was contacting her family. RP 248. D.W. was constantly afraid of being confronted by Rad in public, and anxious that Rad might show up at her door. RP 250. D.W. felt she could no longer go out alone. RP 250. D.W. decided to seek a protection order from the court. RP 248-49.

Before the petition was completed, Rad resumed direct social media contact with D.W. RP 251-52, 268.[14] In a rambling message from late May 2016, Rad remarked that his feelings for D.W. were "permanent," and that D.W. needed to forgive him for being "weird, and overt, and aggressive," which was "just a byproduct of [his] realness." RP

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[12] The attorney friend did not testify at trial, and the State was unable to present testimony that the letter was actually placed in the mail. RP 56-57. The Court declined to admit the letter itself into evidence based on Rad's hearsay and confrontation objections. RP 259.

[13] The message itself was admitted as Exhibit 11. RP 245.

[14] Some messages used the name "Vondod Pwrsyrs," but the conversations referred to things only Rad would know about. RP 251.

255-56.[15] Rad told D.W. that she did not know his "entire perspective, and with time I know that I know you." RP 256. Rad stated that he was "enamored, obsessed, and addicted" to D.W. RP 257. Rad told D.W. she was his "fantasy wife," and that he was "jealous" of anyone else who got to look at and talk to her. RP 258. Shortly after these messages were received, the court issued a temporary protection order and scheduled a full hearing. RP 271.

A few days after the temporary order was issued, D.W. heard a knock at her door while home alone. RP 273. D.W. opened the door without looking first because she was expecting company. RP 273-74. Instead of her friend, she found Rad on her doorstep, "smirking" at her. RP 274. D.W. slammed the door and called 911. RP 274. While D.W. spoke with the 911 operator, Rad walked across the street and paced on the sidewalk. RP 275. At one point, D.W. saw Rad punching a telephone pole. RP 276. The police arrived within a few minutes and arrested Rad. RP 277. Shortly afterward, the court granted D.W. a permanent protection order. RP 279. Rad was present at the hearing and addressed the court. RP 278-79.

Despite the order, D.W. remained fearful. RP 280. She changed apartments so Rad would not know where she lived. RP 281.

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[15] These messages were admitted as Exhibit 12. RP 253.

Approximately six months passed without any contact. RP 280-84. However, in December 2016, Rad again made repeated attempts to contact D.W. on social media from various accounts. RP 284-94. The attempts came from various accounts bearing some obvious iteration of Rad's name, his photograph, or both. RP 284-91. On one occasion, Rad sent D.W. a screenshot of GPS coordinates showing that he was parked outside the elementary school where D.W. taught. RP 296-97.[16]

Rad sent D.W. another message saying "[y]ou win. I'll stop bothering you. Have a great life." RP 298. However, that same evening, D.W. received another message from Rad stating: "Imma [sic] keep trying. I guess the judge can send me to jail on 4th of January." RP 299. D.W. was aware that Rad had a court date on January 4th for the prior protection order violation. RP 299. Rad then sent another message to D.W. about buying her Christmas presents. RP 303.[17] When D.W. logged into her Skype account to call her sister she found that Rad had tried to contact her on that platform as well. RP 304-06.

Rad continued to pepper D.W. with repeated messages and friend requests from different accounts bearing his name and photograph. RP

---

[16] D.W. believed Rad deduced her place of employment through internet searches. RP 53. However, the trial court excluded this evidence as speculative. RP 53.

[17] The name on the account was "Vanlino Bars." RP 302. This appeared to be a play on Rad's middle name: Barzin. RP 302. In any event, Rad admitted that the account was his in a subsequent message. RP 303.

309-10. One message stated a judge "might as well send me to jail forever because I will always find this person and message her." RP 310. D.W. lived in a "horrible state of anxiety and fear." RP 311. D.W. had to teach with the classroom door locked, and the school's campus resource officer escorted her to and from the parking lot. RP 311.

Police officers were dispatched on multiple occasions to take reports from D.W. after she received messages from Rad. RP 134, 138, 150, 163, 168, 297, 299-300, 304. D.W. provided police with screenshots of Rad's messages to her. RP 138, 140, 151, 163, 297, 299-300, 304. On one occasion, Officer Fritsch observed that D.W. was crying and shaking while reporting contact from Rad. RP 141-42.

