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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN -7 PM 3:59
NO. 63298-1-159

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY A. ZIERMAN,

Appellant.

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

The Honorable Larry E. McKeeman, Judge

REPLY BRIEF OF APPELLANT

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ER 401 7

A. ARGUMENTS IN REPLY

1. THE PURPORTED NON-HEARSAY PURPOSE FOR ADMITTING THE 911 STATEMENT WAS NOT RELEVANT.

The appellant, Jeffrey Zierman, contends the trial court violated his constitutional right to confront witnesses and the rules of evidence by admitting portions of a 911 call for a purported non-hearsay purpose that was not relevant. Brief of Appellant (BOA) at 7-22. In response, the state maintains: (1) the evidence was properly admitted for the non-hearsay purpose of explaining the "genesis of the investigation;" (2) statements not offered for the truth of the matter asserted do not violate the confrontation clause; and (3) the 911 information was not testimonial. Brief of Respondent (BOR) 9-30. For the reasons contained in his Brief of Appellant, Zierman urges this court to reject state's contentions (2) and (3). In this brief, Zierman replies to contention (1) only.

As set forth in some detail in the Brief of Appellant, a trial court errs by admitting an out-of-court statement for a non-hearsay purpose when that purpose is not relevant to any issue at trial. BOA at 19-22. Contrary to the state's assertion, explaining the "genesis" of the investigation in Zierman's case was not relevant.

This is made clear in State v. Edwards, 131 Wn. App. 611, 614-615, 128 P.3d 631 (2006). The defendant, named Olin Edwards,

unsuccessfully moved to exclude a detective's testimony that an informant told him "Olin" was dealing cocaine. Edwards, 131 Wn. App. at 613. On appeal, the court held "the State's proffered reason for the testimony" -- to explain why the detective started his investigation -- was "not an issue in controversy" and was therefore irrelevant. State v. Edwards, 131 Wn. App. 611, 614-615, 128 P.3d 631 (2006).

The state explains the holding in Edwards hinged on the fact the out-of-court statement identified the "defendant specifically" as having committed the crime charged. BOR at 13. "Where the potential direct prejudice is so central and obvious," the state surmises, "a court's reluctance to admit such is, expectedly, heightened." BOR at 13.

The Edwards court, however, said no such thing. Instead, the court held, "The issue here was who sold the cocaine. Detective Quist's state of mind simply is not relevant to whether Mr. Edwards committed the crimes charged." Edwards, 131 Wn. App. at 615.

The state uses the same rationale in attempting to distinguish State v. Lowrie, 14 Wn. App. 408, 542 P.2d 128 (1975), review denied, 86 Wn.2d 1010. BOR at 13. Lowrie, however, does not support the state's rationale. As in Edwards, the Lowrie court's holding is plain:

In this case, the court indicated that [Detective] Bansmer's testimony was not hearsay as it was not admitted for the truth of the matter asserted, I.e., that the defendant was present during the

robbery, but only for the purpose of showing that the statement was made and that it in turn resulted in police action. Such circuitry cannot obscure the fact that neither the making of the statement by Mr. Perez nor the resultant police action was in issue. The sole question presented to the jury was whether or not the defendant was involved in the commission of the crimes. Therefore, there is no reason why the statement allegedly made by Mr. Perez to Bansmer was relevant to any issue before the trial court, except to prove the truth of the matter asserted.

Lowrie, 14 Wn. App. at 412-413.

Contrary to the state's argument, neither the Edwards nor the Lowrie court expressed concern that the hearsay statement identified the defendant as a perpetrator. The controlling factor was instead the lack of relevance of the purported non-hearsay purpose of the statements. See, e.g., United States v. Dean, 980 F.2d 1286, 1288 (9th Cir. 1992) ("Long's out-of-court statements are probative of why Deputy Needham went to the mobile home. However, his reasons for going there are not of consequence to the determination of the action, i.e., they do not bear on any issue involving the elements of the charged offense."). The state ignores this factor and in so doing, obscures the main issue.

The prosecutor also cites other cases that purportedly support his theory that explaining the "genesis of the investigation" in Zierman's case is a valid non-hearsay purpose for the 911 evidence. One of those cases,

State v. Lillard,¹ is unpersuasive. BOR at 10. This Court held the challenged investigator's testimony recounting what others had told him was not offered "to prove what the [others] had said, but to show how he conducted his investigation. The evidence was not hearsay." Lillard, 122 Wn. App. at 437.

But this is not the end of the analysis. The question is not whether an appellant court can identify a non-hearsay purpose for admission of out-of-court statements, but whether the purpose is relevant to any issues in the case. Because the Lillard Court did not address this issue, it should be disregarded.