C. LEGAL ARGUMENT

1. THE SOCIAL MEDIA MESSAGES WERE ADEQUATELY AUTHENTICATED.

Rad argues that evidence of his social media contact with D.W. was not properly authenticated. Rad is mistaken. The State provided sufficient contextual information to support a *prima facie* case that the messages were what they purported to be. Furthermore, there is no heightened evidentiary standard for digital evidence, as Rad suggests. This Court should continue to analyze the authenticity of digital evidence under ER 901.

Evidence of authentication is sufficient when it supports a *prima facie* showing that "the matter in question is what its proponent claims." In re Detention of H.N., 188 Wn. App. 744, 751, 355 P.3d 294 (2015); ER 901(a). ER 901 provides an illustrative, non-exclusive list of satisfactory authentication methods. This list includes:

> Testimony of Witness with Knowledge. Testimony that a matter is what it is claimed to be.
>
> ...
>
> Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.[18]
>
> ...
>
> Electronic mail (E-mail). Testimony by a person with knowledge that (i) the e-mail purports to be authored or created by the particular sender or the sender's agent, (ii) the e-mail purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.[19]

ER 901(b).

Because authentication is a threshold inquiry, corroborating facts need not be independently admissible. State v. Williams, 136 Wn. App.

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[18] In other words, authenticity can be determined through circumstantial evidence. State v. Payne, 117 Wn. App. 99, 109, 69 P.3d 889 (2003).

[19] Rad argues that ER 901 "requires" these factors. Brief of App. at 15. This is incorrect. The rule expressly states that its enumerated methods of proof are listed "[b]y way of illustration only, and not by way of limitation." ER 901(b). The test is just one potential method of authenticating an e-mail. Karl Tegland, Courtroom Handbook on Washington Evidence, 475 (2017-18 ed.) ("The amendment is referred to as a *suggested* way because the new procedure is not mandatory. The new procedure is added to a long list of ways in which various kinds of evidence can be authenticated . . .") (emphasis original).

486, 500, 150 P.3d 111 (2007); ER 104(a). The trial court can consider any reliable information, and is not bound by the Rules of Evidence. Williams, 136 Wn. App. at 500.[20] When ruling on authenticity, the court considers only the proponent's information, and does not consider contrary evidence offered by an adverse party. H.N., 188 Wn. App. at 751. The court is not required to rule out the possibility of fraud in order to find evidence authenticated. Id. at 751. Once a threshold finding of admissibility is made, any further question of authenticity is resolved by the jury. H.N., 188 Wn. App. at 752; see State v. Young, 192 Wn. App. 850, 857, 369 P.3d 205 (2016) (contrary evidence goes to the weight of evidence, not admissibility).

The requirements of ER 901 are ultimately satisfied if the proponent's information permits a "reasonable trier of fact" to find the evidence authenticated. State v. Bradford, 175 Wn. App. 912, 928, 308 P.3d 736 (2013). Authentication is a low burden to admissibility. Karl Tegland, Courtroom Handbook on Washington Evidence, 465 (2017-18 ed.) ("The requirement of authentication or identification is easily satisfied in most situations. The applicable rules are designed only to assure that the evidence meets minimum requirements for relevance.").

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[20] The court may rely on, among other things: hearsay, lay opinions, or the proffered evidence itself. Williams, 136 Wn. App. at 500.

A court's rulings on authentication are reviewed for abuse of discretion. Williams, 136 Wn. App. at 499. A court abuses its discretion when its rulings are "manifestly unreasonable," or based on untenable grounds. Id.

a. This Court Should Apply A Straightforward ER 901 Analysis. There Is No Heightened Standard Of Admissibility For Electronic Communications.

While the current rules of evidence do not specifically address communication through social media platforms, ER 901 is flexible enough to allow for review of emerging technologies. See H.N., 188 Wn. App. at 752 ("The current version of ER 901(b) does not specifically address text messages. Nevertheless, these illustrative examples provide proper bases for the trial court's determination in this case.").

Citing State v. Bradford, 175 Wn. App. 912, 929-30, 308 P.3d 736 (2013), Rad argues that Washington has "heightened requirements" for the authentication of electronic messages.[21] However, nothing in the Bradford opinion suggests this to be the case.

Bradford was also a felony stalking prosecution, where the State relied in part on the defendant's phone contact with the victim. Id. at 916-21. The defendant's text messages were found properly authenticated

[21] Brief of App. at 19.

through: (1) evidence that Bradford had been repeatedly trying to contact the victim by phone and in person,[22] (2) the content of the messages being consistent with his obsessive and threatening behavior, and (3) evidence that the messages ceased while Bradford was in custody. Id. at 929-30. Bradford conducted its analysis of authenticity entirely within the normal confines of ER 901. Id. at 927-30 ("The State properly authenticated the evidence of Bradford's text messages pursuant to ER 901(a)."). While the Bradford Court found the facts in that case sufficient, it did not suggest that they represented a standard applicable to other cases.

As further support, Rad cites H.N., 188 Wn. App. at 750-61, which also contains a significant analysis of electronic authentication.[23] But H.N. relied on a straightforward application of ER 901 as well. Id. ("In sum, the requirements of ER 901(b)(1) are satisfied by analogy.").

In short, there is no support in Washington law for the application of any heightened evidentiary standard. After Bradford and H.N., authentication of electronic communications continues to be a fact-based inquiry controlled by ER 901.

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[22] "It was consistent with this obsessive behavior that [Bradford] would also send text messages to Smith as part of his efforts to contact Vilayphone." Bradford, 175 Wn. App. at 929.

[23] In that case, the analysis concerned e-mailed screenshots of text messages. H.N., 188 Wn. App. at 750.

Several other jurisdictions have concluded that their respective ER 901 analogs are capable of administering social media evidence. The analysis of the Pennsylvania Superior Court[24] is particularly apt:

> Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages. The argument is that e-mails or text messages are inherently unreliable because of their relative anonymity and the fact that while an electronic message can be traced to a particular computer, it can rarely be connected to a specific author with any certainty. Unless the purported author is actually witnessed sending the e-mail, there is always the possibility it is not from whom it claims. As appellant correctly points out, anybody with the right password can gain access to another's e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa. R.E. 901[25] and Pennsylvania case law. We see no justification for constructing unique rules of admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity.

In re F.P., 878 A.2d 91, 95-96, 2005 PA Super 220 (Pennsylvania 2005) (internal citation omitted).[26] See also State v. Eleck, 130 Conn. App. 632,

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[24] The "Superior Court" of Pennsylvania is an intermediate appellate court that appears equivalent to our Court of Appeals. The Superior Court of Pennsylvania, http://www.pacourts.us/courts/superior-court/ (last accessed May 10, 2018).

[25] Pennsylvania's evidence rule 901 is similar, although not identical, to Washington's ER 901.

[26] In the recent case of Commonwealth v. Mangel, __ A.3d __, 2018 PA Super 57 (Pennsylvania 2018), the Pennsylvania Superior Court, while acknowledging the potential for fraud in social media messages, adhered to its earlier reasoning in F.P.

640, 23 A.3d 818 (Connecticut 2011) ("We agree that the emergence of social media such as e-mail, text messaging, and networking sites like Facebook may not require the creation of new rules of authentication with respect to authorship."); Tienda v. State, 358 S.W.3d 633, 640 (Texas 2012) ("Like our own courts of appeals here in Texas, jurisdictions across the country have recognized that electronic evidence may be authenticated in a number of different ways consistent with Federal Rule 901 and its various state analogs."); United States v. Browne, 834 F.3d 403, 411-15 (3rd Cir. 2016) (Noting that while social media evidence can be easily falsified "the authentication rules do not lose their logical or legal force as a result.").

The authority to create rules of evidence resides with the Supreme Court and the legislature. State v. Scherner, 153 Wn. App. 621, 643, 225 P.3d 248 (2009); GR 9. The addition of electronic mail to ER 901 demonstrates that these bodies see the existing rule as a competent framework for digital evidence. This Court should decline Rad's invitation to create a heightened standard of authentication.

("Nevertheless, social media records and communications can be properly authenticated within the existing framework of Pa. R.E. 901 . . .).

b. Facts Regarding The Challenged Exhibits.