The same is true of State v. Post, 59 Wn. App. 389, 797 P.2d 1160 (1990), aff'd, 118 Wn.2d 596, 826 P.2d 172 (1992). At issue in that case was a detective's testimony that police learned of appellant "from a telephone information call from an individual who gave us his name." Post, 59 Wn. App. at 394. This Court held "the testimony was offered to establish why the detective acted as he did." Post, 59 Wn. App. at 394-95. Left unanswered was the question whether the reason for the detective's actions was relevant to any issues in the case. As a result, Post lacks persuasive value.

¹ 122 Wn. App. 422, 93 P.3d 969 (2004), review denied, 154 Wn.2d 1002 (2005).

State v. Iverson,² in contrast, highlights the need to determine the relevance of an identified non-hearsay purpose for admission of an out-of-court statement. The state charged Iverson with violating a protection order issued for Cara Nichols after officers found him in an apartment occupied by a woman who told police she was Cara Nichols. Iverson, 126 Wn. App. at 332-33.

Nichols, however, did not appear for trial, leaving the state with no way to identify her because her self-identification to officers was inadmissible hearsay. Iverson, 126 Wn. App. at 333. During a recess, one of the officers obtained Cara Nichols's arrest records from a computer database. The records contained booking photos, which the officers testified matched those of the woman who identified herself as Nichols. Iverson, 126 Wn. App. at 333-35. The trial court admitted the records and found Iverson guilty. Iverson, 126 Wn. App. at 335.

This Court held the woman's statement of identification was properly admitted for the relevant, non-hearsay purpose of explaining why the officers conducted further investigation. Iverson, 126 Wn. App. at 337. This ruling is consistent with Zierman's emphasis on the relevance of the purported non-hearsay purpose. Absent some explanation, a

² 126 Wn. App. 329, 108 P.3d 799 (2005).

reasonable fact-finder without knowledge of the woman's statement would likely wonder why the officer targeted arrest records for a "Cara Nichols." In Iverson, unlike in many cases, testimony that the officer acted on "information received" would not satisfactorily explain the officer's unusual investigative techniques. This is a far cry from the facts in Zierman's case, where the 911 evidence was admitted for the generic and irrelevant purpose of explaining why Officer Upton appeared at Adcock's home. For these reasons, Iverson offers little support to the state.

The state also cites United States v. Holmes³ for the proposition "the [confidential] informant's tip was made for the limited purpose of explaining why a government agent had reason for the stop, search and seizure of Mr. Holmes, not for the purpose of establishing a fact." BOR at 11. But the context of the court's holding indicates the state's reliance on Holmes is misplaced and that the case instead supports Zierman's position more strongly than it does the state's.

Holmes contended the trial court's denial of his motion to compel disclosure of the informant violated his right to confront witnesses at a pretrial suppression hearing. Holmes, 310 Fed. Appx. at 161. Importantly, Holmes challenged the trial court's denial of his motion to

³ 311 Fed. Appx. 156, 163, 2009 WL 323246, *7 (10th Cir. 2009), cert. denied, 129 S.Ct. 2018 (2009).

suppress evidence because the police lacked a constitutional basis on which to stop, search and seize. Holmes, 311 Fed. Appx. at 158. This directly put at issue the legality of the officer's actions, thus rendering the information available to the officer from the informant's tip relevant.

Indeed, this is precisely what this Court said in State v. Aaron, a case relied upon by Zierman:

If the legality of the search and seizure was being challenged, either at a suppression hearing or at trial, the information available to the officer as the basis for his action would be relevant and material. However, the officer's state of mind in reacting to the information he learned from the dispatcher is not in issue and does not make "determination of the action more probable or less probable than it would be without the evidence." ER 401.

State v. Aaron, 57 Wn. App. 277, 280, 787 P.2d 949 (1990). In contrast to Holmes, Officer Upton's appearance upon the scene and entry into the shed were not challenged. The 911 information therefore was not relevant.

To summarize, the state fails to provide support for its assertion that "courts . . . recognize the necessity of admitting out of court statements to explain the genesis of the investigation." BOR at 14. Rather, like any other non-hearsay purpose, explaining an investigation's genesis is admissible only if relevant to an issue at trial. Because the

genesis of the investigation was not relevant, the 911 evidence was improperly admitted.

In addition, for the reasons set forth in the Brief of Appellant, the trial court's error violated Zierman's constitutional right to confront adverse witnesses. Finally, the error was not harmless. This Court should reverse Zierman's conviction for manufacturing methamphetamine and remand for a new trial.

B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Zierman requests this Court to reverse his conviction for manufacturing methamphetamine and remand for a new trial.

DATED this 7 day of December, 2009.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 63298-1-1 |
| |) | |
| JEFFREY ZIERMAN, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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[X] JEFFREY ZIERMAN
DOC NO. 731033
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1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JANUARY, 2010.

x *Patrick Mayovsky*