Rad specifically challenges the authentication of Exhibits 5, 6, 7, 8, and 9.[27] Although the charging period began on June 10, 2016, the prosecutor elected to rely on communications between December 6 and December 28, 2016 to prove the charge.[28] CP 83; RP 350, 375. Thus, the conviction relied on the authenticity of the challenged exhibits.

In order to address this issue, it is first necessary to review the underlying factual bases for authentication:

i. Exhibit Five

Exhibit Five is a photograph showing an individual request to connect with D.W. on Snapchat, a social media service. Ex. 5. The sender of the request is listed as both "Vandad" and "Vandude83." Ex. 5. D.W. received the messages on December 6, 2016. RP 286.

ii. Exhibit Six

Exhibit 6 is a request from "Vandad Rad," username "@van44444," to connect with D.W. on the social media platform

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[27] Brief of App. at 14.

[28] "Really the evidence that the State is arguing proves the crime beyond a reasonable doubt are the messages that were received between December 6 and December 28." RP 350.

"The evidence in this case proves beyond a reasonable doubt that Mr. Rad intentionally and repeatedly harassed [D.W.] over social media during the charging period of June 10 to December 28, 2016. And specifically the messages that you are going to consider when you deliberate are the ones that you [sic] receive between December 6 and December 28. Those are the messages to focus on." RP 375.

Instagram. Ex. 6. The request was made on December 8, 2016. Ex. 6; RP 289. The request includes a photograph of Rad. RP 291.[29] The message notes that "van44444" lives at 4944 North Lexington Street in Ruston, Washington. Ex. 6. D.W. recognized this is as Rad's address. RP 267, 291.

iii. Exhibit Seven

Exhibit Seven is a message received by D.W. on December 13, 2016. Ex. 7. The message originated from another account belonging to "Vandad Rad," with a username of "@vandad._rad)." Ex. 7. The request contains a photograph of Rad. Ex. 7; RP 293. Accompanying the picture is text stating "New duck flannelz," and a "kissy emoji."[30] Ex. 7; RP 295. The user also sent a photograph of GPS coordinates. RP 296. The coordinates indicated that the user's vehicle was parked outside the school where D.W. taught. Ex. 7; RP 296. The image is accompanied by text messages where Rad asks if he can drive D.W. home. Ex. 7.

On December 14, 2016, Rad sent additional messages through the same account. Rad first says "You win. I'll stop bothering you. Have a great life." Ex. 7. D.W. was clear that nobody else besides Rad had been

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[29] The exhibits in the appellate record have been photocopied. The photocopying process appears to have reduced the photographs to indistinct blackness. D.W. identified Rad's photograph from the trial exhibit, which was apparently a higher quality duplicate. RP 291.

[30] An "emoji" is a pictogram showing a small cartoon that expresses some type of emotion. The emoji can be sent as shorthand for how the sender is feeling. The meaning behind a "kissy" emoji is self-explanatory.

"bothering" her during that time period. RP 298. Later that day, Rad sent a message stating: "Ima keep trying . . . I guess the judge can send me to jail on 4th of January." Ex. 7. The State presented evidence that Rad had a court date on January 4, 2017 related to his earlier violation of D.W.'s protection order. RP 185-86, 299.

iv. Exhibit Eight

Exhibit Eight was sent to D.W. through Facebook around December 12-13, 2016. Ex. 8; RP 300. The sender's username was "Banlino Barz." Ex. 7. D.W. knew Rad's middle name was "Barzin." RP 302. The sender attempted to call D.W. over Facebook, and then sent a text message identifying himself as "Vandad Barzin Rad." Ex. 7. Rad stated "12 days before Christmas, I don't know what gift to buy to you yet." Ex. 7; RP 303.

v. Exhibit Nine

Exhibit Nine is comprised of screenshots from D.W.'s Skype messenger account. When D.W. logged into her account on December 24, 2016, she discovered that "Vandad Rad," username "vrad132333," had attempted to contact her twice. Ex. 9. Rad had also attempted to call D.W. on December 12, 2016. Ex. 9; RP 308.

c. Exhibits 5-9 Were Accompanied By A Significant Amount Of Corroborating Evidence.

That the State chose to rely on the December contacts to prove the charge does not limit the use of other evidence to authenticate those messages. Williams, 136 Wn. App. at 500. Courts can consider even inadmissible evidence as corroboration, so long as it is otherwise reliable. Id. Appellate review is not constrained by the trial judge's reasoning, and this Court may affirm on any basis supported by the record.[31] State v. Streepy, 199 Wn. App. 487, 497, 400 P.3d 339 (2017); State v. Byrd, 110 Wn. App. 259, 264, 39 P.3d 1010 (2002).

Rad and D.W. briefly engaged in a dating relationship. RP 206-18. In the course of that relationship, Rad became aware of D.W.'s phone number and home address. RP 208, 272-77. Despite D.W. disavowing any romantic interest in Rad, he plied D.W. with marijuana and sexually assaulted her. RP 218-28.[32] After this event, Rad contacted D.W. through Facebook and spoke expressly about the incident. RP 230-31. It is not plausible that any person but Rad wrote about this private sexual

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[31] The trial court followed the letter of ER 901, stating it would admit electronic communications if evidence connected them to Rad, and showed that they "appear to be what they purport to be." RP 45. The trial court suggested that, in the context of this case, Rad's name on an attempt to contact D.W. would be sufficient for admissibility. RP 62-63. However, the court also referenced other circumstantial evidence, such as the longer messages from Rad that reference private events between him and D.W. RP 62-63.

[32] The testimony implied that Rad may have drugged D.W. However, the State acknowledges that no forensic evidence was available to substantiate this theory.

encounter. The messages also showed that Rad was willing and able to pursue D.W. on social media.

Rad then attempted to contact D.W. by sending text messages from a new number. RP 232. Rad identified himself as the sender. RP 232. The messages were independently innocuous,[33] but consistent with Rad's ongoing attempts to associate with D.W. RP 232-34. Several months later, there were 5-6 different attempts to connect with D.W. on multiple social media platforms. RP 235. Each profile identified itself as belonging to Rad and contained Rad's photograph. RP 235-56. Again, while each contact may not have been individually material, they aggregated to a significant showing of Rad's continuing efforts to re-establish contact with D.W.

Rad then sent a Facebook message to D.W.'s father. RP 245. The message contained details of their relationship that only Rad would have known. RP 246. The message acknowledged their "several dates," that the relationship had soured because Rad had acted improperly, that D.W. was refusing to speak to him, that he had been trying to contact D.W. through social media, and that she had blocked his accounts in response. RP 246-47.

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[33] The messages stated "How have you been," "this is Vandad," and "Hi, [D.W.]." RP 232-34.

Rad then sent several other messages through Instagram and Facebook, sometimes using the thinly veiled pseudonym "Vondod Pwrsyrs." RP 251-53. The message read to the jury was a highly personal diatribe about the course of their relationship. RP 255. Rad described at length his feelings for D.W., and asks forgiveness for being "weird, and overt, and aggressive." RP 256. Rad admitted to being obsessed with D.W., and described himself as "addicted" to her. RP 257. The message is consistent with Rad's obvious ongoing infatuation.

Finally, after D.W. had applied for and received a temporary protection order, Rad appeared uninvited at D.W.'s front door. RP 273-74.[34] Even though D.W. immediately slammed the door shut, closed her blinds, and called 911, Rad did not leave the area. RP 274. Rad was arrested loitering across the street from D.W.'s home, where he had been pacing about and punching a telephone pole. RP 275-76.

Around the same time that D.W. received the communications in exhibits 5-9, she received another message from Rad saying that he would continue to contact her unless the judge jailed him forever. RP 310. This

[34] While there was no direct evidence that Rad had been served with the temporary order, it was heavily implied from the testimony. D.W. testified to her knowledge that law enforcement had served the protection order. RP 271. Rad also appeared at the subsequent hearing, indicating that he received notice. RP 278-79.

message was clearly related to Rad's pending legal issues stemming from D.W.'s protection order.

d. The State Provided Sufficient Information For A Reasonable Fact Finder To Authenticate The Social Media Messages.

Authentication can be established by either direct or circumstantial evidence. Payne, 117 Wn. App. at 109.[35] Circumstantial evidence is evidence derived from inferences based on common sense and experience. WPIC 5.01 (cited with approval in State v. Johnson, 100 Wn.2d 607, 620, 674 P.2d 145 (1983) (overruled on unrelated grounds by State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985)).[36]

It is unnecessary for this Court to decide whether a contact bearing only Rad's name and photograph, taken in isolation, would have been sufficiently authenticated. While some of the contact attempts in this case indeed showed little more than an account bearing Rad's name, this evidence existed within a larger factual universe. It was part of a years-long ordeal where Rad repeatedly tried to contact D.W. through various means. This Court should not indulge a divide-and-conquer strategy.

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[35] As a practical matter, electronic messages will almost always need to be authenticated by circumstantial evidence, barring the rare occasion where a witness observes the sender sitting at their computer. F.P., 878 A.2d at 95-96.

[36] "The term 'circumstantial evidence' refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case." WPIC 5.01.

The unelaborated social media contacts in exhibits 5, 6, and 9 existed within the same narrative as Rad's sexual assault of D.W., his attempt to contact her in person, and other messages that contained more details.[37] Exhibit 7, for example, contained information about a court date that someone besides Rad would be unlikely to know. Rad made clear, both by word and conduct, that he was willing to go to great lengths to re-establish a romantic relationship with D.W. A reasonable fact finder could determine that the same person who committed these verifiable acts was likely the same individual who sent the other messages. In other words, substantial circumstantial evidence identifies Rad as the culprit. During argument, Rad implied that D.W. framed him out of self-loathing at her failure to be a "strong" woman. RP 393-95.[38] But the theoretical

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[37] Rad acknowledged before the trial court that a message could potentially be authenticated by its internal details:

"Now there are other ways that the State can try to authenticate items. So for example, sometimes – and I would agree. Sometimes if you do have – say, in the context of a conversation or in something that is very, very – a really lengthy message – the State is going to have an easier time trying to authenticate that if the message, you know, is relevant. Is the type of thing the person has said in the past, or there is just other indicia that the message does come from the person who they are claiming that it comes from." RP 61.

[38] "She is a modern woman, is supposed to be good, and strong, and do the right thing in all situations. So this situation couldn't have arisen through her at all. This has to be entirely on Mr. Rad . . . and that's why it is so easy for her to lay blame on this marijuana soda. That is why it is so easy to make a comment when you – if her perspective of the situation is regretful and is a perspective that something happened that she didn't want to have happen, then it is easier for her to say he drugged me." RP 395. Furthermore, during cross-examination, Rad asked D.W.: "So you are aware that – I mean you could go on your phone right now and create an account that said my name or Vandad Rad's name, correct?" RP 329. D.W. acknowledged that she could. RP 329.

possibility of fraud is immaterial to an analysis of authenticity under ER 901.[39]

State v. Young, 192 Wn. App. at 853, is one of the few Washington cases to have addressed this type of issue. The defendant in Young was convicted based in part on text messages the victims had received from his phone number. Id. at 856-57. Young argued on appeal that the messages had not been sufficiently authenticated. Id. Division Two disagreed, finding authentication sufficient based only on (1) the texts having come from a phone number that evidence showed was Young's, and (2) the content of the messages being topical to the relationship between Young and the victim.[40] Id. at 857. Notably, the court ruled in favor of admission despite evidence showing that another person might have written the messages. Id.; see State v. Blizzard, 195 Wn. App. 717, 735-36, 381 P.3d 1241 (2016) (text messages authenticated by

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[39] "...the proponent is required only to make a prima facie showing of authenticity. The *opponent's* challenges to authenticity go only to weight, not admissibility. This point is worth repeating. Most of the recent cases and literature have been concerned with expert testimony attacking the credibility of electronic communication by examining metadata or by similar means. This sort of attack on credibility occurs at trial and has nothing to do with the preliminary determination of authenticity under Rule 901. An attack on the credibility of an electronic communication is simply a distraction and beside the point as far as authentication is concerned." Karl Tegland, Courtroom Handbook on Washington Evidence, 475 (2017-18 ed.).

[40] The text messages referenced prostitution activity and a fraudulent check transaction that Young had forced the victim to participate in. Young, 192 Wn. App. at 857.

knowledge of defendant's phone number and recognition of the message's content).

This case is reasonably analogous to Young. The entire body of corroborating evidence here contained messages from social media accounts that identified Rad as the owner by name, photograph, and, in one instance, home address. Those messages with additional content were consistent with Rad's relationship to D.W., which consisted mainly of undaunted attempts to contact her and resume a romantic relationship.

Furthermore, the evidence at issue appears largely compliant with ER 901(b)(10), although such compliance is not essential to admissibility. D.W. testified that the contact attempts originated from social media accounts purporting to belong to Rad. Where textual content existed, Rad was the apparent author. The appearance and substance of this evidence, "taken in conjunction with the circumstances," strongly suggested that the evidence was what it purported to be. ER 901(b)(10).

Rad's concerns are neither new nor specific to electronic messages. The State acknowledges that social media accounts can be forged without great difficulty. But type-written documents can also be counterfeited with relative ease, witnesses can lie, and a phone number can be utilized by someone other than its owner. These concerns have not halted the admission of evidence under the historically liberal rule of authentication.

See State v. Andrews, 172 Wn. App. 703, 708-09, 293 P.3d 1203 (2013) (citing State v. Thompson, 777 N.W.2d 617, 624, 2010 ND 10 (North Dakota 2010)). The restrictive rule of authentication favored by Rad could allow criminals to electronically harass their victims with impunity, as long as they took precautions like using a public computer terminal. The rules of evidence do not compel this result.

Here, the State's evidence satisfied the minimum requirements of authentication. It was the jury's responsibility to weigh the credibility of this evidence in light of whatever deficiencies Rad identified at trial. H.N., 188 Wn. App. at 752.

D. CONCLUSION

The State respectfully requests this Court affirm Rad's conviction.

DATED this 17 day of May, 2018.

Respectfully submitted,

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Constitutional Provisions

U.S. Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

RCW 26.50.010

Definitions.

*** CHANGE IN 2019 *** (SEE 1517-S2.SL) ***

As used in this chapter, the following terms shall have the meanings given them:

(1) "Court" includes the superior, district, and municipal courts of the state of Washington.

(2) "Dating relationship" means a social relationship of a romantic nature. Factors that the court may consider in making this determination include: (a) The length of time the relationship has existed; (b) the nature of the relationship; and (c) the frequency of interaction between the parties.

(3) "Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

(4) "Electronic monitoring" has the same meaning as in RCW 9.94A.030.

(5) "Essential personal effects" means those items necessary for a person's immediate health, welfare, and livelihood. "Essential personal effects" includes but is not limited to clothing, cribs, bedding, documents, medications, and personal hygiene items.

(6) "Family or household members" means spouses, domestic partners, former spouses, former domestic partners, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

(7) "Judicial day" does not include Saturdays, Sundays, or legal holidays.

[2015 c 287 § 8; 2008 c 6 § 406; 1999 c 184 § 13; 1995 c 246 § 1. Prior: 1992 c 111 § 7; 1992 c 86 § 3; 1991 c 301

§ 8; 1984 c 263 § 2.]

NOTES:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Part headings not law—Severability—2008 c 6: See RCW 26.60.900 and 26.60.901.

Short title—1999 c 184: See RCW 26.52.900.

Severability—1995 c 246: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1995 c 246 § 40.]

Findings—1992 c 111: See note following RCW 26.50.030.

Finding—1991 c 301: See note following RCW 10.99.020.

Domestic violence offenses defined: RCW 10.99.020.

RCW 10.21.040

Detention order—Hearing—Expedited review.

If, after a hearing on offenses prescribed in Article I, section 20 of the state Constitution, the judicial officer finds, by clear and convincing evidence, that a person shows a propensity for violence that creates a substantial likelihood of danger to the community or any persons, and finds that no condition or combination of conditions will reasonably assure the safety of any other person and the community, such judicial officer must order the detention of the person before trial. The detainee is entitled to expedited review of the detention order by the court of appeals under the writ provided in RCW 7.36.160.

[2010 c 254 § 6.]

NOTES:

Intent—Contingent effective date—2010 c 254: See notes following RCW 10.21.010.

RCW 7.36.160

Writ to admit prisoner to bail.

The writ may be had for the purpose of admitting a prisoner to bail in civil and criminal actions. When any person has an interest in the detention, and the prisoner shall not be discharged until the person having such interest is notified.

[Code 1881 § 679; 1877 p 140 § 682; 1869 p 158 § 619; 1854 p 214 § 447; RRS § 1077.]

RCW 7.36.010

Who may prosecute writ.

Every person restrained of his or her liberty under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal.

[2011 c 336 § 185; Code 1881 § 666; 1877 p 138 § 669; 1869 p 156 § 606; 1854 p 212 § 434; RRS § 1063.]

RCW 9A.46.110

Stalking.

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

(2)(a) It is not a defense to the crime of stalking under subsection (1)(c)(i) of this section that the stalker was not given actual notice that the person did not want the stalker to contact or follow the person; and

(b) It is not a defense to the crime of stalking under subsection (1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person.

(3) It shall be a defense to the crime of stalking that the defendant is a licensed private investigator acting within the capacity of his or her license as provided by chapter 18.165 RCW.

(4) Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. "Contact" includes, in addition to any other form of contact or communication, the sending of an electronic

communication to the person.

(5)(a) Except as provided in (b) of this subsection, a person who stalks another person is guilty of a gross misdemeanor.

(b) A person who stalks another is guilty of a class B felony if any of the following applies: (i) The stalker has previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a protective order; (ii) the stalking violates any protective order protecting the person being stalked; (iii) the stalker has previously been convicted of a gross misdemeanor or felony stalking offense under this section for stalking another person; (iv) the stalker was armed with a deadly weapon, as defined in RCW 9.94A.825, while stalking the person; (v)(A) the stalker's victim is or was a law enforcement officer; judge; juror; attorney; victim advocate; legislator; community corrections' officer; an employee, contract staff person, or volunteer of a correctional agency; court employee, court clerk, or courthouse facilitator; or an employee of the child protective, child welfare, or adult protective services division within the department of social and health services; and (B) the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties; or (vi) the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony.

(6) As used in this section:

(a) "Correctional agency" means a person working for the department of natural resources in a correctional setting or any state, county, or municipally operated agency with the authority to direct the release of a person serving a sentence or term of confinement and includes but is not limited to the department of corrections, the indeterminate sentence review board, and the department of social and health services.

(b) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

(c) "Harasses" means unlawful harassment as defined in RCW 10.14.020.

(d) "Protective order" means any temporary or permanent court order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person.

(e) "Repeatedly" means on two or more separate occasions.

[2013 c 84 § 29; 2007 c 201 § 1; 2006 c 95 § 3; 2003 c 53 § 70. Prior: 1999 c 143 § 35; 1999 c 27 § 3; 1994 c 271 § 801; 1992 c 186 § 1.]

NOTES:

Findings—Intent—2006 c 95: See note following RCW 74.04.790.

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Intent—1999 c 27: See note following RCW 9A.46.020.

Purpose—Severability—1994 c 271: See notes following RCW 9A.28.020.

Severability—1992 c 186: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1992 c 186 § 10.]

Regulations and Rules

RULE ER 901

REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General Provision. The 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.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert Opinion on Handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by Court or Expert Witness. Comparison by the court or by expert witnesses with specimens which have been authenticated.

(4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public Records or Reports. (Reserved. See RCW 5.44 and CR 44.) (8) Ancient Documents or Data Compilation. Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 20 years or more at the time it is offered.

(9) Process or System. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Electronic Mail (E-mail). Testimony by a person with knowledge that (i) the e-mail purports to be authored or created by the particular sender or the sender's agent; (ii) the e-mail purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

(11) Methods Provided by Statute or Rule. Any method of authentication or identification provided by statute or court rule.

[Adopted effective April 2, 1979; amended effective December 10, 2013.]

RULE ER 902

SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(a) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(b) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in section (a), having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(c) Foreign Public Documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (1) of the executing or attesting person, or (2) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(d) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with section (a), (b), or (c) of this rule or complying with any applicable law, treaty or

convention of the United States, or the applicable law of a state or territory of the United States.

(e) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(f) Newspapers and Periodicals. Printed materials purporting to be newspapers or periodicals.

(g) Trade Inscriptions and the Like. Inscriptions, signs tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(h) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(i) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(j) Presumptions Created by Law. Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic.

[Amended effective August 27, 1980; September 1, 1988; September 1, 1992.]

VANDAD RAD - FILING PRO SE

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